Reconsidering Securities Industry Bars

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Abstract. Is it professional "capital punishment" for a broker to be barred from industry? How does that affect designing sanctions? This article examines industry bars in securities enforcement, focusing on those imposed by broker-dealer industry's self-regulatory organization FINRA.

Relying on an empirical analysis of new BrokerCheck data, this article discusses the prevalence and reasons for industry bars. As we might expect, many disclosures about the reasons for bars are suggestive of underlying misconduct matching the investor protection mission of the securities laws. In disciplinary cases, FINRA has prioritized industry bars in cases involving overt dishonesty and harm to investor interests, but the bulk. Yet most bars are imposed not in enforcement proceedings but in more informal "expedited proceedings," for nondisciplinary reasons like failure to engage with FINRA's investigations and requests for information. These factual findings raise questions both about these bars' function as well as the procedures surrounding these bars. Combining empirical, historical, and theoretical analysis of the political economy of securities industry bars, this article argues that the observed pattern of sanctions are the path-dependent outcomes resulting from past political coalitions among regulated brokers, formed with the goal of changing control over economic ordering. At the same time, this article proposes that such bars remain justified today for their role in promoting investor protection, self-regulatory organization authority over the markets, and broader social concerns in the design of sanctions regimes.

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The problem of industry bars highlights problems of proportionality as well as questions about whether existing legal protections are up to the challenge.

Industry bars have significant implications for market dynamics, including licensing and competition policy. This article argues that enforcement and expedited proceeding bars may well be justified in our current moment of deference to industry self-regulatory organizations (SROs). The article concludes by reflecting on the challenges facing administrative justice and the future of SRO enforcement in the face of increasing judicial scrutiny and the need for reform in both doctrine and practice.

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Introduction

Capital markets are rife with potential pitfalls for ordinary people investing. Fraudsters lurking in the shadows are ready to prey on hard-earned savings, and some managers simply lack competence. Those who work in financial markets have intimate access to other peoples' money.[1] Financial regulators have many enforcement options and sanctions at their disposal to deter theft, cheating, conflicts of interest, and violations of law and duty.[2] These include fines, disgorgement, and other sanctions.[3]

The "most fearsome [sanction] of them all," however, is the industry bar, which limits participation in the securities industry for certain conduct.[4] Many familiar regulatory regimes impose sanctions for professionals who violate professional conduct rules.[5] In the imagination of securities law, industry bars are typically imposed on individuals who have engaged in serious misconduct like fraud, misappropriation, or other violations of regulations governing the securities industry.[6] The black-letter purpose of the industry bar is to protect investors from unscrupulous behavior by preventing individuals who have committed such offenses from continuing to work in the industry.[7] Through incapacitation and deterrence, industry bars aims to protect investors from those responsible for misconduct.

Yet a significant majority of these bars, this paper's empirical analysis shows, have gone not to those who have been found responsible for grievous violations of the professional conduct rules, but rather to those who have thumbed their noses at FINRA's regulatory authority. Relying on a new empirical dataset scraped from regulatory disclosures, I show, perhaps surprisingly, over a third of FINRA industry bars each year on average are imposed in "expedited proceedings," such as for failing to respond to FINRA's

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1. Many have emphasized the potential hazards arising from the intimate access to other peoples' money, which former Justice Brandeis likened to "the privilege of taking the golden eggs laid by somebody else's goose." LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 17-18 (1914); *see, e.g.*, Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 860 (2003).
2. *See, e.g.*, David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1170–72 (2016); Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 HARV. BUS. L. REV. 129, 136 (2014).
3. *See infra* note 53.
4. Urska Velikonja, *Public Enforcement After* Kokesh*: Evidence from SEC Actions*, 108 GEO. L. J. 389, 399 (2019).
5. *See infra* Part III.D.1.
6. *See infra* note 30.
7. *See infra* Parts III.B and C.

requests for information.[8] By design, these expedited proceedings involve looser processes and more deferential review by the SEC. What's more, this data suggests that almost four-fifths of FINRA bars involve allegations of failing to comply with requests for information in its investigations.

FINRA's enforcement and sanctions practices have become increasingly politically salient targets, with scholars, activists, and lawyers calling for reform.[9] Recent Supreme Court[10] and federal appellate[11] decisions have called into question the fairness of administrative securities enforcement, partly grounding these concerns in sanction severity.[12] Under the relevant statutory standards, the securities industry's self-regulatory organization FINRA can impose enforcement bars when they are not "excessive or oppressive," but faces no similar constraint for "expedited proceeding" bars.[13]

Most recently, in July 2023, Judge Justin Walker of the D.C. Circuit expressed doubts about the constitutionality of FINRA's hearing officers, noting that their imposition of a "corporate death penalty" through expelling a firm from the industry was an impermissible exercise of executive power.[14] Several

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8. *See infra* Part II.

9. *See, e.g.,* David Slovick, *The "Capital Punishment" of the Securities Industry: Reconsidering the Reach of Collateral Bars in SEC Enforcement Actions*, 41 No. 9 FUTURES & DERIVATIVES L. REP. NL, Oct. 2021, at 2. (arguing that "the SEC imposes associational bars, knee-jerk fashion, because it can"); Michael Weitman, *Can the Remedial Bar Survive* Kokesh, LAW360, Nov. 7, 2017; Hester Pierce, *The Financial Industry Regulatory Authority: Not Self-Regulation After All*, in BUILDING RESPONSIVE AND RESPONSIBLE FINANCIAL REGULATORS IN THE AFTERMATH OF THE FINANCIAL CRISIS 233 (Pablo Iglesias-Rodríguez ed., 2015).

10. *See infra* note 218, 293, 302-303; *see also, e.g.,* Adam Liptak, *Supreme Court Sems Wary of In-House S.E.C. Tribunals*, N.Y. Times (Nov. 29, 2023) (reporting on oral arguments in one of these cases).

11. *See infra* notes 14–15, 194, 196.

12. *See, e.g.,* Theresa Gabaldon, *The Insidious Effect of Soundbites: Why Fences Aren't Punishment*, 72 AM. U. L. REV. 1 (2022) (describing a slate of recent cases that have focused on sanction severity and the concept of "punishment," and criticizing the jurisprudential approach in *Kokesh* that relies on "soundbite" quotes in determining what is and isn't "punishment"); Russell G. Ryan, *Uncivil Procedure: The Need for Heightened Due Process Protection in SEC Enforcement Prosecutions*, ABA CRIMINAL JUSTICE MAGAZINE, Aug 1, 2023, https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2023/summer/uncivil-procedure-need-heightened-due-process-protection-sec-enforcement-prosecutions [https://perma.cc/RYJ4-PPVH].

13. 15 U.S.C. § 78s(e)(2).

14. *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, No. 23-5129, 2023 U.S. App. LEXIS 16987 at *2-9 (D.C. Cir. July 5, 2023) (Walker, J., concurring) (Petition for Rehearing *en banc* filed); *see also, e.g.,* James Fallows Tierney & Benjamin P. Edwards, *FINRA Faces Uphill Battle in Case Challenging Its Enforcement Authority*, COLUM. L. SCH. BLUE SKY BLOG (Aug. 1, 2023), https://clsbluesky.law.columbia.edu/2023/08/01/finra-faces-uphill-battle-in-case-challenging-its-enforcement-authority [https://perma.cc/C6Q5-SP6Y] (describing *Alpine* and suggesting that anti-administrative challenges to FINRA's constitutional

years ago, while still on the D.C. Circuit, then-Judge Brett Kavanaugh echoed the professional-death-penalty criticism in a case involving FINRA sanctions including an industry bar against an individual broker.[15] The drastic nature of ending a professional career may have played a central role in raising fairness concerns about the securities enforcement program that animate litigation over sanctions in securities enforcement cases.[16]

This article defends industry bars against these criticisms, articulating an account for industry bars' social usefulness and remedial nature. In their function as enforcement sanctions, bars should be understood not mainly as punitive efforts to end a financial adviser's career, but rather as means of incapacitating and deterring wrongdoing in financial markets. Moreover, it is a category error to analyze industry bar policy in terms of "punishment," a concept that is not contemplated in the Exchange Act. Understood in a more holistic and contextual light, we can see that industry bars implicate matters such as deterrence, investor protection, and delegation to self-regulatory organizations (SROs) that remain justifiable today.

I bring empirical evidence to bear on these questions. Using a combination of natural language processing ("NLP") and "law-as-data" methods, I scrape BrokerCheck disclosure data for most brokers FINRA has identified as having been barred from 1999 to 2023, and my research assistants and I hand code the rest. A significant majority of FINRA bars are associated with disclosures suggesting that the broker has been barred in an expedited proceeding for failure to respond to FINRA's requests for information, rather than for more traditional "investor protection" misconduct like fraud or conversion.

History also gives us a window into how we got here. Once capital markets became a site of mass affluent capitalism, the problem of whether and how to delegate power to self-regulated industry was no longer a parochial concern. It instead became a problem of taming an industry to make it "safe" for investors.

structure are likely to ripple across FINRA's enforcement program); Comment, *Administrative Law — Nondelegation Doctrine — D.C. Circuit Grants Injunction In Constitutional Challenge To Private Regulator.* 137 HARV. L. REV. 1042 (2024); *see generally infra* Part IV.A.

15. *Saad v. SEC*, 873 F.3d 297, 306 (D.C. Cir. 2017) ("Saad II") (Kavanaugh, J., concurring) (describing "what [a] prior opinion in this case called the 'securities industry equivalent of capital punishment'") (citation omitted); *see also Saad v. SEC*, 980 F.3d 103 (D.C. Cir. 2020) ("Saad IV") (affirming SEC's determination on remand from *Saad II* that *Kokesh*, an intervening Supreme Court decision, did not change whether FINRA's bar was permissible or warranted).

16. *See infra* Part IV.C; *see also, e.g.*, Veronica E. Callahan et al., *In the Shadow of Lucia: The Uncertain Future of SEC Administrative Proceedings*, ARNOLD & PORTER ADVISORY (June 22, 2022), https://www.arnoldporter.com/en/perspectives/advisories/2022/06/in-the-shadow-of-lucia [https://perma.cc/P254-PF7N] (arguing that the accretion of "more and more authority (and available remedies) in administrative proceedings" through statutory reform has resulted in backlash).

By preventing certain individuals from participating in the securities market, industry bars cordon off market exchanges in capital markets for their broad, ex ante investor protection value. Industry bars promote investor confidence required for liquid capital markets. This article offers a theoretical contribution to a broader project about thinking of securities law as a mechanism for implementing democratic control over the economy.

Securities law has largely overlooked industry bars' dual roles in upholding investor-protection and SRO-promotion goals in securities regulation.[17] That is surprising, given recent attention to SEC enforcement sanctions and administrative proceedings among scholars and in the courts.[18] Securities law scholars know relatively little about the shape of enforcement sanctions in this area.[19] Legal scholar Barbara Black canvassed the FINRA enforcement and

17. Scholars have addressed some aspects of securities industry bars. *See, e.g.*, Slovick, *supra* note 9; Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 CAL. L. REV. 1081, 1085 n. 18, 1089–90 (2015) (discussing the limited scholarship on bars in other securities contexts, such as "bad-actor and ineligible-issuer disqualifications" that prevent "relying on safe harbors from the mandatory securities registration requirement, and from taking advantage of relaxed disclosure requirements for large public companies"). In particular, Barbara Black has examined the FINRA sanctions doctrine that warrant imposing an industry bar. *See* Barbara Black, *Punishing Bad Brokers: Self-Regulation and FINRA Sanctions*, 8 BROOK. J. CORP. FIN. & COM. L. 23 (2013). Otherwise, existing scholarship has focused on other contexts, such as bars from being an officer or director of a public company. *See, e.g.*, Renee M. Jones, *Unfit for Duty: The Officer and Director Bar as a Remedy for Fraud*, 82 U. CIN. L. REV. 439 (2013); Jayne W. Barnard, *SEC Debarment of Officers and Directors After Sarbanes-Oxley*, 59 BUS. LAW. 391 (2004); Philip F.S. Berg, *Unfit to Serve: Permanently Barring People from Serving as Officers and Directors of Publicly Traded Companies After the Sarbanes-Oxley Act*, 56 VAND. L. REV. 1871 (2003); Jayne W. Barnard, *The SEC's Suspension and Bar Powers in Perspective*, 76 TUL. L. REV. 1253 (2002).

18. *See infra* Part IV.A. Litigants, courts, and scholars have focused on structural questions about the role of SEC administrative law judges, and about other sanctions in the SEC's enforcement toolkit. On structural issues, *see, e.g.*, Alexander I. Platt, *Unstacking the Deck: Administrative Summary Judgment and Political Control*, 34 YALE J. ON REG. 439 (2017) (discussing the idea that procedural reforms may respond to perceptions that respondents in administrative proceedings face unfair disadvantage, like being dealt from a stacked deck of cards); Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1 (2016) (focusing on the backlash generated by the SEC's aggressive prosecution within administrative proceedings); Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform through Removal Legislation*, 85 FORDHAM L. REV. 1143 (2016) (providing the overview of criticisms against the SEC's administrative proceedings). On disgorgement, *see, e.g.*, Velikonja, *supra* note 5; Roberta S. Karmel, *Will Fifty Years of the SEC's Disgorgement Remedy Be Abolished?*, 71 S.M.U. L. REV. 799 (2018); Daniel B. Listwa & Charles Seidell, *Penalties in Equity: Disgorgement after Kokesh v. SEC*, 35 YALE J. ON REG. 667 (2018).

19. There is no recent scholarly discussion of the extent to which securities enforcement proceedings result in bars—or about the different categories of bars that are imposed, especially those categories that are overlooked. For example, in his study of SEC sanctions against broker-dealers, Stavros Gadinis said he was "not cover[ing]" FINRA actions and that empirical study of those sanctions "would further the inquiry [his] study

sanctions landscape a decade ago.[20] But even regulatory insiders have privately reported a great deal of uncertainty at a 35,000-foot level about who gets barred and why. So, in addition to situating industry bars in their historical and theoretical contexts, I offer new evidence to help answer basic empirical questions that inform debates about the desirability of existing policies and administrative practices governing industry bars.

The structure of this article is as follows. Part I briefly summarizes how regulators like FINRA kick people out of the industry; this part situates brokers in regulatory and enforcement context and introduces the two main ways that people can be barred: in full bore "enforcement" proceedings and in informal "expedited proceedings." In Part II, I examine what real-world data can tell us about why people get barred.

Part III offers a theory of industry bars in historical and practical perspective. I begin by considering three eras in which the changes to securities law became sticky. I argue that the industry bar practices we see today are the path-dependent consequences of these eras related to deference, investor protection, and FINRA's need to police its regulatory boundaries. I also defend the functional purposes of industry bars with respect to investor protection, the promotion of SRO power, and the broader design of agency adjudication programs in administrative law. Considering the social welfare case for industry bars, I address the ideal purposes of an industry bar program (like deterrence and proportionality) and offer thoughts on how to achieve them.

Part IV concludes this article by discussing the role of coalitions and movements in changing administrative law. Reforms that made SEC and FINRA industry bars more powerful, I suggest, created incentives for blowback among regulated communities. This blowback has taken the form of recent court challenges to FINRA's structure, authority, and ability to impose sanctions like bars. I consider what might be in store for FINRA and the broader project of self-regulation if these court challenges are successful, and what this means about the role of non-enforcement sanctions in promoting self-regulation. I also identify room for doctrinal reforms, and end with some comments on the role of popular movements in the reform of administrative law.

[began]." Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 686, 692-700 (2012) (finding from data on SEC enforcement actions that the SEC almost always imposes bars in proceedings following on a court decision finding a violation of the securities laws, but in "only 20 percent of administrative cases). The literature on broker-dealer enforcement has examined some of these questions, based on older data that predated the significant expansions in SEC industry-bar authority in the Dodd-Frank Act. *Id.* at 709–11 (finding that small-firm respondents are barred in SEC actions more often than large-firm ones). For another empirical analysis of SEC sanctions, *see also* Patricia Ewick, *Redundant Regulation: Sanctioning Broker-Dealers*, 7 LAW & POL'Y 421 (1985).

20. Black, *supra* note 17, at 40-55.

I. Brokers, Regulators, Enforcement, and Sanctions

This part explores the roles of brokers and regulators in financial advisory markets, examining how their roles shape the enforcement landscape and market behavior. This part also addresses FINRA enforcement proceedings, detailing the mechanisms used to govern market conduct and impose industry bars as enforcement sanctions.

A. Brokers and Regulators in Financial Advisory Markets

Brokers play an important role in capital markets. They facilitate and execute trades on behalf of individuals and institutions who purchase and sell securities. In doing so, brokers facilitate the provision of liquidity and capital from investors directly (e.g., stocks, bonds, crypto asset securities) or through intermediaries (e.g., mutual funds).[21] There are a variety of financial intermediaries and entities to provide advice, and investors often rely on this financial advice to make informed decisions.[22] But the credence-good nature of financial advice risks uncertainty about the quality of advice they will get.[23]

One of the securities laws' core functions is to regulate markets for financial advice and securities intermediary services like these.[24] Financial advisers can be regulated as brokers, investment advisers, or under other licensing regimes.[25] In these markets, there are overlapping regulators; those with a role in oversight include federal agencies like the SEC, state securities regulators, and industry SROs such as FINRA. They develop regulatory policy, implement it in rules, examine registered entities for compliance, and bring enforcement actions.[26] Some regulators also issue licenses to people who work in the industry, such as

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21. Brokers are those "engaged in the business of effecting transactions in securities for the account of others." Securities Exchange Act of 1934 § 3(a)(4)(A), 15 U.S.C. § 78c(a)(4)(A).

22. Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 OHIO ST. L. J. 181, 187 (2017).

23. *See* Roman Inderst, *Consumer Protection and the Role of Advice in the Market for Retail Financial Services*, 167 J. INST. & THEORETICAL ECON. 4, 10 (2011). Credence goods are services the quality of which is difficult for consumers to assess before they purchase them.

24. On the policies served by the securities laws, *see infra* Parts III.B and C.

25. *See, e.g.*, Edwards, *supra* note 22, at 212–13 (describing brokerage, insurance, and investment advice as the "three roles" of regulated "financial advisors [that] now play a major role in dispensing personalized investment advice and influencing retail capital allocation decisions"); Susan Krawczyk & Issa J. Hanna, *Status of Financial Planning Under the Investment Advisers Act*, in 2 INVESTMENT ADVISER REGULATION: A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW (3rd ed., 2021).

26. *See* Sam Scott Miller, *Self-Regulation of the Securities Markets: A Critical Examination*, 42 WASH. & LEE L. REV. 853, 854–55 (1985).

the "Series 7" license for a brokerage sales representative.[27] Setting aside nuances not relevant here, most firms must register with states where they work and be members of FINRA, and may have more or fewer obligations with respect to the SEC too.[28]

Like other professional regulation regimes, securities law relies on a combination of licensing, enforcement, and market-based solutions to promote high-quality professional services in the industry. Bars, as the topic of this article, are typically the result of enforcement or other proceedings.[29] We might expect that barred of the industry for this misconduct are typically those who have engaged in unethical or illegal activities. The broker may be found to have provided inaccurate or incomplete information to their clients, recommended investments that were not suitable for the client's financial situation, or failed to disclose any potential conflicts of interest for investments they recommend.[30] Yet as Part II illustrates, financial advisers are *most often* barred from the industry for failing to comply with regulatory authority, such as by not responding to FINRA's requests for information or for investigatory testimony.[31]

Though this article's focus is FINRA, I identify the many overlapping regulators to underscore the many ways to be barred from the securities industry.[32] Most salient, federal securities law authorizes the SEC to impose bars in certain enforcement proceedings and to ask courts to impose them in others.[33] The SEC uses these sanctions extensively against issuers, regulated entities, and associated personnel.[34] Securities law typically directs the SEC to weigh whether public interest concerns would require that the person be

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27. *See* 15 THOMAS P. LEMKE & GERALD T. LINS, BROKER-DEALER REGULATION § 2:38 (2022-2023 ed. 2022).

28. *See* 15 U.S.C. § 78*o*. In the U.S., brokers and dealers have always been regulated as a single kind of intermediary that can act in either capacity. *See* Arthur B. Laby, *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 BUS. LAW. 395, 400 (2010) (explaining that the same person can act as both an agent (a broker) and a principal (a dealer) with respect to their customers).

29. *See infra* Part II.A.

30. *See, e.g.*, Louis Ottimo, Exchange Act Release No. 95141, 2022 WL 2239146 (June 22, 2022).

31. On these bars, *see infra* Parts II, III.A.2–3, and III.B.1–2.

32. This does not even include the concept of "statutory disqualification." *See, e.g.*, Kelly Breslauer, *Wall Street's Enormous Net: How Scaling Back Statutory Disqualifications Would Better Harmonize Statutes and Practice with the Times*, 38 HOFSTRA LAB. & EMP. L. J. 357 (2020).

33. Unlike FINRA bars, the SEC contemplates that bars are not categorically permanent and offers a procedure (17 C.F.R. § 201.193) for readmission notwithstanding an SEC bar.

34. *See* Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 923 (2016) (discussing varieties of SEC enforcement).

excluded from the industry in the future (or, perhaps, some lesser sanction).[35] In SEC proceedings, the scope of industries and roles from which one can be barred is quite broad.[36] These sanctions are a dominant but often-overlooked part of the enforcement ecosystem. These days, the SEC imposes a time-out exclusion sanction—a suspension or a bar—in many of its enforcement actions. Securities law scholar Urska Velikonja observed that, absent technical defects, industry bars are *always* imposed in a category of administrative enforcement proceedings against registered persons, like brokers and investment advisers, who have committed some predicate act, have been convicted or enjoined, etc.[37]

The SEC is not the only bar-issuing regulator, even though it may be most familiar. State securities regulators are the primary licensing authority for brokerage firms and their employees.[38] According to the North American Securities Administrators Association, a group of state and provincial regulators, in 2021 these regulators pursued "1,284 administrative actions" against licensed professionals, "suspended 26 securities professionals . . . , revoked licenses of 50 . . . and barred 61 individuals from the industry."[39] In other words, about 4.75% of administrative actions by state regulators in 2021 ended up in industry bars for the respondents. Other regulators, like state insurance licensing boards, foreign regulators, commodities exchanges, and the

35. 15 U.S.C. § 78*o*(b)(6) (providing that the Commission may choose from an increasingly severe menu of sanctions, up to bars, if it finds that they are "in the public interest").

36. Recent amendments to the securities laws also allow the SEC to impose so-called "collateral" bars, excluding someone from an industry in which they'd never worked before. Bartko v. SEC, 845 F.3d 1217, 1219–21 (D.C. Cir. 2017); *see also, e.g.*, Chad Howell, *Back to the Future: Applying the Collateral Bars of Section 925 of the Dodd-Frank Act to Previous Bad Acts*, 7 J. BUS. & TECH. L. 285 (2012).

Furthermore, federal securities law also authorizes exclusion from certain profitable roles in business or engaging in other particular professional activities. The SEC can impose or seek bars against serving as officers or directors of public companies; prohibit professionals like lawyers and accountants from "practicing" before the Commission (and thus from assisting clients with securities regulatory filings and compliance); and bar people from participating in certain offerings of low-priced or penny stock. *See, e.g.,* Task Force on Rule 102(e) Proceedings, *Report of the Task Force on Rule 102(e) Proceedings: Rule 102(e) Sanctions Against Accountants*, 52 BUS. LAW. 965, 967-970 (1997); 15 U.S.C. § 78o(b)(6)(B); *see supra* note 17. As Jayne Barnard has pointed out, "Congress has not been reluctant to authorize removal, suspension, and bar powers in situations comparable to those involving [corporate] executive misconduct." Jayne W. Barnard, *The Securities Law Enforcement Remedies Act of 1989: Disenfranchising Shareholders in Order to Protect Them*, 65 NOTRE DAME L. REV. 32, 34–35 (1989).

37. Velikonja, *supra* note 35 at 963 (explaining that the SEC must initiate an enforcement action to impose a professional bar).

38. *See* Andrew K. Jennings, *State Securities Enforcement*, 47 BYU L. REV. 67 (2021).

39. NASAA, NASAA 2022 ENFORCEMENT REPORT 4, 7 (2022), https://www.nasaa.org/wp-content/uploads/2022/09/2022-Enforcement-Report-FINAL.pdf [https://perma.cc/E5QE-KMYP].

CFTC all generate industry bars that may have more or less broad collateral consequences for licensing in other regulatory regimes.[40]

In addition, federal securities law relies on a robust system of industry self-regulation, in which regulated entities act with delegated or quasi-governmental powers.[41] The SEC oversees this delegation through statutory mechanisms in Exchange Act Section 19.[42] The Commission and its staff in the Division of Trading and Markets conduct ex ante review of proposed SRO rules, and the General Counsel's office conducts ex post review of many SRO actions with respect to their members and the public).[43] This system of self-regulation also includes the stock exchanges, which have in turn contracted with FINRA to handle certain regulatory functions like examination and enforcement.[44]

FINRA has come to oversee a wide fiefdom in the financial sector.[45] It regulates thousands of brokerage firms and oversees over 600,000 individual registered representatives (to say nothing of the many non-registered "associated persons" who may be within FINRA's enforcement jurisdiction).[46] To manage such a large responsibility, FINRA operates with an annual budget (for 2023) of over $1.4 billion, including $138.1 million for enforcement.[47]

40. On collateral bars, *see* Slovick, *supra* note 9.

41. *See infra* Parts III.A.3, B.2, D.1, and IV.B; *see, e.g.*, Exchange Act §15A, 15 U.S.C. § 78o-3.

42. 15 U.S.C. § 78s.

43. On appellate review, *see infra* notes 177–179.

44. *See, e.g.*, CBOE Exch., Inc., *Notice of Filing & Immediate Effectiveness of a Proposed Rule Change to Allow Certain Flexible Exch. Equity Options to Be Cash Settled*, Exchange Act Release No. 34-98044, 2023 WL 4950666, 7-8 n.21 (Aug. 2, 2023) (noting that "Cboe and its affiliated securities exchanges maintain regulatory services agreements . . . whereby FINRA provides certain regulatory services to the exchanges, including cross-market surveillance, investigation, and enforcement services"). Rule 17d-2 governs plans for the allocation of regulatory responsibility between SROs. *See* 17 CFR § 240.17d-2. On stock exchange enforcement, *see* Verity Winship, *Enforcement Net-works*, 37 YALE J. ON REG. 274, 278, 328 (2022); *see also* Geeyoung Min and Kwon-Yong Jin, *Relational Enforcement of Stock Exchange Rules*, 47 BYU L. REV. 149 (2021).

45. *See infra* notes 134-142.

46. *See* FINRA Statistics, https://www.finra.org/media-center/statistics [https://perma.cc/2TQT-TDLL] (reporting 620,882 registered representatives and 3,378 securities firms for 2022). On the rules governing jurisdiction over associated persons, *see* 15 Lemke & Lins, *supra* note 27, at § 2:21 (summarizing the different roles of principals, registered representatives, associated persons, and how they must take examinations and do licensing registration with states); *cf.* Michael Gross, *Does FINRA Have Jurisdiction Over Me?*, BROKER-DEALER LAW CORNER, Feb. 11, 2019, https://www.bdlawcorner.com/2019/02/does-finra-have-jurisdiction-over-me/ [https://perma.cc/YU22-PXT5] (describing wrinkles in FINRA's regulatory jurisdiction, such as ability to enforce Rule 8210 requests on pain of a bar, based on "whether [the person] is still associated with a firm, and when the association ended").

47. *See* FINRA, FINRA 2023 ANNUAL BUDGET SUMMARY 5, https://www.finra.org/sites/default/files/2023-06/FINRA-2023-Annual-Budget-Summary.pdf [https://perma.cc/QHU9-9Z9F] (reporting budgeted cash flow uses for 2023 of 501

FINRA is thus a key player alongside government entities like the SEC in financial regulation, and its enforcement programs have an outsized impact on regulation of the brokerage industry.[48]

B. FINRA's Enforcement Proceedings and Background

The Exchange Act requires the SROs to impose bars in certain appropriate cases, reflecting their historically grounded and integral role in securities regulation.[49] Attorneys who defend brokers in enforcement actions acknowledge that FINRA's use of industry bars is routine and enthusiastic.[50] Drawing on her time with FINRA's appellate body, legal scholar Barbara Black has described some ways that people get barred and the statutory limits on when FINRA may impose that sanction.[51]

FINRA bars individuals from the securities industry through two main types of proceedings: ordinary disciplinary proceedings and expedited proceedings. Each of these processes has different timelines, procedures, and use cases.

1. Disciplinary Enforcement Proceedings

Disciplinary proceedings are used to address substantive violations of FINRA rules or other securities laws. These matters might begin with a complaint from FINRA's enforcement department and be settled through a letter of acceptance, waiver and consent ("AWC") in which sanctions are imposed by consent.[52] Or a contested case might go before a hearing panel, which can impose sanctions including fines, censures, suspensions, and bars.

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million for member supervision, 138.1 million for market regulation, and 135.4 million for enforcement).

48. *See infra* Parts III.A.3 and B.2.

49. *See* Securities Exchange Act of 1934, § 15A(b)(7), 15 U.S.C. § 78o-3(b)(7); Securities Exchange Act of 1934, § 6(b)(6), 15 U.S.C. § 78f(b)(6).

50. *See, e.g.*, Alan Wolper, *FINRA Claims to Be Reasonable When It Comes to Sanctions, but It Is Clear That Permanent Bars Are What It's All About*, JD SUPRA (2020), https://www.jdsupra.com/legalnews/finra-claims-to-be-reasonable-when-it-59764/ [https://perma.cc/9Z2B-8NDR].

51. *See* Black, *supra* note 17, at 53 (describing examples of FINRA bars that had come before its highest appellate body, including "five of eighteen . . . for failure to respond to a FINRA inquiry . . . ; another three . . . for conversion of customers' funds;" and "[b]ars or a two-year suspension . . . for simple fraud or obvious wrongdoing").

52. Johnny Clifton, Exchange Act Release No. 69982, 2013 WL 3487076, at *2 n.11 (July 12, 2013) ("AWCs are the means through which many FINRA disciplinary actions are settled prior to the filing of a complaint."); Robert J. Haft et al., 4B Tax-Advantaged Securities § 15:106 (describing settlements by AWC).

FINRA's Sanctions Guidelines also call for bars as appropriate sanctions for a wide range of conduct.[53]

FINRA's actions are potentially subject to *ex post* SEC or judicial review. Where the person or firm contests the charges or sanctions, there's an opportunity for appellate review before FINRA's appellate body (the National Adjudicatory Council), the SEC, and then the D.C. Circuit or their local federal court of appeals.[54]

The standard of review for disciplinary enforcement proceedings is set out in Exchange Act Section 19(e).[55] In particular, Section 19(e)(2) provides the standard of review for SRO sanctions: the SEC "may cancel, reduce, or require the remission" of any sanction that it finds to be "excessive or oppressive," or to "impose[] any burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act.[56] I return to discuss the statutory standard of review below.[57]

2. Expedited Proceedings

FINRA also uses bars as administrative tools to enforce its regulatory authority and market power. These "expedited proceedings" are less complex and have faster, less respondent-protective procedures.[58] These expedited proceedings typically cover a person's failure to engage with some FINRA process, such as failure to pay an arbitration award or to provide information to FINRA in an investigation.[59]

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53. FINRA, Sanction Guidelines 9–10 (Sept. 2022), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [https://perma.cc/NLT3-HENK]; Black, *supra* note 18, at 46-55 (describing the application of the guidelines in bar cases).

54. On the dominance of the D.C. Circuit's "case law on SEC programs about broker-dealer regulation," see Kyle Langvardt & James Fallows Tierney, *On "Confetti Regulation": How Not to Regulate Gamified Investing*, 131 YALE L. J. FORUM 717, 731 n.62 (2022) (discussing the role of the D.C. Circuit's caselaw looming large here).

55. PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1064 (D.C. Cir. 2007) ("Pursuant to § 19(e) of the Securities Exchange Act of 1934, the Commission is to review de novo a disciplinary sanction imposed by the NASD [FINRA's predecessor] upon a member firm or a person associated therewith to determine whether the sanction 'imposes any burden on competition not necessary or appropriate' to further the purposes of the Act, or is 'excessive or oppressive.'"); *Keith Patrick Sequiera*, Exchange Act Release No. 81786, 2017 WL 4335070, at 3-4 (Sept. 29, 2017) (noting that the SEC applies Section 19(e) to bars in "a formal disciplinary proceeding based on a finding of misconduct").

56. 15 U.S.C. § 78s(e)(2).

57. *See infra* Parts II.C.1 and IV.C.

58. *See* FINRA, Guide to Expedited Proceedings, https://www.finra.org/rules-guidance/adjudication-decisions/office-hearing-officers-oho/guide-expedited-proceedings [https://perma.cc/7MNS-JNA8].

59. *See id.*; FINRA Rule 9552 (failure to provide information), https://www.finra.org/rules-guidance/rulebooks/finra-rules/9552 [https://perma.cc/TAK8-MNSN]; Rule 9553

Consider the example of someone who doesn't respond to FINRA's requests, which then triggers a series of actions with escalating consequences for noncompliance. Under Rule 9552, the person can be notified that if they don't cure the default within 21 days of service, they'll be suspended.[60] The suspension becomes effective at the end of that period unless the person requests a hearing on the merits, though afterward the person can still request that the suspension be lifted for good cause.[61] If the person doesn't request suspension for three months, they "will *automatically* be expelled or barred."[62] Many bars in expedited proceedings arise from a decision to stop engaging with FINRA's processes. The SEC has justified this on grounds that "it promotes an 'efficient disciplinary process.'"[63]

Notably, expedited proceedings also involve a looser standard of review than enforcement proceedings.[64] There is no proportionality analysis under Section 19(f) ensuring sanctions are neither excessive nor oppressive, as there is under Section 19(e)(2). Rather, Section 19(f) directs the SEC essentially to affirm an SRO's bar in a nondisciplinary proceeding if it basically got the facts right, did so consistent with the SRO's own rules, and those rules are and were applied in a manner consistent with the Exchange Act's purposes.[65]

As Part II shows, most of the public licensing database disclosures for disbarred brokers show failure to provide information to FINRA in its investigative processes. We'll see that bars of this sort are meant to promote SRO authority and jurisdiction. Notably, FINRA is not a government agency and

(failure to pay FINRA due and fees), https://www.finra.org/rules-guidance/rulebooks/finra-rules/9553 [https://perma.cc/7KGZ-432K]; Rule 9554 (failure to comply with an arbitration award or certain other compensatory sanctions), https://www.finra.org/rules-guidance/rulebooks/finra-rules/9554 [https://perma.cc/WP52-SJZU].

60. FINRA Rule 9552(a).

61. FINRA Rule 9552(d)–(f).

62. FINRA Rule 9552(h) (emphasis added); *see, e.g.*, Michael Nicholas Romano, Exchange Act Release No. 76011, 2015 WL 5693099 at 3 nn. 6-8 (Sept. 29, 2015).

63. Romano, 2015 WL 5693099, at *5 (quoting FINRA, Inc., *Order Approving Proposed Rule Change Amending the FINRA Rule 9550 Series (Expedited Proc.)*, Exchange Act Release No. 61252, 2009 WL 5125425, at *1 (Dec. 28, 2009)).

64. As the SEC has said, "the choice of review . . . turns on whether the bar is imposed in an expedited proceeding." *Sequiera*, 2017 WL 4335070, at 4 (distinguishing these from bars that "result from disciplinary action").

65. 15 U.S.C. § 78s(f); *see* Tony R. Smith, Exchange Act Release No. 34-43748, 2000 WL 1855093, 2-3 (Dec. 20, 2000) (noting that Section 19(f) requires the SEC, in reviewing SRO "actions barring a person," to assess whether "the specific grounds upon which the [SRO] based its action exist in fact," its action "was in accordance with its rules," and "those rules were applied in a manner consistent with the purposes of the Exchange Act, or imposed any burden on competition not necessary or appropriate in furtherance of" those purposes).

lacks enforceable subpoena power.[66] Nor can it go to court to enforce fines.[67] FINRA thus wields bars in ways that are supposedly designed not to punish but to secure compliance, though the distinction is subtle.[68] In any case, these processes rely heavily on FINRA Rule 8210 and related doctrines to enforce compliance with regulatory jurisdiction.[69] Rule 8210 "requires members and associated persons to provide testimony in connection with any [FINRA] investigation, complaint, examination, or proceeding," and related doctrines deem a violation of Rule 8210 as "conduct inconsistent with the just and equitable principles of trade" rules.[70]

The SEC has upheld these bars in expedited proceedings, and the justification is worth briefly visiting. Consider the SEC's opinion in *Howard Brett Berger*, a Section 19(f) adjudication about the validity of one of these bars in a petition for review of action by FINRA's predecessor NASD. On the advice of counsel, Berger did not engage with two requests by NASD to take his on-the-record testimony.[71] In upholding the bar, the Commission said that "in the absence of mitigating factors, a complete failure to cooperate with [FINRA] requests for information or testimony is so fundamentally incompatible with [FINRA's] self-regulatory function that the risk to the markets and investors posed by such misconduct is properly remedied by a bar."[72]

The empirical data to which this project now turns shows that a majority of FINRA bars are in expedited proceedings for not engaging with FINRA's processes. As discussed below, these bars proliferated as an emergent property of FINRA's expanded regulatory jurisdiction in the shadow of a statutory provision that allows it to impose bars without regard to their proportionality.

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66. *See* 15A Lemke & Lins, *supra* note 27, at § 6:11 ("Because FINRA does not have subpoena power, it must rely on Rule 8210 to obtain information from firms during its investigations.").

67. *See infra* notes 162-166.

68. *See infra* Parts III.B.2 and C.2.

69. *See* FINRA Rule 8210 (provision of information and testimony), https://www.finra.org/rules-guidance/rulebooks/finra-rules/8210 [https://perma.cc/DV7N-GPDD].

70. Howard Brett Berger, Exchange Act Release No. 55706, 2007 WL 1306843 at n.1 (May 4, 2007) ("Berger I").

71. *See id.* at 9 (denying an advice-of-counsel defense to the bar). For discussion of the reasons for this kind of legal advice, *see* text accompanying *infra* note 170.

72. Howard Brett Berger, Exchange Act Release No. 58950, 2008 WL 48991010 at 4 (Nov. 14, 2008) ("Berger II") (citation omitted), *aff'd sub. nom.* Berger v. SEC, 347 F. App'x 692, 694 (2d Cir. 2009) ("Berger III"). One consequence of cases like *Axon v. FTC* may be to undercut the Second Circuit's additional holding in *Berger* that a registered representative doesn't have an opportunity "to challenge [FINRA's] jurisdiction over him or her prior to an [on-the-record interview]." *Id.*; *see* Axon Enters. v. FTC, 143 S. Ct. 890 (2023) (concluding, in consolidated cases involving FTC and SEC, that federal courts had jurisdiction to consider constitutional challenges to agency adjudication notwithstanding statutory schemes providing for ex post judicial review of administrative adjudications).

II. What Kinds of Bars? Evidence from Text Mining FINRA BrokerCheck

This Part draws on empirical methods from data science and text mining to examine most of the industry bars that FINRA has imposed over the last two decades.

A. Data Sources and Empirical Approach

Because all brokers are FINRA members, the SRO has certain jurisdiction over firms' registered and other associated persons. It keeps track of licensing, employment, and other data in its Central Registration Depository (CRD), including detailed information about allegations, regulatory proceedings, and enforcement sanctions. Much, but not all, of this data is reported publicly through FINRA's BrokerCheck website, making it amenable to computational collection and analysis.

This article aims to uncover similar empirical questions as Velikonja using different methodological approaches.[73] Scholars often find it prohibitively costly to consume and code data manually at volume. To avoid this problem, I use "law as data."

"Text as data" and "law as data" are empirical methodologies at the intersection of computational analysis and legal studies. "Text as data" refers to the practice of converting unstructured text into quantifiable, structured data that can be systematically analyzed using statistical or machine learning methods.[74] "Law as data" combines this with non-textual analysis, like statistical occurrences of fact patterns or metadata, from legal texts like court decisions, regulations, contracts, and more.[75] By treating law *as* data, we can empirically analyze vast legal text corpora to gain new understanding of how law evolves, what information is disclosed, and what contract terms are produced.[76] As

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73. *See, e.g.,* Velikonja, *supra* note 4; *supra* note 37.

74. *See, e.g.,* JUSTIN GRIMMER, MARGARET E. ROBERTS, & BRANDON M. STEWART, TEXT AS DATA: A NEW FRAMEWORK FOR MACHINE LEARNING AND THE SOCIAL SCIENCES (2022). These methods and empirical approaches central to the field of natural language processing are leveraged in many disciplines relevant to empirical research in the social sciences contexts, from sentiment analysis to topic modeling.

75. *See, e.g.,* Nina Varsava, *Computational Legal Studies, Digital Humanities, and Textual Analysis*, in COMPUTATIONAL LEGAL STUDIES: THE PROMISE AND CHALLENGE OF DATA-DRIVEN RESEARCH (2020); *see also, e.g.,* LAW AS DATA: COMPUTATION, TEXT & THE FUTURE OF LEGAL ANALYSIS (Michael A. Livermore & Daniel N. Rockmore eds., 2019).

76. Some approaches also contemplate the use of these methods to inform plain-meaning interpretation, *e.g.,* Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156 (2011). My goal is to use these methods to take the external view. *See, e.g.,* Tyler A. Scott, Nicholas Marantz, and Nicola Ulibarri, *Use of Boilerplate Language in Regulatory Documents: Evidence from Environmental Impact Statements*, 32 J. PUB. ADMIN. RES. &

recent literature in securities regulation has shown, this approach may permit scholars to discover patterns, trends, and insights that were previously inaccessible using costly traditional legal research methods.[77]

Here is an example of data source and analysis performed. FINRA's website includes a list of individuals who have been subjected to bars between 1999 and 2023.[78] The list includes the individual's name, their CRD or license number, and in many cases a link to more information about the nature of the bar and the conduct that gave rise to it.[79] For just under one-third of the list entries, only the name and CRD number are available.[80] Because my computational approach doesn't let me do anything more with these bars, I reluctantly exclude them.

THEORY 576 (2022) (studying boilerplate text in agency regulatory documents); Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. CHI. L. REV. 1 (2021) (examining material contracts filed with the SEC to determine the role of law firm influence on the presence and stickiness of contract clauses); Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57 (2017) (examining role of attorney drafting in merger agreements).

77. *See, e.g.*, James Fallows Tierney, *The Stock Exchange Rulemaking Firehose: A law-as-data approach* (unpublished manuscript), https://am.aals.org/wp-content/uploads/sites/4/2024/01/tierney__stock_exchange_rulemaking__for_aals__dec_2023.pdf (using NLP methods to scrape almost 700,000 filings from the Federal Register and examine roughly 23,000 SRO rule proposals published there pursuant to Exchange Act Rule 19b-4); Sergio Davalos & Ehsan H. Feroz, *A Textual Analysis of the US Securities and Exchange Commission's Accounting and Auditing Enforcement Releases Relating to the Sarbanes-Oxley Act*, 29 INTELL. SYS. ACC. FIN. MGMT. 19, 20, 36-37 (2022) (explaining that a traditional approach, like "going through the documents and interpreting and generating insights, . . . has limitations in generating reproducible results and is time consuming," and drawing evidence from NLP methods of how the SEC used different language in its accounting adjudications before and after accounting reform in the Sarbanes-Oxley Act); Charlotte S. Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695, 1723 (2021) (noting that "text analytics enables researchers to automate the process of turning text into data—in our case, transforming over 3,000 written arbitration decisions, composed of over 5.3 million words—into an organized data set susceptible of analysis, without having to read each and every decision and extract the relevant information by hand").

78. *See* Individuals Barred by FINRA, https://www.finra.org/rules-guidance/oversight-Oversight%20%26%20Enforcement/individuals-barred-finra [https://perma.cc/UW39-UKQK]. The list says it contains data from 1999 to 2023, but some data scraped from Brokercheck suggest some people were barred before then.

79. There were 8,833 entries on FINRA's bar list over this two-decade period as of when I collected the data in summer 2023.

80. It's not clear whether these bars are not present because of changes over time in FINRA's recordkeeping or in the temporal scope of its jurisdiction (in asking people about their histories, like for character and fitness, on Form U4). It's also possible that many are collateral bars imposed by regulators like the SEC where the person hadn't previously registered as a broker and so did not have a CRD record to begin with.

In other circumstances, FINRA reports the bar in connection with a monthly newsletter reporting recent disciplinary decisions.[81] The remaining entries on the bars list have a link to one of these newsletters. Among these, most of them provide a narrative textual disclosure about the person's conduct, which typically have information about alleged violations but not dates. Categorical disclosures report the person's name, date, CRD number, and information about the nature of the expedited proceeding in which they were barred.

Tbl. 1. Counts of Different Categories of Data

Type of data	Count
Categorical disclosures	284
Textual disclosure available	372
FINRA BrokerCheck record available	5308
Only name and CRD available	2869
Total	8833

The remaining entries, comprising 60% of the total, have a link to the person's BrokerCheck record. I collected the data through R—a statistical programming language— by scraping the bar list for the CRD license number, name, and link to BrokerCheck database record. FINRA makes access to BrokerCheck available through an application programming interface (API), which permits automated programmatic queries to the database. Using a custom R script, I query the BrokerCheck API for each individual with a valid BrokerCheck entry on the bars list. I thus capture the information in a tabular form.[82] The result is a structured, tidy dataset that includes, among other information, the textual disclosures associated with the industry bar and previous enforcement sanctions entered against the person. For the categorical and textual disclosures, research assistants and I visited the websites linked on the bars list, and hand-collected the texts of the disclosures.

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81. *See, e.g.*, FINRA, Disciplinary and Other FINRA Actions (Reported for December 2023, https://www.finra.org/sites/default/files/2023-12/Disciplinary_Actions_December_2023.pdf [https://perma.cc/26LL-NE5B]. For many of the excluded-for-now individual observations, FINRA's list of bars includes a link to the monthly report rather than to the machine-readable BrokerCheck API. For the dataset used in this article, see James Tierney, *Replication Data for: Reconsidering Securities Industry Bars*, https://doi.org/10.7910/DVN/UPMMMJ [https://perma.cc/9KNG-L555], Harvard Dataverse, V1 (2024).

82. In other words, I divert the information into a dataset rather than into a browsable website, and do so with a scraping script (e.g., politely, overnight) without sitting there clicking away. For a discussion and illustration of polite web scraping, see Ryan Romard, *Tidy Text Scraping, Cleaning and Processing with Karl Marx and R*, DATA SCIENCE FOR CLASS STRUGGLE, https://ds4cs.netlify.app/learning/text-as-data/getting-started-scraping-and-processing-text-data/ [https://perma.cc/YCS4-XYX8].

The empirical strategy uses a natural language processing technique known as "regular expressions" to search for specific character patterns in the textual data.[83] I define search strings for a variety of categories of interest, like fraud or conversion, or indicia of expedited proceedings like the numbers of the relevant FINRA rules (e.g., 8210 and 9552), which are often reported.[84] I combine the hand-collected disclosures with the machine-collected texts and tag each occurrence of an industry bar based on text from the "allegations," "regulatory comments," "initiated by," and "resolution" fields in BrokerCheck. As the next part shows, this data provides a novel look at how FINRA is barring people.

B. How Many Bars, and for What?

These data reveal that, for the bulk of the years covered in the dataset, FINRA was imposing roughly 300 bars per year until around 2015.[85] In the years since then, its rate of barring people appears to have dropped off precipitously, to an average of 150 since 2020. This could be Covid-related, but my sense is that it undercounts the number of FINRA bars because it fails to account for missing dates. They also are likely biased in favor of certain programmatic kinds of bars pursuant to expedited proceedings, as in the case of failure to update a mailing address.[86]

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83. *See, e.g.*, Nyarko, *supra* note 76, at 30-32. There are tradeoffs in the choice of method. Search patterns that have misspellings or alternate phrasings may well evade detection. It's a simpler, more direct approach than more sophisticated methods, like machine learning, which could help us better put these disclosures in context.

84. For instance, the "allegations" in BrokerCheck might reflect that:

 "Without admitting or denying the findings, [the broker] consented to the sanctions and to the entry of findings that she refused to produce documents and information and to appear for on-the-record testimony requested by FINRA in connection with its investigation concerning certain suspicious fund transfers involving her member firm and affiliates thereof indirectly owned and controlled by [the broker]."

 This is the allegations field for the first result in my dataset. An automated script might tag this as a Rule 8210 disclosure by matching the text patterns "refused to produce" or "on-the-record testimony." To come up with the list of match patterns, I undertook trial-and-error searches with iteratively more inclusive Regex match patterns (e.g., to deal with hyphenated and non-hyphenated matches) until I winnowed down the number of remaining unmatched disclosures.

85. According to FINRA's statistics, about two in five enforcement actions result in bars in recent years; in March 2020, for the two preceding years "FINRA barred more than 730 brokers from the brokerage industry—*an average of one per day*—for a vast range of misconduct." Jessica Hopper, *Working on the Front Lines of Investor Protection – The Importance of FINRA Rule 8210*, FINRA NEWS BLOG (July 20, 2020), https://www.finra.org/media-center/blog/working-front-lines-investor-protection-importance-finra-rule-8210#:~:text=What%20is%20FINRA%20Rule%208210,the%20ability%20to%20subpoena%20information [https://perma.cc/BXZ6-CZQF].

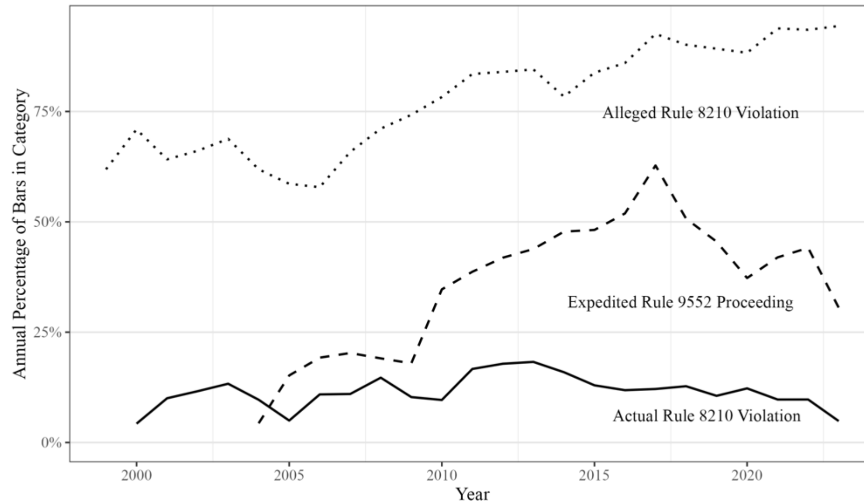
86. In addition to the count of bars per year, the dashed line reports a "naively imputed count," which tries impressionistically to visualize some of the missing data. I derive this

Fig. 1. Number of Bars Identified as Imposition by TINRA / NASD

The data also reflect that upward of half of bars are imposed in FINRA expedited proceedings, as depicted below in Figure 2. The dotted line toward the top reflects the time series of bars in which the "allegations" field match a search string for Rule 8210 cases, which could be the case either in an enforcement or an expedited proceeding bar. The solid line at the bottom reflects the time series of bars in which the "findings" fields match a search string. The dashed line reflects bars in which the regulatory statement field specifically identifies the bar as produced in an expedited proceeding under Rule 9552(d) or (h). This data suggests that in recent years upwards of 85% of FINRA bars have involved what we might consider brokers flouting FINRA's regulatory authority. As market-power theories of FINRA industry bars have pointed out, FINRA lacks the authority to subpoena and to go to court to enforce sanctions, underscoring the importance of FINRA's ability to police its membership through exclusion.

by taking all the bars for which I don't have dates, dividing them evenly by number of years, and adding that to each year.

Fig. 2. Three Kinds of Bars Identified by Regex Tagging



The data also shed light on the reasons people are barred in enforcement cases. In the appendix, Figure 5 and Figure 6 look respectively at the text of *allegations* and *findings* in the BrokerCheck data, binned by year. Other than Rule 8210 requests, a significant portion of the remaining bars are applied in response to severe forms of misconduct such as misappropriation, conversion, and fraud. In contrast, fewer bars are imposed for misconduct such as outside business activities or suitability violations unless these occur in conjunction with other forms of rule-breaking.

Taken together, this article's empirical results suggest that FINRA has prioritized industry bar policy in two categories. In disciplinary cases, FINRA has prioritized cases involving overt dishonesty and significant harm to investor interests, rather than lesser forms of misconduct or rule violations. In expedited proceedings, it has prioritized cases involving the failure to engage with its processes and regulatory authority. This Part showed that most FINRA bars are in expedited proceedings and associated with conduct that looks like disrespect for FINRA's mission, jurisdiction, or authority over the industry.

Securities regulation scholars have historically overlooked expedited proceedings, and we know relatively little empirically about the process or the sanctions it produces. These empirical findings begin to fill out our picture of industry bar policy at FINRA, and raise questions about whether the observed pattern is the result of policy choice—and if so, whether and how we should reconsider those choices.

III. Theory of Securities Industry Bars

This part situates the traditional "enforcement" and "expedited proceeding" bars, as well as the patterns of deference to SRO decision-making, within the broader history of the securities laws' self-regulatory framework. I suggest the patterns we observe are path-dependent outcomes of choices to structure the SRO framework in three historical eras, and a fourth is being contested today. The two main categories of bars can also be understood functionally, one for traditional investor protection goals and the other for the less well-understood SRO-promotion function. Sanctions policy also raises broader policy questions about how to design administrative systems to trade off error costs and adjudication costs—or, in other words, the costs of deciding and of deciding wrong.

Turning to the core of this article's theory of securities industry bars, I contend that the "excessive or oppressive" standard reflects proportionality, not a remedial/penal distinction. I address implications for the incapacitation and deterrence purposes for which industry bars are put, then defend them in both enforcement and expedited proceeding contexts. I consider problems of proportionality, occupational licensing and the lawyer analogy, and the objection that we should use disclosure policy as a lighter tough intervention here.

A. Bars' Investor-Protection and SRO-Promotion Functions as Path Dependence

This part examines the history of industry bars to argue that the observed pattern is a result of path dependency, not intentional design. The history of industry bars isn't linear; it's influenced by historical events, such as policy compromises or turnover of personnel at regulators or in the judiciary, that play out across time. For us, path dependence is the idea that "an outcome or decision is shaped in specific and systematic ways by the historical path leading to it."[87]

In a model of path dependence that borrows from evolutionary theory, the "punctuated equilibrium" form of path dependence suggests that "[l]ong periods of stasis are followed by rapid change."[88] As legal scholar Oona Hathaway has written, this form of path dependence is akin to the "critical junctures" model of institutional development scholarship, in which "[e]ach critical juncture . . . produces a distinct legacy that remains largely intact until the next critical juncture breaks down and reshapes the political and institutional arrangements anew."[89] When we set down a particular path, the costs of

87. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603–04 (2001).

88. *Id.* at 641.

89. *Id.* at 642; *see id.* n.163 (explaining that the "critical junctures approach suggests that the choice made during a juncture forecloses other options because vested interests arise around the solution chosen and operate to defend and maintain it until a new crisis once

switching may be too high, leading us to stay on that path even if a better one is available, until there is a next critical juncture.[90] Law professor Mark Roe has argued that the typical American form of corporate governance "was politically and historically contingent, a path dependent artifact of populist politics and a federal system."[91]

Understanding the path to the current state, therefore, might help understand how the patterns of enforcement we saw in Part II may be more the result of accident than efficient evolution or careful design.[92] To that end, this subpart examines three eras of industry bar history—early exchange history, the New Deal realignment in finance, and the expansion of FINRA's regulatory authority—and assesses how we got to where we are, before turning in Part III.B to the normative justifications for the types of bars we see today. I return in Part IV.A to discussion of a fourth era involving the rise of a business-oriented conservative legal movement that continues to contest the role of securities law sanctions like bars.

1. A Private Club

One feature of industry bar doctrine we see is a widespread deference by courts and regulators to the exclusion decisions of SROs like FINRA. This mode of deference is not new and reflects a throughline from the earliest years of exchange regulation. I use "contractarian theory" to refer to a defense of industry bars on the grounds that market participants have agreed to a system in which exclusion is the sanction for specified conduct.[93] To this day, courts and the SEC adhere to contractarian theory in assessing claims about industry bars.[94] I

again opens the door to substantial change") (citing Sidney Verba, *Sequences and Development,* in CRISES AND SEQUENCES IN POLITICAL DEVELOPMENT 283, 308 (1971)); *cf.* Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L. Q. 809, 812 (2018) (noting that environmental law "carries forward conceptions" about how to allocate power between economic actors, and "the role of distributive considerations in managing it that formed in a particular moment").

90. *See* Hathaway, *supra* note 87, at 642; *see also, e.g.,* Ronald J. Gilson, *Corporate Governance and Economic Efficiency: When Do Institutions Matter?*, 74 WASH. U. L. Q. 327, 330 n.6 (1996) (noting the path-dependency concept "that the initial starting point has resulted in inefficiency that could be remedied, either by having made an alternative choice at the outset or by changes now, but the inefficient conditions remain").

91. Gilson, *supra* note 90, at 331 (also citing MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 7-8 (1994)).

92. On these themes, see *infra* Part IV.D.

93. *See, e.g.,* Norman S. Poser, *Reply to Lowenfels*, 64 CORNELL L. REV. 402, 404 (1979) (describing this SRO action as "based on a contractual arrangement" rather than government power).

94. *See, e.g.,* D'Alessio v. SEC, 380 F.3d 112, 123 (2d Cir. 2004) ("When appellants became members of the Exchange they consented, quite knowingly and intelligently to its disciplinary procedures.") (cleaned up); *see also, e.g.,* Susan L. Merrill, Matthew L. Moore

suggest here that practices and normative commitments of SRO contractarianism—that a broker has agreed to be part of the industry, and so can't complain about being kicked out for violating its rules—flow from attitudes and legal doctrines arising from the earliest days of SRO governance, about when people can complain about sanctions to which they've purportedly agreed. I return in a later section to suggest that this approach was once coherent, but considering changed circumstances now might be best understood as a legal fiction.

Understanding the role of contractarian theory in today's continued deference to SRO decision-making requires a brief detour to the earliest days of industry exclusion at the stock exchanges. Shortly after the revolution, broker-dealers in New York formally constituted the New York Stock Exchange (NYSE) in 1817.[95] Its first organizational document, a "constitution," provided for disciplinary sanctions including expulsion for certain offenses or upon supermajority vote of the membership.[96] Exchanges were informally organized voluntary associations that derived power from mutual assent.[97] Like other private clubs or voluntary associations, they could control their membership, including by expulsion.[98] Members who got kicked out could hardly be heard to complain, as they'd agreed to be subjected to that sanction.[99]

Brokers' contractual relationships with the exchanges—what would later become the SROs, and in their sanctioning capacity FINRA[100]—thus grounded courts' deference to exchange governance and sanctions, going beyond the

& Allen D. Boyer, *Sharper and Brighter: Focusing on Sanctions at the New York Stock Exchange*, 3 N.Y.U. J. L. & BUS. 155, 164–65 (2006) (NYSE attorneys examining history of exchange discipline and concluding the authority rests on the respondent's "[choice] to join the exchange community and assume the responsibilities of participation").

95. William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 14–16 (2012). On NYSE's dominance and the larger exchange ecosystem at this time, *see also* Richard Sylla, *The Origins of the New York Stock Exchange*, in THE ORIGINS OF VALUE: THE FINANCIAL INNOVATIONS THAT CREATED MODERN CAPITAL MARKETS 299, 308 (William N. Goetzmann & K. Geert Rouwenhorst eds., 2005).

96. NYSE, Constitution of 1817 § 18; *see* Merrill *et al.*, *supra* note 94 at 163–64.

97. *See, e.g.*, White v. Brownell, 1868 WL 6113 (N.Y. Com. Pl.), *aff'd*, 1868 WL 5887 (N.Y. Com. Pl. 1868) (distinguishing voluntary membership associations from other business entities like partnerships and corporations, and holding that Open Board of Brokers' "constitution and laws, as agreed on by the members, . . . form the law which must determine their rights and obligations").

98. *See, e.g.*, Zechariah Chafee Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 998 (1930).

99. *See* Merrill, Moore, and Boyer, *supra* note 91 at 186; Cohen v. Thomas, 101 N.E. 708, 709 (N.Y. 1913) (noting that, having agreed to the rules for discipline and expulsion, "upon what ground may [an expelled member] invoke the interference of the law with the action of the committee?").

100. *See infra* Part III.A.3.

inherent powers that the common law granted.[101] What's more, the retail public was mostly uninvolved in the stock market before the late 19th century, meaning little public curiosity or demand for oversight in their governance relative to later periods.[102] Governance majorities in the early exchanges, then, had largely unchecked power to determine whom to kick out of the industry, and on what terms.[103] A 1914 treatise on stock exchange law reports that NYSE rules provided for a suspension of up to a year for refusing to produce books and records in connection with an exchange investigation.[104] It could do this because, as one observer has noted, at this time "the NYSE had no regulatory rival in local, state, or federal government."[105]

NYSE exercised significant market power at this time. Courts in New York would not enforce certain trading contracts, but the exchange would—*on pain of expulsion*.[106] At exchanges like NYSE, expulsions (the equivalent of industry bars) were rare until the late 19th century.[107] Perhaps the exchanges were good at screening members, or perhaps they had a collective interest in

101. The traditional rule was that *for-profit* associations couldn't expel members without contracting for that sanction in advance in their organizational documents. A "different rule" applied to non-profit associations like stock exchanges, which had "implied or incidental power[s] to disfranchise or expel . . . member[s]." 12A FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 5696 (2020); *see also, e.g.,* JOHN R. DOS PASSOS, A TREATISE ON THE LAW OF STOCK-BROKERS AND STOCK EXCHANGES 72 (1905) (describing the inherent expulsion power as among the "most important" of financial exchange powers). A more restrictive rule would apply to incorporated exchanges. *White*, 1868 WL 5887, *supra* note 95 at *7; *cf.* W. C. van Antwerp, *infra* note 106 at 266–67 (observing that private ordering and inherent powers gave exchanges "vastly greater control over [their] members than any law . . . could possibly give").

102. *See, e.g.,* Mary O'Sullivan, *The Expansion of the U.S. Stock Market, 1885-1930: Historical Facts and Theoretical Fashions*, 8 ENTERPRISE & SOC'Y 489, 537 (2007) (concluding that "a broad-based [retail] market for corporate stocks was a long way from being well established by the early [1910s]," and only became so after "the enthusiasm of the 1920s, especially the late 1920s").

103. *See* Alan Lawhead, *Useful Limits to the Fifth Amendment: Examining the Benefits That Flow from a Private Regulator's Ability to Demand Answers to Its Questions During an Investigation*, 2009 COLUM. BUS. L. REV. 210, 215 (2009).

104. SAMUEL P. GOLDMAN, A HANDBOOK OF STOCK EXCHANGE LAWS 20–21 (1914).

105. John I. Sanders, *Break from Tradition: Questioning the Primacy of Self-Regulation in American Securities Law*, 7 MICH. BUS. & ENTREPRENEURIAL L. REV. 93, 99 (2017). On market power, see *infra* Part III.B.2.

106. *See* STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690-1860 263–64 (1998); Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 591 (2000) (also citing Stuart Banner, *The Origin of the New York Stock Exchange, 1791-1860*, 27 J. LEGAL STUD. 113, 126, 132 (1998)).

107. *See, e.g.,* The Stock Exchange, N.Y. TIMES, Aug. 21, 1865 (reporting "three expulsions from the membership" up to 1865).

underenforcement.[108] More members meant deeper liquidity and higher commission profits for the brokers. Membership in NYSE carried economic benefits—network effects, reputation, and goodwill—that translated into higher commission income and trading profits for NYSE members.[109] This made the threat of expulsion a supposedly meaningful deterrent.[110] And expulsions of brokers had indeed become more common, with brokers kicked out for breaching obligations to the exchange or to each other—fraud, nonpayment of debts, and similarly disreputable conduct.[111] The flip side is that exchanges also sometimes excluded brokers from membership for reasons that would strike us today as the product of conflicts of interest.[112]

108. New York (State) Committee on Speculation in Securities and Commodities, *Report of the Governor Hughes' Committee on Speculation in Securities and Commodities*, June 7, 1909, reprinted in W. C. VAN ANTWERP, THE STOCK EXCHANGE FROM WITHIN 415, 426 (1914). On the Hughes' Committee, *see* George T. Simon & Kathryn M. Trkla, *The Regulation of Specialists and Implications for the Future*, 61 BUS. LAW. 217, 229 (2005).

109. *See* Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. CHI. L. REV. 119, 122 (1987). It wasn't strictly necessary to be an exchange member, as broker-dealers could transact in the street outside the exchange and in competing upstart exchanges. *See, e.g.*, WALTER WERNER & STEVEN T. SMITH, WALL STREET (1991). Because the best liquidity and profit opportunities were at the exchange, an expulsion that had the effect of prohibiting transactions with exchange members was a major sanction for broker-dealers. *Id.*

110. *See, e.g.*, Edward C. Eliot, *Exchange By-Laws, in Their Relation to "Option Dealing,"* 20 AM. L. REV. 217, 229 (1886) (calling "fear of expulsion . . . a controlling motive").

111. *See, e.g., Expelled from Stock Exchange*, N.Y. TIMES, Sep. 26, 1895, p. 4; *The Law of "Wash Sales,"* N.Y. TIMES, Sep. 7, 1892; Rorke v. San Francisco Stock & Exchange Board, 33 Pac. 881 (Cal. 1893).

112. These arose from the agency relationship between exchanges and members, and featured prominently in the early case law on expulsion. The exchange's governing bodies had an incentive to use disciplinary and other tools to punish or otherwise poorly treat members who were disfavored for harming the parochial economic interests of a supermajority of voting members. *See also, e.g.*, DOMENIC VITIELLO & GEORGE E. THOMAS, THE PHILADELPHIA STOCK EXCHANGE AND THE CITY IT MADE 83 (2010) (giving examples of "standards for admittance aimed at protecting Philadelphia and its financial community," such as by expelling members who'd been physically absent from the city for 18 months).

Expulsions were a tool for enforcing cartel pricing and exclusive dealing, and deterring off-exchange trading. Exchange members were required to charge a minimum commission to effect trades. *See, e.g.*, Stanislav Dolgopolov, *Insider Trading, Chinese Walls, and Brokerage Commissions: The Origins of Modern Regulation of Information Flows in Securities Markets*, 4 J. L. ECON. & POL'Y 311, 318–19 (2008); *see also, e.g., Cahn & Co. In Trouble*, N.Y. TIMES, Feb. 14, 1886 (fixed commissions were among "the most rigid rules of the Exchange," enforceable by suspension or expulsion).

2. New Deal Realignment

After the early era of exchange regulation gave us contractarian theory, with its focus on brokers' agreement to be disciplined in appropriate cases, the early 20th century and New Deal regulatory fights that followed ushered in policies and practices of protecting investors through enforcement sanctions. As this subpart argues, enforcement sanctions policy is authorized and constrained by statutory frameworks that were directly influenced by the alignment of mass affluent political constituents in favor of greater market regulation through the early 20th century under a system of industry self-regulation. The New Deal settlement of regulation in finance, which put in place these investor-protection policies while retaining industry flexibility through the self-regulatory organization model, helps illustrate the path-dependent nature of the practices we continue to see today.

Public-choice theory posits that regulatory outcomes are skewed in favor of special interests due to their ability to mobilize resources and influence decision-making processes, and a mismatch of incentives where benefits are concentrated while costs are dispersed.[113] Brokers and their firms typically have relatively more resources and clout, which they can use to influence policy (potentially at the expense of their customers). In an era when most people didn't care about brokers, industry was largely able to dominate. That changed once a politically powerful constituency of retail shareholders came to have interests at stake in the markets. Retail investors and 'good' brokers—and, perhaps, the monopoly-regulator SRO that big brokers have been able to capture—have a shared interest in cleaning up the market. For these groups respectively, bars reduce fraud, competition, and work or risk for FINRA.[114] The convergence of these interests, I have suggested, contributed to the creation of a powerful coalition that could counteract the influence of well-resourced "bad" broker interests.

In the early period discussed above, financial markets were interdependent on the real economy, but few people speculated in securities; stock markets had relatively little direct impact on the ordinary middle class saver's life.[115] Yet the

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113. *See, e.g.*, Stephen J. Choi, *A Framework for the Regulation of Securities Market Inter-mediaries*, 1 BERKELEY BUS. L. J. 45, 80 (2004) (arguing that regulators may be slow to address an issue when dispersed investors suffer harm while, "where a small group of investors suffers a very visible and concentrated harm[,] . . . public demand for a stringent regulatory solution will not be far behind.").

114. *See, e.g.*, Tierney and Edwards, *supra* note 15 (noting that bad brokers can use expungement to mimic good brokers).

115. Much of the public agitation, mostly led by NYSE, related to the problem of "bucket shops." These were "non-member firms that purportedly accepted wagers on the movement of stock prices, with no actual transfer of stock," threatening the monopoly profits of the exchange's members. Julia Ott, *The "Free and Open" "People's Market": Public Relations at the New York Stock Exchange, 1913-1929*, 2 Bus. & Econ. Hist. On-Line, 1, 8 (2004).

conduct of financial market participants was not an entirely private affair. Drawing on a rich tradition in Anglo-American thought, many observers saw speculation in financial instruments—and even more so in commodities—as a great evil.[116] Still, most Americans were not financially exposed to organized exchanges, and so did not have a meaningful stake in how it would be governed and regulated. By contrast, from an internal governance perspective, NYSE's market power had become more significant as the stock market had emerged in facilitating investment in capital intensive businesses like railroads and manufacturing. It was this time that gave rise to the Berle-Means corporation.[117]

By the early 20th century, popular interest in the governance of stock markets started to shift. Financial panics, exchange governance scandals, and growing concern about speculation and the corrupting influence of the "money trusts" generated widespread distrust of the stock market and the stock exchanges explicitly.[118] Between 1913 and 1929, progressives clamored for exchange regulation.[119]

The exchanges successfully fended off these efforts at reform for decades. Historian Julia Ott showed that the NYSE led a public relations strategy against regulation that extolled the virtues of self-regulation.[120] As NYSE resisted the idea that it should be treated like a public utility rather than as a private club, an essential component of its public relations strategy during this period was to encourage a broad base of retail shareholding.[121] The NYSE in particular engaged in public relations efforts designed to assuage the concerns of the "respectable professional" public—those with voice, political power, and extra capital to allocate to assets other than bank savings—whose support the exchange needed to stave off reform. What's more, by increasing the number of

116. Walter Werner, *Management, Stock Market and Corporate Reform: Berle and Means Reconsidered*, 77 COLUM. L. REV. 388, 391-392 (1977) (distinguishing notions of speculation and investment).

117. *See, e.g.*, Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians, and the Concentration of the U.S. Equity Markets*, 96 NEB. L. REV. 688, 698-704 (2018); *see also* ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1991).

118. *See* Simon and Trkla, *supra* note 108, at 227–28 (noting that even before the "stock market crash of 1929, . . . [e]arlier market disruptions" in 1893 and 1907 saw "small investors" suffer "significant financial losses," thus "provok[ing] calls for government to regulate the securities markets"). On agitation among agrarians, reformers, and progressives who sought greater popular control over the capital markets, including by reorganizing the exchanges, *see* Cedric B. Cowling, POPULISTS, PLUNGERS, AND PROGRESSIVES: A SOCIAL HISTORY OF STOCK AND COMMODITY SPECULATION 1890-1936 (1965).

119. *See* Ott, *supra* note 115, at 42.

120. *See id.*

121. *See* Julia C. Ott, *"The Free and Open People's Market": Political Ideology and Retail Brokerage at the New York Stock Exchange, 1913-1933*, 96 J. AM. HIST. 44, 52, 55–56 (2009).

people with equity holdings, NYSE built a retail constituency who would care about capital markets. In doing so, it also created a pool of capital that was exposed to the risk of having stockbrokers mismanage or steal their money, and who thus had stronger incentives to pursue investor-protection regulation.

Mass affluent capitalism effectively transformed retail investors into powerful political constituents. This pool of capital, the newly formed class of retail investors, soon clamored for regulation when they were left holding the bag. Securities law's initial enthusiasm for self-regulation "only came into question after a series of public scandals harmed middle-class Americans," spurring a response from politicians responsive to this newly powerful constituency.[122] The laissez-faire era could not survive popular perceptions about the causes of the Crash of 1929, and the growth of popular support for greater democratic control over capital markets.[123]

Federal securities laws developed in ways that reflected new concerns that the design of capital market should reflect the public interest. According to legal scholar Saule Omarova, "[t]he New Deal settlement in finance . . . institutionalized the broad concept of public interest—including public representation and public enforcement—as a legitimate factor in the daily operation of financial markets."[124] The core federal securities laws—including the Securities Exchange Act of 1934, amendments to it in the Maloney Act and again in 1975, and the Investment Advisers Act of 1940 and the Investment Company Act of 1940—created the main regulatory structures that govern exclusion sanctions from the financial industry. The securities laws brought the exchanges under federal supervision, creating in the 1930s the twin categories "national securities exchange" and "national securities association" to reflect the exchange-traded and over-the-counter securities markets.[125]

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122. Sanders, *supra* note 102, at 99.

123. *See* MICHAEL PERINO, THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA'S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE (2011); JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (3rd ed. 2003). It is of course contested the extent to which manipulation in capital markets was a cause of the Crash of 1929. Birdthistle & Henderson, *supra* note 93, at 16 (suggesting that this was "at the time the conventional wisdom of the cause of the crash"). The point is that an emergent class of middle-class retail shareholders lost wealth and power in the wake of the Crash, and thus acted as a bloc clamoring for reform as part of a broader restructuring of control over the economy.

124. Saule T. Omarova, *New Tech v. New Deal: Fintech as a Systemic Phenomenon*, 36 YALE J. ON REG. 735, 746 (2019).

125. The exchanges were made subject to federal regulation in the Securities Exchange Act of 1934 and the Maloney Act also brought the over-the-counter markets into the fold in 1938. *See, e.g.*, SECURITIES AND EXCH. COMM'N, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS (Comm. Print 1964).

Congress required these SROs to register with the Commission, and to meet certain minimum standards to be registered as such.[126] Those standards included that SROs had to adopt rules that met certain statutory standards. Under Exchange Act Section 15A(b)(6) through (8), for instance, FINRA's rules must be designed "to protect investors and the public interest," and to provide for appropriate discipline—including the possibility of a bar or expulsion.[127]

Much of the regulatory entrepreneurship in developing securities law during the mid-20th century reflected concerns about the use of regulation and enforcement against brokers to protect retail investors, in particular, from fraud and other misconduct.[128] Consider, as an example, the rise of the "shingle theory"—an implied representation that a broker will deal with a customer fairly and in accordance with the standards of the profession.[129] Offering a way for retail investors to recover against "bad" brokers, the shingle theory was acutely concerned for the problem of involuntary redistribution away from unsophisticated investors. In an early case, *Duker & Duker*, the SEC revoked a broker-dealer firm's registration on the ground that it violated the securities laws by marking up securities resold to customers by a price that bore no relation to prevailing market price. As the Commission explained, a broker cannot "exploit trust and ignorance for profits far higher than might be realized from an informed customer."[130] Such rules were designed to reduce certain kinds of conflicts of interest (and the agency costs associated with the separation of rentier absentee ownership and managerial control).[131] Investor protection continues to be a dominant policy of the securities laws, a theme we will return to in Part III.B.1.

3. Expansion of Regulatory Authority

The third category of bars we see—expedited proceedings for failure to engage with FINRA's regulatory processes—is likewise a path-dependent consequence of a shift in financial regulation in how we organize market regulation. Securities law has long embraced self-regulation, which is believed

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126. Richard W. Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 L. & CONTEMP. PROBS 663, 667–77 (1964) (describing evolution of self-regulatory system).

127. 15 U.S.C. § 78o-3(b)(6)-(8).

128. *See* Jerry W. Markham and Thomas Lee Hazen, *Federal regulation begins—The securities markets* in 23 BROKER-DEALER OPERATIONS UNDER THE SECURITIES AND COMMODITIES LAW § 2:11 (2023-2024 ed.).

129. 15A Lemke & Lins, *supra* note 27, at § 5:1.

130. *Duker & Duker*, Exchange Act Release No. 2350, 6 S.E.C. 386, 1939 WL 36426, at *2 (SEC Dec. 19, 1939).

131. On agency cost justifications for investor-protection regulatory interventions, *see infra* Part III.B.1.

to be more agile and better able to incorporate expertise to manage the complexities of the national market system.[132] Over the last several decades, SROs such as FINRA have changed in character to look increasingly governmental—a shift best understood against the background philosophy of governance that favors market-led self-regulation as efficient and effective.[133]

Established in 1939 under the Maloney Act amendments, FINRA's predecessor, the National Association of Securities Dealers (NASD), was first authorized as a registered national securities association to oversee member conduct in the over-the-counter (OTC) or off-exchange trading markets.[134] Forty years of experience with SRO oversight after the Exchange Act and Maloney Act resulted in statutory reforms in 1975, an effort to bring the exchanges and NASD under ever-greater monitoring and oversight by the SEC.[135]

After the 1975 amendments, NASD and the other SROs performed their enforcement roles in parallel for decades, imposing enforcement sanctions and sometimes barring people from associating with other members of that SRO.[136] But this regulatory landscape shifted in 2007 when NASD merged with the regulatory functions of the NYSE's member regulation, enforcement, and arbitration operations.[137] The resulting merged entity, FINRA, consolidated the oversight of securities firms doing business with the public within a single SRO, expanding the scope of surveillance and regulatory enforcement.[138] FINRA also took over enforcement responsibilities from other SROs, centralizing its role in policing of the brokerage industry.[139] Other requirements have come over time, such that now all brokers and almost all dealers must become FINRA members.[140] These changes have reduced SROs' overlapping investments in monitoring and enforcement efforts, and promoted a single entity that could wield enforcement power.

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132. *See infra* note 307.

133. *See generally* Peirce, *supra* note 9; Kim v. Fin. Indus. Regul. Auth., Inc., No. 1:23-CV-02420 (ACR), 2023 WL 6538544, at 3 (D.D.C. Oct. 6, 2023).

134. Maloney Act of 1938, Pub. L. No. 75-719, 52 Stat. 1070 (1938).

135. *See* Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97.

136. Birdthistle & Henderson, *supra* note 93, at 13-22 (recounting this history).

137. On the merger, *see* Christopher W. Cole, *Financial Industry Regulatory Authority (FINRA): Is the Consolidation of NASD and the Regulatory Arm of NYSE a Bull or a Bear for U.S. Capital Markets?*, 76 UMKC L. REV. 251 (2007).

138. *See* Birdthistle & Henderson, *supra* note 8793, at 22-23.

139. *Id.*

140. *See* Exchange Act § 15(b)(8), 15 U.S.C. § 78(o)(b)(8) (prohibiting broker-dealers from effecting securities transactions if not a member of FINRA); *see also Exemption for Certain Exchange Members*, Exchange Act Release No. 95388 (July 29, 2022) (proposing amendments to narrow existing rules exempting certain dealers from FINRA membership).

FINRA's jurisdiction has also expanded so that it oversees registering and educating industry participants to examining securities firms, writing rules, enforcing those rules and the federal securities laws, and informing and educating the investing public. It also operates "the largest securities dispute resolution forum in the United States."[141] This expansive reach has raised questions about FINRA's operations.[142] William Birdthistle and M. Todd Henderson argued that FINRA has begun to resemble a monopoly regulator—a transformation that has important implications for how regulators wield power in financial markets.[143] The relative predominance of "expedited proceeding" industry bars reflect the increasing role of bars meant to protect FINRA's jurisdiction and authority.

Regulatory theory offers some perspective on incentives in these circumstances. The major tension is between those theories that conceive of "regulators as public-minded individuals who arrive at policy choices based on their perceptions of the public interest," on one hand, and those that "attribute regulatory favors for industries to the capture of regulators."[144] Capture theory, the latter of these perspectives, offers a well-understood basis for concern with respect to SRO governance and enforcement. An enduring problem of self-regulation is the concern that rule enforcement will be underproduced against fellow industry members, to the detriment of their clients or to the broader public interest.[145] Even the most public minded may find it hard to resist the incentives facing any institution: to increase its importance, budget, salience, and influence.[146]

All these incentives can aggrandize institutional power, like a regulator's use of its sanction powers to exclude people from a market, in ways that might

141. Nicole G. Iannarone, *A Model for Post-Pandemic Remote Arbitration?*, 52 STETSON L. REV. 393, 394 (2023); *see also* Nicole Iannarone, *Finding Light in Arbitration's Dark Shadow*, 4 NEV. L. J. FORUM 1, 2 n.9 (2020).

142. *See, e.g.*, Peirce, *supra* note 9, at 24.

143. Birdthistle & Henderson, *supra* note 92, at 23 (describing the FINRA merger as creating a monopoly).

144. Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1270 (2015); see Alex Platt, *The Non-Revolving Door*, 46 J. CORP. L. 751, 757-64 (2021) (describing these theories in connection with securities law).

145. *See* Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 U. CIN. L. REV. 573 (2017); CONCEPT RELEASE CONCERNING SELF-REGULATION, Exchange Act Release No. 50,700, 2004 WL 2648179 § I, at 2 (Nov. 18, 2004); *see also* Saule Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411 (2011); Saule Omarova, *Rethinking the Future of Self- Regulation in the Financial Industry*, 35 BROOK. J. INT'L L. 665 (2010).

146. On aggrandizement theory, see Zheng, *supra* note 144, at 1297 ("Agencies may seek self-aggrandizement by asserting a new power not authorized by the legislature, by expanding the scope of an existing power, or by claiming that their jurisdiction is triggered by the presence of a certain factual predicate.").

be in tension with the public interest. Perhaps as FINRA's jurisdiction has grown, so has *its* need to police the boundaries of its membership. As we'll see shortly, FINRA's market power is dependent on its ability to make its mandates enforceable by threat of expulsion.[147] The simple investor protection story masks motivations for sanctions policy that reflect FINRA's own interests, which may or may not align with the public interest. In later subparts of this article, I turn back to examining expedited proceeding bars again, and consider whether there is sense in treating these different from enforcement bar.[148]

B. The Modern Functions of Industry Bars

This part puts in context each of the historical eras we just examined, showing how deference to SROs, an investor protection mission, and the SRO's protection of its jurisdictional turf reflect important aspects of the pattern of bars that we see. This subpart argues that they can be understood functionally, for their purposes in promoting more traditional investor protection goals and the less well understood SRO-promotion function. The former is produced by the rules that go to public confidence in markets. The latter is produced by the rules that go to shaping regulated persons' views and behavior toward FINRA as an SRO. This subpart also considers implications for how to design adjudications programs.

1. Investor Protection and Agency Costs

The New Deal alignment of the mass affluent with financial regulation is a story in which increased public activity in capital markets came with increased exposure to risk of misconduct in those markets. What to do with bad brokers thus transformed from an issue of market integrity to one of political interest. Industry bars and other sanctions became a politically expedient tool. Policymakers, tasked with protecting the interests of their constituents, had a vested interest in developing and enforcing stringent regulations to prevent exploitative practices in the securities industry.[149] And one of the things they insisted on was a statutory requirement that SROs sanction their members for appropriate violations—and a further that their menu of sanctions include an industry bar.[150]

These investor protection interests are well understood in securities law, in which they form the basis for some of its core policy commitments in regulating

147. *See infra* Part III.B.2.

148. See infra Parts III.C and IV.C.

149. On change in administrative law, see infra Part IV.D.

150. *See supra* notes 126–127.

the relationship between an investor and their financial adviser.[151] Take the broker-client relationship, which is well known to give rise to such agency problems.[152] An investor client relies on the broker, as agent, to execute investment decisions—and, sometimes, to advise about those decisions.[153] These relationships give rise to agency problems.[154] Brokers can steal, shirk, pursue conflicts of interest, and violating rules intended to promote the integrity of capital markets.[155]

One of the supervening goals of the securities laws is to minimize the principal-agent problem between financial markets intermediaries and their clients. Economists might say that sanctions' main role here is to promote a more allocatively efficient reduction in "agency costs" in capital markets, thereby attracting investment in the market and promoting market ordering.[156] Bars might well reduce monitoring costs and reduce future losses.

151. *See, e.g.*, Yoon-Ho Alex Lee, *Beyond Agency Core Mission*, 68 ADMIN L. REV. 551, 565 (2016) ("Although no one doubts that protection of investors was the most important driver behind the creation of the SEC, in some ways, it is somewhat curious that this historical consideration should play such a sticky role for the SEC's core mission for eighty years to follow."); Patrick Corrigan, *Do the Securities Laws Actually Protect Investors (and How)? Lessons from SPACs*, WASH. U. L. REV. 20 (forthcoming 2024) ("The investor protection theory motivates the mandatory protections in the federal securities laws."). On the general concerns with "investor protection," *see, e.g.*, Koch v. SEC, 793 F.3d 147, 150 (D.C. Cir. 2015); Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 315 (1985).

152. *See* James Fallows Tierney, *Investment Games*, 72 DUKE L.J. 353, 394 (2022) ("This kind of agency cost problem is intimately familiar to scholars of capital markets."); *see, e.g.*,; Deborah A. DeMott, *Rogue Brokers and the Limits of Agency Law*, in CAMBRIDGE HANDBOOK OF INVESTOR PROTECTION (Arthur B. Laby ed., 2022); Quinn Curtis, *The Fiduciary Rule Controversy and the Future of Investment Advice*, 9 HARV. BUS. L. REV. 53, 61 (2019); Daniel Bergstresser, John M.R. Chalmers & Peter Tufano, *Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry*, 22 REV. FIN. STUD. 4129, 4153–54 (2019); Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 74 WASH. & LEE L. REV. 1457, 1469 (2017); *see also, e.g.*, SEC. & EXCH. COMM'N, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H. Doc. No. 95, 88th Cong., 1st Sess. Ch. 3, 254 (1964).

153. Brokers have specific legal, regulatory, and contractual agency obligations—and in some jurisdictions a general fiduciary obligation can arise depending on the circumstances of the relationship. *See, e.g.*, Angela H. Magary, *Theories of Involuntary Fiduciary Liability*, 12-FALL PIABA BAR. J. 29 (2005); *cf.* Benjamin P. Edwards, *Fiduciary Duty and Investment Advice: Will a Uniform Fiduciary Duty Make a Material Difference*, 14 J. BUS. & SEC. L. 105 (2014).

154. *See* Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 OHIO ST. L.J. 181, 184 (2017) ("Some products offer the advisors larger commissions, and advisors have an incentive to steer clients toward products that maximize advisor commissions.").

155. Because "when a broker cheats, the customer loses," their relationship is unlike other counterparty relationships in which cheating imposes costs on third parties and thus results in gains to customers. Birdthistle & Henderson, *supra* note 93, at 10.

156. *See, e.g.*, Thomas Lee Hazen, *Are Existing Stock Broker Standards Sufficient? Principles, Rules, and Fiduciary Duties*, 2010 COLUM. BUS. L. REV. 709, 736.

From this perspective, the investor protection mission of securities enforcement sanctions depends on how it intervenes to reduce agency costs. I suggest they tend to do so through two channels: incapacitation and deterrence, concepts I return to in Part III.C.2.[157] For now, the point is that securities industry bars' reduction of agency costs in this way is said to improve public confidence. Some brokers who have engaged in misconduct will impose undesirable costs against investors again in the future; those who have done so and are likely to again should, on this account, be excluded from the profession.[158] In this way, they may reduce investors' concern for adverse selection in the market for brokerage services, making investors less likely to underpay for these services (or to leave the market entirely).

The law governing property rights in securities as intangible assets illustrates clearly securities' contingent nature. Securities are "unusually vulnerable forms of property," in the radical legal scholar Paddy Ireland's words; associated voting and cash-flow rights are susceptible not only to the ordinary "agency problems associated with absentee ownership," but also to the actions of counterparties and third parties, such as fraud or manipulation.[159] Property law, contract law, corporate law, and securities law all intervene to reduce owners of capital's vulnerability to these and similar risks.[160] Lurking in the background are questions about how the design of securities markets affect not only the processes by which wealth is accumulated, but also how and to whom it is distributed. If securities law has deep distributive commitments, its scholars should identify and understand the tools by which it implements those commitments.[161]

2. SRO Market Power

While some bars appear to serve investor-protection ends, other bars are more straightforwardly geared toward protecting the power of SROs to regulate

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157. *See, e.g.*, William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUDIES 683, 685–86 (1993).

158. If sanctions are to be reassuring to customers and the broader community, they must be effective at incapacitation or deterrence. Trust in the effectiveness of regulation that protects the interests of owners of capital underpins the willingness to participate, and in turn overall stability of the market.

159. Paddy Ireland, *Property and Contract in Contemporary Corporate Theory*, 23 LEGAL STUDIES 453, 492 (2003).

160. *Id.* at 493.

161. That securities law has distributive commitments beyond allocative efficiency is a descriptive claim about securities law's structure, functions, and historically contingent goals. It is not to argue that securities law should protect investors. It is to observe that investor protection is not a neutral or natural product of private ordering, but instead the product of institutional design choices.

the boundaries of their authority and jurisdiction. In this vision of SRO governance, sanctions policy might be designed to promote compliance incentives by increasing the costs of not being part of the club. But how important are the SRO's graces for staying in the industry?

As FINRA has become more like a monopoly regulator, it has faced new challenges in policing the boundaries of its regulatory jurisdiction. Consider that FINRA cannot sue in court to collect on the fines it imposes on its members.[162] Instead, it must instead rely on other, more serious sanctions to encourage compliance with its orders and rules, such as the threat of being barred for noncompliance.[163] The SEC has explained, "failure to provide information undermines the NASD's ability to carry out its self-regulatory functions."[164] So the defining feature of SRO discipline, as Jonathan Macey and Caroline Novogrod have argued, may be that it's effective only when the SRO has market power.[165] Only then, they argue, does expulsion have any significant effect as a sanction and thus effective deterrent (or inducement to secure compliance).[166]

This helps make sense of the otherwise surprising predominance of bars in "expedited proceedings." As one observer has noted, "more than a third of all disciplinary cases that resulted in individual bars . . . were based on violations of [FINRA's] Rule 8210 . . . often never getting to the substantive conduct violation."[167] Because the bulk of FINRA bars come in these cases, observers might be justifiably concerned that FINRA is over-producing industry bars in

162. Fiero v. Fin. Indus. Reg. Auth., Inc., 660 F.3d 570, 574, 578 (2d Cir. 2011) (concluding that "Congress did not intend to empower FINRA to bring court proceedings to enforce its fines," and further that the purported SRO rule authority on which FINRA relied was not properly promulgated under Exchange Act 19(b)'s rulemaking requirements, so FINRA could not sue to collect a fine against a background history of not doing so).

163. *See* Jeffrey Zeisman, *A Cautionary Tale of a Small Broker-Dealer's and Its Associated Persons' Failure to Honor FINRA's Suspension Rules*, BRYAN CAVE LEIGHTON PAISNER INSIGHTS (Jan. 27, 2021), https://www.bclplaw.com/en-US/events-insights-news/a-cautionary-tale-of-a-small-broker-dealers-and-its-associated-persons-failure-to-honor-finras-suspension-rules.html (noting that FINRA expelled a firm and permanently barred a principal when the principal was allowed to continue to work for the firm while under a regulatory suspension).

164. Joseph Patrick Hannan, Exchange Act Release No. 40438, 1998 WL 611732, at 6 (Sept. 14, 1998).

165. *See* Jonathan Macey & Caroline Novogrod, *Enforcing Self-Regulatory Organization's Penalties and the Nature of Self-Regulation*, 40 HOFSTRA L. REV. 963, 963-64 (2012).

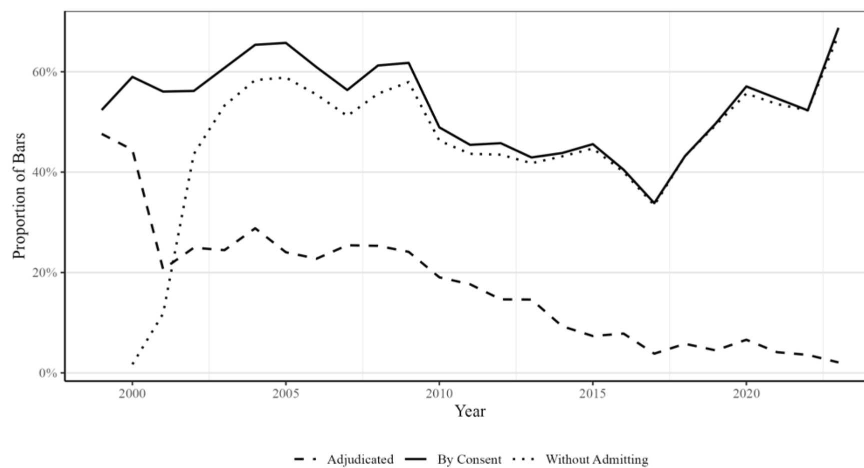
166. *Id.* at 967 ("For example, if members could simply and costlessly join a rival securities association or participate in the securities industry notwithstanding its lack of membership in FINRA, the threat of expulsion would no longer serve to dissuade members from violating FINRA's rules.").

167. Gary Carleton, *Where have all the FINRA Members (and disciplinary actions) gone?*, Carleton Law (Aug. 6, 2020), https://carletonlaw.net/where-have-all-the-finra-members-and-disciplinary-actions-gone/.

expedited proceedings relative to the traditional, investor-protection context. But as a social planning matter, we also might be concerned that those who don't engage with FINRA's processes are too risky to let stay in the industry. The same things that reflect increased agency costs in the investor context may well manifest in other conduct, such as lack of due care in handling one's relationship with the licensing authority, or refusal to engage in its processes.[168]

From an institutional perspective, FINRA may also have incentives to produce these bars for aggrandizement. The use of expedited proceeding bars may bolster FINRA's clout, emphasizing to industry participants the consequences for noncompliance. A rational response would be for FINRA to expand out into the statutory authority it has been given.

Fig. 3. Bars Resolved by Consent/Settlement, "Without Admitting" Allegations, and Adjudicated Cases[169]



There is a second, less well appreciated justification for these expedited proceeding bars that more fully aligns with broker's interests. These bars provide optionality for people to cut their losses rather than face expensive FINRA enforcement proceedings. Not only might it be rational to disengage with an investigation, but moreover under some circumstances the best-counseled legal advice may be to disengage and take the bar.[170] Consider someone who has violated the securities laws and faces a FINRA investigation.

168. On proportionality and justification for these bars, see infra Parts III.C.2–.3.

169. Note that there appears to be a gap that slowly closes over time between those who settle and those who do so without admitting or denying the allegations. This could reflect better lawyering over time, fewer people handling their own AWCs, or potentially a more common expectation among FINRA enforcement staff that it would be part of the boilerplate AWC deal.

170. *See* text accompanying *supra* note 71.

That investigation may be itself costly, even before we start accounting for a sanctions order that includes a fine, suspension, or a bar anyway. What's more, FINRA's requests are not subject to the Fifth Amendment privilege against self-incrimination, and courts have traditionally been reluctant to stop FINRA from sharing this information with the SEC and Department of Justice.[171] Halting the enforcement proceedings in exchange for an industry bar may well be the superior option for many potential respondents.[172] This suggests that some fraction of "expedited proceeding" bars are better understood as safety valve sanctions for people who might not otherwise be caught, an enforcement strategy I liken below to the famous gangster Al Capone.[173]

3. Error Costs

Additional policy questions arise in the institutional design of industry bars. Among the most important, to which I return in Part IV, is how to design a process for adjudicating sanctions like bars. An economically minded analysis might rely on an "error costs" framework, which weighs the costs of making decisions against the costs of getting those decisions wrong.[174] According to this perspective, there is a tradeoff in promoting low error and low costs of decision-making, in neither category is the optimal amount zero.[175] In the interests of time, I briefly sketch out some error cost implications here.

Let's begin with the costs and sources of error. As this Part III discusses, industry bars have consequences for brokers as well as for the public. Under an error cost framework, we might weigh the costs of false positives (improperly barring a competent, ethical broker) against the costs of false negatives (failing to sanction one who poses a risk to the public). Errors in either direction may well be costly, though for different reasons. False positives inappropriately remove someone from the industry, potentially reducing choice in the market,

171. *See* Rohit Nafday, *From Sense to Nonsense and Back Again: SRO Immunity, Doctrinal Bait-and-Switch, and a Call for Coherence*, 77 U. CHI. L. REV. 847 (2010).

172. For a study suggesting that sanctions imposed at hearings may be less onerous than pursuant to an AWC, see Brian L. Rubin & Jae C. Yoon, *Stepping into the Ring Against the SEC and FINRA: Sometimes It Pays to Duke It Out Against the Regulators*, 40 SEC. REG. L.J. 485 (2012).

173. SEE INFRA notes 212-215.

174. William McGeveran, The Trademark Fair Use Reform Act, 90 B.U. L. REV. 2267, 2280 (2010) (explaining principles from decision theory "that should influence the design" of legal doctrine, considering the tradeoff between "administrative costs . . . and error costs").

175. S*ee* James Fallows Tierney & Benjamin P. Edwards, *Stockbroker Secrets*, U. PA. J. BUS. L. (forthcoming 2024) (draft on SSRN) (describing error cost framework and collecting literature); *see also, e.g.*, Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUD. 399, 400–401 (1973); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEG. STUD. 379 (Jun. 1995).

diminishing the labor pool, and imposing significant first-party harms on the excluded broker. The false negatives, by contrast, would also be directly harmful on investors and may undermine the reputation of brokers. Error in either direction may arise from the information asymmetries between regulators and brokers; a mismatch between legal doctrine and our ideal vision of which bars are "false" or "true" in this respect; or even the possibility of regulatory bias.[176]

Error costs may be mitigated by imposing more rigorous processes or safeguards that facilitate accurate decision-making and error correction. Existing processes and safeguards set a baseline against which to tinker with adjudication complexity. Those who have been barred already can appeal within FINRA, to the SEC, and as desired to the federal courts.[177] The robust appellate review mechanisms at the SEC—where most appeals to bars end—should provide a substantive check against incorrect sanctions.[178] Staffing and budgetary constraints at the SEC, however, raise concerns that decisionmakers may be hasty due to limited resources.[179] The processes by which agencies like the SEC produce adjudications precedent call for faithful, if sometimes rote, application across time and space.

Inaccuracy, or error, in determining whether the public interest warrants excluding a person from the securities industry is costly in both directions.[180] The question is whether a system that imposes those costs is justifiable in terms of securities law's aims—those related to allocative efficiency as well as to distribution. High error costs indicate slack in regulators' ability to calibrate the

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176. The risk of error here implicates concerns about discriminatory or inequitable imposition of sanctions. For instance, FINRA enforcement defense attorneys report the SRO often takes a low-hanging-fruit approach that treats smaller and less capitalized firms more harshly than larger firms. *See, e.g.*, Bill Singer, *A Stroll Down Wall Street's Fetid Memory Lane of Disparate Regulation*, Broke and Broker Blog (Nov. 27, 2020), https://www.brokeandbroker.com/5523/jpm-occ-finra-sec/. And if brokers from smaller and less capitalized firms are disproportionately subject to industry bars, then we should expect that this will hasten industrywide trends toward consolidation. *See* Alan Wolper, *LPL AWC Proves, Once Again, That Big Firms Can Buy Their Way Out of Trouble That Would Kill Small Firms*, Broker-Dealer Law Corner (Jan. 20, 2021), https://bit.ly/3bADWXp. For a particularly searching inquiry into allegations of bias at FINRA, *see* Application of Asensio & Co., Exchange Act Release No. 68505, 2012 WL 6642666 (Dec. 20, 2012).

177. *See* FINRA Rule 9311; Exchange Act Section 19(d), 15 U.S.C. § 78s(d); Exchange Act Section 25(a)(1), 15 U.S.C. § 78y(a)(1).

178. *See* SEC Office of General Counsel, Adjudication, https://www.sec.gov/ogc/adjudication.

179. *Cf.* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1099 (2018) (noting, with respect to Social Security adjudication, that "[t]he quality of adjudication often buckles under . . . furious pace, and criticism for slipshod, inconsistent decision-making has long dogged these agencies").

180. *See, e.g.*, Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEG. STUD. 307 (1994).

amount of agency costs, slack that may reflect and reinforce existing distributions of wealth and power in society.

One important challenge is to find the optimal balance of the costs of deciding and of deciding wrong; more rigorous procedural safeguards designed to reduce error costs will themselves be more costly to the decisionmakers, and going too far in the other direction may be worse. Consider the effect of tinkering with these processes in the most obvious direction. As we'll see in the next part, the SEC scrutinizes the record closer in § 19(e)(2) enforcement bar cases than in § 19(f) expedited proceeding cases and must undertake more thorough analysis justifying that proportionality.[181] The SEC could undertake this review in all cases, but it would complicate administrative review in the SEC's adjudications program at unknown, but empirical and quantifiable, benefit and cost.[182]

C. The Purposes of FINRA Enforcement Sanctions and Optimal Deterrence

One of the questions mentioned was the purposes that sanctions are directly meant to serve. Broader social purposes, like the promotion of investor protection or of SRO jurisdiction, that we might identify bars as furthering. This subpart considers the statutory framework bearing on sanctions' purposes, considerations for optimal deterrence, and the problem of proportionality.

1. Statutory Limitation Against "Excessive or Oppressive" Bars

Let's begin with the statutory limits on when FINRA can impose industry bars, and how they accord with the question of permissible purpose in sanctions determinations. Recall that FINRA bars are reviewed under two provisions of Exchange Act Section 19. Enforcement sanctions are thus tested for being "excessive or oppressive," while non-enforcement SRO actions (such as expedited proceeding bars) are tested under a looser standard of being consistent with the statutory purposes.[183]

Respondents and defendants in enforcement actions routinely raise arguments that a bar would be excessive or punitive under the circumstances.[184]

181. *See infra* Part III.C.

182. The error cost framework raises other empirical questions, such as about the magnitude of the adjudication costs associated with a shift toward more error correction. Because of scope considerations, I identify these questions rather than aim to answer them in the first instance. On how the SEC might incorporate concerns about error cost in a programmatic review of industry bars, see text accompanying note 317.

183. See *infra* Part I.B.

184. *See* Amy LaMendola, *Banned for Life: Court Rulings Uphold SEC and FINRA Lifetime Bars*, TABBFORUM (April 27, 2021); *see, e.g.*, Black, *supra* note 18, at 40-55; Noah Albrecht, *A*

These efforts often pay off on the merits: in several recent instances in which the SEC had prevailed in litigated jury trials against investment advisers, the agency nonetheless failed to secure injunctions at the sanctions stage because of courts' worries that an injunction would have a collateral effect of ensuring an industry bar (and the end of the person's career).[185]

The problem is in how to determine whether, as Section 19(e)(2) contemplates, a bar sanction is "excessive or oppressive." The relevant provisions of Section 19 were added in the Securities Acts Amendments of 1975.[186] Though the report doesn't say much about Section 19, it describes analogous provisions of Section 6(c)(3) applicable to exchange bars as focused on incapacitating recidivists and preventing future misconduct.[187] The 1975 reforms also worked against a backdrop in which courts had reviewed SRO sanctions—a backdrop that has introduced unnecessary distraction about how to characterize bars.

Courts have imported a distinction between remedial and punitive sanctions that is misaligned with the "excessive or oppressive" standard and does not make much conceptual sense either. Then-Judge Kavanaugh observed in *Saad II* that the rule prescribing "remedial . . . expulsions or suspensions finds its roots in a single, unexplained sentence in a 77-year old Second Circuit case."[188] In that case, *Wright v. SEC*, the Second Circuit had drawn a distinction between "remedial" and "penal" industry bars, which then was carried forward in later caselaw.[189] The distinction does not straightforwardly flow from the statutory "excessive or oppressive" standard in Section 19(e)(2), and may in fact have been an artifact of the kind of challenge brought there. At issue was whether an SEC bar, under an unrelated version of the confusingly numbered Section 19, was "penal" in the criminal sense and thus required to be "proved beyond a reasonable doubt."[190] The court held that the bar could be characterized "not as a penalty but as a means of protecting investors, if in the Commission's opinion such action is necessary or appropriate to that end."[191] The atextual distinction thus

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Remedial Purpose: How Justice Kavanaugh's Concurrence in Saad v. Securities and Exchange Commission *Misclassified FINRA Lifetime Bars as Punitive* (unpublished manuscript, on file with author).

185. *See* Adam Aderton and Melissa Taustine, *Recent Rulings Can Help Securities Defendants Avoid Industry Bans*, BLOOMBERG LAW (Dec. 22, 2022).

186. Pub. L. No. 94-29 § 16, 89 Stat. 97 (1975).

187. *See* S. Rep. 94-75, at 97 (1975) (comparing the barring standard for securities exchanges under Section 6(c)(3), providing that an exchange can impose a bar for "past conduct inconsistent with just and equitable principles of trade" and "likely to occur again").

188. *Saad II*, 873 F.3d at 304 (Kavanaugh, J., concurring).

189. *See* Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940).

190. *Id.*

191. *Id.*

seems not even a good gloss on the substantive statutory standard—and, as we'll see, may introduce more complications than it does good.

In the context of remedial/penal distinction as a matter of precedent, in a series of decisions the D.C. Circuit has interpreted a sanction as "remedial," and thus not subject to cancellation or modification as "excessive or oppressive," if imposed "as a means of protecting investors."[192] These doctrines reflect concern for incapacitation and deterrence.[193]

Under doctrines like this, the SEC *in reviewing an enforcement bar* must engage in some kind of proportionality balancing (a broader question I return to in Part III.C.3).[194] In *Saad IV*, for instance, the D.C. Circuit found satisfactory the SEC's explanation that a bar was appropriate because the broker, who had falsified expense reimbursements from his employer, "posed a clear risk of future misconduct given his willingness and likely future opportunities to similarly deceive and misappropriate funds from investors."[195] Courts require similar factor-based analyses that look at proportionality in analogous contexts, such as the Fifth Circuit's *Steadman* factors used at the SEC for determining when to use its power to impose agency bars for brokers and other professionals (like investment advisers).[196]

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192. *PAZ II*, 566 F.3d at 1176.

193. On these purposes, see infra parts III.C.2-.3.

194. See infra notes 228. Judge Kavanaugh in *Saad II* concluded that *Kokesh*, an intervening Supreme Court decision, had called into question previous D.C. Circuit precedent characterizing bars as "remedial." The implication of *Kokesh*, he said, was that bars are punitive under the doctrine that requires sanctions to be remedial and not punitive. He also argued, somewhat in tension with this, that FINRA is authorized to impose bars and concluded that the import of *Kokesh* was to require the SEC to engage in proportionality balancing. *See* Saad, 873 F.3d at 306 (Kavanaugh, J., concurring) (arguing that if bars are punitive, FINRA and the SEC "will have to explain why such penalties are appropriate under the facts of each case"). But the SEC already has to do this. Besides, if the meaning of Section 19(e)(2) is that bars are categorically excessive or oppressive if imposed for punitive purposes, then if Kavanaugh is right it would mean bars simply couldn't be used—not that they would have to be justified in fact based on proportionality. He might have felt constrained by precedent, but in my view the better reading is that the remedial/punitive distinction doesn't make much sense in this context, and we should instead focus on the statutory term that encompasses a proportionality or balancing analysis.

195. *Saad IV*, 980 F.3d at 103.

196. *See* Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979) (looking to "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations"), aff'd on other grounds, Steadman v. SEC, 450 U.S. 91 (1981). Consider also where a court in an SEC civil enforcement action must decide whether to bar a penny stock promoter who has violated the securities laws' registration requirements from engaging in further penny stock transactions. See, e.g., SEC v. Kahlon, 873 F.3d 500, 507 (5th Cir. 2017);

That courts require bars to be "remedial" and not "punitive," however, does little to illuminate when bars are permissible or instead "excessive or oppressive."[197] "As the Supreme Court has pointed out, 'from the defendant's standpoint even remedial sanctions carry the sting of punishment.'"[198] A proportionality analysis, which I discuss later, would be better. Instead, these doctrines do not tell us that a bar should be imposed in enumerated circumstances, but rather rely on contentless—and, in the context of financial regulation, forever contested—concepts like "investor protection" and "the public interest." Securities law does not itself provide easy answers to how to balance between the Exchange Act's various purposes, which include as part of the "public interest" a multi-polar set of policies like promoting compensation, capital formation, and fair and efficient markets.[199]

Instead, I suggest that Part III.A's historical framework helps us better understand the nature of these legal interventions There is no fixed meaning of a concept like "excessive or oppressive." How institutions like the SEC interpret substantively contentless rules like the "excessive or oppressive" test—and how we apply them—reflects the alignments of past political coalitions, and compromises made in context, for how to allocate the power to decide how to sanction people with a variety of overlapping policy ends in mind.[200] By beginning to walk down certain paths and not taking others, we make space for regulators to implement these rules in particular ways that may become sticky, though not for any good reason. And as a doctrinal matter, what we put in place at one time reflect certain values that may—or may not—reflect the later preferences of different political coalitions with new policy views, making it hard to calibrate meaning in open-ended concepts like "the public interest" across time.

compare *id.* at 511 (Jones, J., dissenting) (arguing that a penny stock bar imposed by the court in its equitable powers was not proportionate and could have been more "tailored" than an all-out ban on penny stock activity, such as a narrower ban that "would only prevent them from engaging in any Rule 504 transactions," for a case involving one non-fraud violation, "ceased . . . after being singled out by the SEC, and [had] agreed not to engage in any further transactions" under the Rule 504 offering exemption).

197. That a sanction's character is slippery this way has made doctrinal analysis harder in this space, as Theresa Gabaldon has recently argued. *See* Gabaldon, *supra* note 13; *see also* Theresa A. Gabaldon, *Party Games: The Supreme Court's 21st Century Jurisprudence by Telephone*, 75 RUTGERS U.L. REV. 1, 3 (2022) (criticizing the jurisprudential approach); *see supra* note 194.

198. John M.E. Saad, Exchange Act Release No. 86751, 2019 WL 3995968, 2019 WL 3995968 (Aug. 23, 2019) (*Saad III*), *aff'd by Saad IV*, 980 F.3d at 103. Disclosure: I worked on *Saad III* in public service.

199. *See* Lee, *supra* note 151, at 565-57.

200. *See, e.g.*, Birdthistle & Henderson, *supra* note 107, at 42 ("The history of the securities SRO offers a good example of how the locus of regulatory control can be calibrated to reflect prevailing political views of the time."); *compare* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020).

The rest of part III.C addresses some social-welfare considerations including public interest and investor protection. I aim to answer those questions from first principles, focusing on the desirability and availability of industry bars in both the enforcement context (which must not be "excessive or oppressive") as well as in expedited proceedings (which face no such statutory limit). From an institutional design perspective, I argue for the value in promoting deterrence through industry bars—both in a more idealized world, and in the current world we have where some bars are tested for proportionality while others are not. In later parts of the article, I turn to some broader implications, such as whether a different set of doctrinal review standards might be appropriate, as well as the continued desirability (or not) of industry self-regulation as a form of organizing securities law.

2. Optimal Deterrence Theory and Industry Exclusion

Regulators and courts often justify industry bars for their incapacitation and deterrence functions in service of broader policy ends like investor protection. This subpart considers each, focusing on how to design a deterrence regime.

At the outset, purposes can but does not always affect sanctions' statutory availability. Let me begin with "expedited proceeding" bars, for which the answer is simple: they can be imposed as a statutory matter *mostly without regard* to whether they're punitive or disproportionate. Section 19(f) limits the purpose inquiry to whether the SRO has made its rules and applied them consistent with the Exchange Act's purposes.[201] The Second Circuit has also noted that "sanctions such as temporary trading bans may be appropriate to secure compliance with the rules, regulations, and policies governing traders."[202] By its terms, Section 19(f) does not authorize the SEC to cancel or reduce expedited-proceeding bars when they're excessive (or, under the judicial gloss, punitive), so they can be imposed regardless of their deterrent functions.

The story is more complex, by contrast, for "enforcement bars" subject to Section 19(e)'s excessive-or-oppressive limitation. We can begin with the incapacitation function, which is straightforward enough; incapacitation is an important goal of licensing regimes that seek to reduce harm to the public from an untrustworthy professional. Bars "incapacitate" wrongdoers by preventing them from being employed in industry roles that give them legitimate and

201. Section 19(f), 15 U.S.C. § 78s(f).

202. McCarthy v. SEC, 406 F.3d 179, 188 (2d Cir. 2005); *see also Sequiera*, 2017 WL 4335070, at 4 (explaining that the goal of an expedited-proceeding bar "is to encourage respondents to comply with the law or previously imposed orders, not to sanction them for past misconduct").

lawful access to other people's money.[203] Investor protection means, at minimum, keeping away those expected to harm them. As the SEC has characterized Judge Patricia Millett's explanation in *Saad II*, "'[o]rdering the fox out of the henhouse' by barring Saad 'directly remedied' the harms his repeated misconduct caused 'by making sure they stopped' and so 'falls comfortably within the common understanding' of the term 'remedial.'"[204] NYSE's lawyers have also defended the exchange's heavy reliance on bars for those reasons.[205] There is not much more to say about it, except that a bare nod to "incapacitation" without regard to actual future risk might well be insufficient standing alone for a bar.

In my view the deeper theoretical and doctrinal puzzles come with how industry bars pursue deterrence goals, and whether the way they do so is justifiable. The essence of deterrence is to discourage behavior generally (and specifically in the individual) by instilling a fear of the negative consequences that will result from detection, apprehension, and imposition of the sanction. In the context of FINRA bars, the Second Circuit has said that "although general deterrence is not, by itself, sufficient justification for expulsion or suspension, . . . it may be considered as part of the overall remedial inquiry."[206]

That deterrence operates through spectacle and fear has led some observers, like then-Judge Kavanaugh, to highlight potential limits on the deterrent functions of these bars. In *Saad II*, he relied on language from *Kokesh*—that "deterrence is not a legitimate nonpunitive governmental objective"—to conclude that deterrent purposes make a sanction punitive if it otherwise wouldn't be.[207] Theresa Gabaldon has argued that it doesn't makes sense to import *Kokesh*'s concept of punishment here.[208]

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203. *McCarthy*, 406 F.3d at 188-89 (citing Boruski v. SEC, 289 F.2d 738, 740 (2d Cir. 1961)).

204. Brief of the Securities and Exchange Commission, Saad v. SEC, 2020 WL 2037117, at 27 (quoting 873 F.3d at 312 (Millett, J., dubitante)).

205. Merrill, Moore, and Boyer, *supra* note 91 at 160.

206. McCarthy, 406 F.3d at 188-89.

207. Kokesh v. SEC, 581 U.S. 455 (2017). In *Kokesh*, for instance, the Supreme Court had to decide whether disgorgement was a "penalty" and thus subject to a statute of limitations for bringing certain SEC enforcement actions that applies to penalties. Relying on two cases involving pretrial detentions and forfeitures under the Excessive Fines clause, the Court in *Kokesh* observed that "sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because *deterrence is not a legitimate nonpunitive governmental objective*." Id. at 464.

208. Gabaldon, *supra* note 13, at 4 (noting the "extremely unfortunate tendency of some courts—or, at any rate, the Supreme Court—to assume that both common sense and context are irrelevant and that precedents are mix-and-match" in determining whether sanctions are remedial or penal); *see also, e.g.*, *supra* note 194.

I would further suggest the Court's observation in *Kokesh* is not correct that there's no legitimate nonpunitive government objective in deterrence.[209] The goal is for an institutional design of public-interest control over access to a particular licensed activity in which misconduct or noncompliance can give rise to significant agency costs, externalities, and other social harms. In this context, deterrence can serve important social harms unrelated to a retributive purpose.[210]

Regulating access to licensed markets or activities serves public interests in avoiding second- and third-party harms. We do this in professions like medicine where the public interest implications are significant. There may well be other professions where the consumer protection rationale looks more like a pretext for protectionism, but the harms are real in the brokerage context. Licensing regimes are designed to ensure that individuals and entities meet certain standards of competence—and here, standards of ethical behavior. The gatekeeping functions associated with this consumer- or investor-protection policy contemplate a tradeoff between allowing entry into the profession or activity and safeguarding the public interest.

Consider the drunk driver who, having been adjudicated of misconduct under the license, loses their privilege to drive. Law intervenes here to discourage socially harmful action (like drunk driving) by *revoking drivers licenses*, in addition to whatever other consequences may arise. The purposes of the license sanction is mostly incapacitative (and maybe a deterrent), but mostly not retributive; that is what the fines, and perhaps the jail term, are for. By revoking drivers' licenses we more directly promote safety and welfare in a society that sells alcohol and relies on people to drive themselves around in heavy machinery.

a. Optimal Deterrence

In law and economics, optimal deterrence approaches posit that we act based on rational calculations of the costs and benefits of our actions. If the expected consequences of action outweigh the benefits, we should decline. In its most workhorse form, optimal deterrence theory considers the probability of

209. *Cf.* Eithan Y. Kidron, *Understanding Administrative Sanctioning As Corrective Justice*, 51 U. MICH. J.L. REFORM 313, 317 (2018) (noting problems with the approach that "attempt[s] to attribute to administrative sanctioning an existing framework, either civil or criminal," which "proponents of both paradigms dismiss . . . for leading to uncertainties and inconsistencies"). Thanks to editor Mick Li for suggesting that if we set aside that deterrence is definitionally punitive, we might de-emphasize its punitive aspects rather than repudiate it entirely.

210. *Cf.* Gabaldon, *supra* note 12, at 3 (highlighting the doctrinal inconsistency that "disgorgement remedies are punitive if they operate as a deterrent, but that depriving a wrongdoer of ill-gotten gains 'serves a deterrent purpose distinct from any punitive purpose'") (citations omitted).

detection (and imposition of a sanction) and the magnitude or severity of the sanction.[211] We weight future states of the world by their likelihood, so this theory suggests that the expected future cost of a sanction should exceed expected benefits if deterrence is to be successful.

This highlights the difficulty of calibrating a deterrence-based sanctions regime to the probability of detection, especially when underlying misconduct is widespread but hard to detect. An illustration might be helpful, this one patterned on the Chicago gangster Al Capone.[212] The federal government for years tried unsuccessfully to get Capone for his "real" misconduct involving organized crime, but eventually got him for tax evasion.[213] The Capone hypothetical reflects the strategy of adjusting for low likelihood of detection and apprehension for the conduct you are really trying to deter, like organized crime. By using a different legal theory as proxy, regulators might impose high-magnitude penalties on detected breaches or violations of the proxy to counterbalance the instances when misconduct goes undetected and unenforced.[214]

Like the tax evasion theory that caught Capone, many people who catch FINRA bars do so after stopping participating in FINRA's investigative processes. FINRA may have some allegations about their underlying misconduct, or the person might just be trying to avoid regulatory enforcement. Because FINRA can't issue subpoenas, it enforces engagement with its investigative processes through threat of industry bar for noncompliance. By setting a high penalty for those who get caught, and a low threshold for getting the penalty, the aim is to encourage brokers to think twice and comply with FINRA's regulatory authority across the board.

This approach could be *understandable* from a deterrence perspective. Suppose a broker is deciding whether to defraud her employer by submitting fake expense reimbursements, the scenario in *Saad*. If she correctly perceives that detection is unlikely—that she might get away with it this time, or a couple times more—the costs of going through with it should not weigh too strongly in her mind, especially if she faces a modest sanction in the off chance she does get caught. By contrast, if she believes there'll be devastating consequences conditional on getting caught, she might be less likely to do the bad thing (falsifying an invoice).

211. *See, e.g.*, Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 MICH. L. REV. 2185, 2187 (1999).

212. Thanks to Jordi Goodman for the contours of the hypothetical.

213. Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1136 (2004).

214. *See generally id.* (discussing the Capone scenario and situating it within a broader theory of pretextual use of prosecutorial discretion in the federal criminal context); *see also* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

Though it might be understandable to design a deterrence regime around the Capone scenario, it doesn't necessarily make it just or wise. It could be seen as unfair to impose such a severe sanction, especially if the facts of the triggering act appear disproportionate to the sanction's severity, addressed in Part III.C.3. We might also object to the idea of accounting, when meting out sanctions, for undetected offenses based on potentially fictitious assumptions about the distribution of violative conduct across the regulated community. Finally, there might be epistemological doubts about our ability to calibrate the threshold at the right level so that it doesn't impose error costs associated with overdeterrence or "chilling the market."

What's more, FINRA's "expedited proceeding" bars raise different but no less pressing questions about the role of proportionality analysis. That these bars can be imposed even if "excessive or oppressive," because they are not subject to that standard of review, means that FINRA is largely unconstrained in imposing these bars for reasons that may well escape rational justification. In particular, given the incentives of regulatory institutions toward self-aggrandizement, we might be concerned that FINRA (with the SEC's blessing) is wielding the deterrent effect of its expedited-proceeding bars to impose unjust and disproportionate penalties for what appear to be minor infractions.[215] We'll return shortly to this topic, when I argue that the sanction is not disproportionate in the vast majority of these cases, but the lack of programmatic or even case-by-case balancing might raise doubts about confidence in that view in light of error cost implications.[216]

b. Cross-Sectional Deterrent Effect of Professional "Capital Punishment"

The deterrent value of being kicked out of the industry should vary based on expected future costs, and in turn on individual circumstances. Those deeply entrenched in the industry should see it as a worse, costlier sanction than those with weaker ties. If we are not considering how differences in individual circumstances bear on the deterrent effect of an industry bar, we may miss a significant source of error in the use of FINRA industry bars.

Criticisms about industry bars center on the career-ending effects. Disbarment is the equivalent of "capital punishment," in this theory, or the professional "death sentence."[217] And in a case not otherwise related to securities law, *Sessions v. Dimaya*, Justice Neil Gorsuch decried industry bars in a 2018 dissent. He noted that a variety of civil sanctions in modern society may well be

215. *See infra* Part II.A.3 and II.B.2.

216. *See infra* Part III.C.3.

217. *See, e.g.*, *supra* notes 9, 15-17.

"more severe than those [penalties] found in more criminal statutes," including those "that strip persons of their professional licenses and livelihoods."[218] Still, the judicial trend has followed the Tenth Circuit's observation in 1960 that "[s]erious as this personal injury may be, it is not of controlling importance as primary consideration must be given to the statutory intent to protect investors," for which a bar or "[e]xclusion from the securities industry is a remedial device."[219]

It is easy to understand why those who've invested time and effort in being a broker would be more likely to be deterred by the threat of an industry bar. Industry bars threaten the loss of professional identity, firm- and sector-specific investments in human capital, and ability to earn money in a profession.[220] The sunk costs include dedicated time, resources, and effort to build a careers, experience, and networks in an industry.

The prospect of losing out on all of this may well make the deterrent value of industry exclusion exceptionally high. The empirical impact bears researching, but the perceived influence would certainly bear on a rational calculation about whether some regulatory violation has positive or negative net present value.[221] It is a severe sanction to be driven out of your profession, perhaps among the gravest on the spectrum of seriousness for noncustodial and noncorporeal civil sanctions.[222] That the sanction appears subjectively really unattractive may be one reason why the atextual and unhelpful "remedial/penal" distinction has attracted so much attention.

But there is also likely to be some cross-sectional variation in who is sensitive to the deterrent effect of a licensing sanction, with looser effects among those with shallower connections to the brokerage industry. There are other groups that may well be deterred by industry bars: those either who cannot

218. Sessions v. Dimaya, 138 S. Ct. 1204 (2018). In a dissenting opinion in an immigration case involving a statute making aliens convicted of "aggravated felonies" removable (*see* 8 U.S.C. § 1227(a)(2)(a)(iii)), Gorsuch asked with respect to the civil-criminal distinction "shouldn't we take account of the fact that today's civil laws regularly impose penalties more severe than those found in many criminal statutes?" Sessions, 138 S. Ct. at 1229 (Gorsuch, J., dissenting). He decried "'civil' penalties [like] confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken," and industry bars and other licensing sanctions. *Id.*

219. Assoc. Sec. Corp. v. SEC, 283 F.2d 773, 775 (10th Cir. 1960).

220. Financial economics would say that income in these sectors varies across a distribution, and is discounted to present value. Even so, exclusion from capital markets industries can be quite financially costly across a lifetime. *Cf.* Steven N. Kaplan and Joshua Rauh, *Wall Street and Main Street: What Contributes to the Rise in the Highest Incomes?*, 23 REV. FIN. STUD. 1004 (2010).

221. *Cf.* Hashem Dezhbakhsh & Joanna M. Shepherd, *The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment,"* 44 ECONOMIC INQUIRY 512 (2006).

222. On severity and proportionality, *see infra* Part III.C.2-.3.

transfer their highly specialized skills to other sectors, or who would be precluded from doing so by the collateral consequences of being barred. By contrast, other groups might not be particularly deterred by the threat of an industry bar, such as short-term players,[223] those with easily transferrable skills,[224] and rational calculators.[225] These groups present acute concerns in calibrating the deterrent function of industry bars.

3. Industry Bars and Proportionality

Given the seriousness of industry bars, many observers understandably view them as a particularly severe penalty, especially if the underlying misconduct is minor or seemingly unintentional. Proportionality principles might help industry-bar doctrine balance these interests.

Proportionality is an important virtue in calibrating the level of sanctions. In this view, minor infractions, such as failure to update a mailing address with FINRA, might warrant lesser sanctions than being kicked out of the industry forever. In theory, proportionality might apply across the board for the institutional design of industry bars.[226] In practice, however, the statutory

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223. Most troubling are the short-term players, who include near-retirees, new entrants, and others with short time horizons. Consider a new entrant like a recent college graduate going into finance. They may not yet have made significant human capital investments in the brokerage sector, though they may have taken the introductory Securities Industry Essentials licensing exam, done college work, or studied for a certification like the CFA. Unlike with law licenses, individuals' brokerage licenses are tied to the firms with which they register or associate; those not employed by a firm don't have an active freestanding license. Short-term players may see little upside expected value in remaining in the industry. This may be why we see so many bars for failure to update one's mailing address with FINRA.

224. Professionals with diversified skills, networks, and experiences may be better able to move on from a professional licensing sanction. Those who can transfer these skills away from the brokerage sector might not view an industry bar as a particularly severe sanction. Is it still industry capital punishment if the professional can rise again, like a phoenix from the ashes, in a different industry? See Colleen Honigsberg et al., *Regulatory Arbitrage and the Persistence of Financial Misconduct*, 74 STAN. L. REV. 737, 741 (2022) (evidencing wandering of barred brokers into adjacent professions).

225. The securities markets also have a population of high-risk, high-reward calculators. Whether rationally or for behavioral reasons, some people may face an opportunity set where the potential benefits (such as illicit profits that can be secreted away and not disgorged) might be so high that even the risk of an industry exclusion might not be a sufficient deterrent. This raises important theoretical and empirical questions for securities regulation scholars, and law and economics scholars, about the optimal choice of industry sanctions among the full menu available to regulators to achieve deterrent and other policy ends. These questions sound very interesting, but we're running long already so they are outside the scope of this article.

226. *Cf.* Slovick, *supra* note 10 (noting that "the need for proportionality and ends-based analysis . . . is even more important today" because of the broader collateral consequences of being barred).

standards of review mean the SEC and courts only engage in proportionality balancing for enforcement bars, not expedited proceeding bars. Under existing statutory criteria, it simply doesn't matter in each case whether an expedited proceeding bar for failing to update the mailing address is proportional.

Focusing first on enforcement bars, how ought proportionality to bear on the right level of sanctions? That enforcement bars can't be "excessive or oppressive" suggests the importance of case-by-case inquiries into whether these bars are disproportionate to the underlying conduct.[227] Perhaps the most justifiable approach to proportionality in these cases begins (1) with the existing doctrinal admonition that regulators cannot simply say that a person has done wrong and should be excluded from the industry as a result,[228] then (2) examines fitness to remain in the industry. From that perspective, the analysis might not *merely* be about the specific act in question but the broader implications for the industry's integrity.

Some salient bars that might appear "disproportionate," or a mismatch between sanction and offense, still might be justifiable when understood this way. Recall the *Saad* case, in which the D.C. Circuit eventually upheld FINRA's bar of a broker who engaged in expense reimbursement fraud with his employer. The D.C. Circuit agreed with the SEC's conclusion in reviewing FINRA's bar that this kind of misconduct was not small potatoes: It indicated willingness to engage in deceptive practices for personal gain, a willingness that bears on the person's fitness to remain in the industry.[229] Similarly, in cases involving "expedited proceeding" bars for refusing to engage with FINRA's investigative functions, these bars have traditionally been justified for what the conduct says about a person's ability or willingness to abide by the rules that ensure the industry's proper functioning.[230]

Only violators would benefit from engaging in minor fraud without serious consequences, or if they believe they can ignore regulatory bodies like FINRA. But the "good" or conscientious broker might wish to get the bad competitors

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227. Without getting too deep into sanctions theory, a retributive sanction might well still be proportional. *Cf.* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanctions*, 94 CORNELL L. REV. 239, 319 (2009). At its core, retribution is about fitting the sanction to the offense, a perspective rooted in the idea that offenders should get what they deserve, no more and no less. Disproportionality here might suggest a mismatch between severity of the sanction and gravity of the underlying conduct. In regulatory environments, we may see disproportionality emerge as a consequence of pursuing other policies, like the need to deter potential wrongdoers, protect investors, or maintain the integrity of the SRO's authority and the industry's reputation.

228. *See Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1113 (D.C. Cir. 1988) (tying the "excessive or oppressive" inquiry to a requirement that "the Commission . . . do more than say, in effect, petitioners are bad and must be punished").

229. *Id.*

230. See *supra* notes 69-72.

out to induce retail confidence in the market. In past coalitions that built the securities laws, the interests of "good" brokers and retail investors converged to promote a vision of economic ordering that accounts for investor protection through industry bars to get rid of the minor fraudster.[231]

Even so, concerns about proportionality and mismatch raise questions about whether alternative sanctions, such as fines, censures, or temporary suspensions, could be better calibrated to the severity and circumstances of the misconduct, might ensure a more proportionate and equitable system of enforcement.[232] Monetary sanctions that go to financial gain, like civil penalties and disgorgement, are often seen as insufficient in financial markets regulation.[233] Violations of the securities laws can have positive expected value if they tend overall to go underdetected and underenforced. As industry bars illustrate, one response securities law offers—akin to the Al Capone scenario described above—is to stamp out violations by setting arbitrarily high sanctions, so that despite underdetection and underenforcement the violations may come to have negative value.

Still, securities law is often criticized for not doing *enough* to deter fraud and other socially undesirable misconduct.[234] Should we hold companies, not individuals, accountable? Former SEC Chairman Richard Breeden once articulated a vision of enforcement that leaves wrongdoers "naked, homeless, and without wheels."[235] Yet after the 2008 financial crisis, it was a common refrain that regulators had failed to bring enforcement actions, or to impose sufficient sanctions, that held individuals accountable. Occupy Wall Street

231. *See infra* Part III.A.2.

232. Focusing on proportionality also raises questions about the prospect of other valuable ends sought to be promoted, such as rehabilitation and forgiveness, that are foundational to restorative justice models focused on reconciliation between an offender and the larger community. *See, e.g.*, Kristen Blankley, Kathleen Claussen & Judith Starr, *Alternative Dispute Resolution in Agency Administrative Programs* (Dec. 17, 2021) (report to Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/ADR-final-report.pdf; Kristen M. Blankley & Alisha Caldwell Jimenez, *Restorative Justice and Youth Offenders in Nebraska*, 98 NEB. L. REV. 1, 6-11 (2019). Before deciding on the severity of sanctions, a decisionmaker might well consider the potential for a person to be rehabilitated. Can an individual fix their mistakes, on their own or with additional oversight or training? If so, perhaps a more modest sanction (such as a suspension) paired with rehabilitative measures might be more appropriate. *See infra* Part IV.C.

233. They also differ from prescriptions from optimum deterrence theory because they focus on the wrongdoer's gain rather than the total external harm imposed. Alex Raskolnikov, *Deterrence Theory: Key Findings and Challenges*, in II CAMBRIDGE HANDBOOK OF COMPLIANCE 179 (Benjamin van Rooij & D. Daniel Sokol, eds., 2021).

234. *See, e.g.*, Robert Schmidt et al, *Mary Schapiro's Unfinished Business*, BLOOMBERG (Nov. 29, 2012).

235. Donald C. Langevoort, *On Leaving Corporate Executives "Naked, Homeless and Without Wheels": Corporate Fraud, Equitable Remedies, and the Debate over Entity Versus Individual Liability*, 42 WAKE FOREST L. REV. 627, 627 (2007) (citation omitted).

called for "jail[ing] the bankers."[236] The impulse to jail the bankers suggests Breeden's vision might be less than ambitious. On this account, entity-focused mechanisms of deterring corporate malfeasance are unlikely to be as effective as individual accountability.[237] Apart from individual civil sanctions from regulation, securities law also seeks to achieve its purposes through criminal sanctions. Criminal law is an indelible aspect of how governments regulate markets.[238] Securities regulators work closely with federal and state prosecutors to pursue criminal charges against securities law violators.[239] State securities law provides for robust mechanisms of individual accountability through criminal liability.[240]

Like exclusion sanctions, however, what makes criminal liability robust is also what makes it objectionable.[241] Overcriminalization and carcerality have given rise to growing unease with "make it a crime" or "throw them in jail" solutions.[242] Carceral solutions are also objectionable to the extent that they are the product of, and perpetuate, structural and individual-level biases. Industry bars can avoid some problems with carceral solutions, while serving underlying

236. Marjolein van der Veen, *Contending Theories of the Current Economic Crisis*, 27 SOCIALISM & DEMOC. 32 (2013); *see also* Stephen Squibb, *What Was Occupy*, MONTHLY REVIEW (Feb. 1, 2015).

237. *See, e.g.*, JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017).

238. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1793 (2020); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 147–49 (2011).

239. *See, e.g.*, Zaring, *supra* note 18, at 1203–04; Andrew Jennings, *State Securities Enforcement*, 47 B.Y.U. L. REV. 67 (2022); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models--and What Can Be Done About It,* 101 YALE L.J. 1875, 1887 (1992).

240. *See* Wendy Gerwick Couture, *Principles for State Prosecution of Securities Crime in a Dual-Regulatory, Multi-Enforcer Regime*, 22 U. PA. J. BUS. L. 30 (2019).

241. Lifetime industry bars, which prevent individuals from re-entering their profession, are fundamentally different from sanctions like incarceration for at least two reasons that cut in different directions. On one hand, incarceration is an awful experience, leading many people to comply with penal laws out of an interest in avoiding incarceration. The deprivation of professional liberty, of being unable to practice a licensed profession for the rest of one's career, may feel at once more interminable and less all-encompassing a deprivation of liberty than incarceration. On the other hand, the infinite nature of a lifetime bar doesn't offer the possibility of rehabilitation in the same field, and thus forecloses potential policy virtues such as reconciliation, forgiveness, and personal growth. Insofar as incarceration contemplates a fixed-period deprivation of liberty in non-lifetime sentences, in acknowledges the theoretical potential that a person will have changed and can be successfully reintegrated into social and economic life at the end of their custodial sentence. *See supra* note 232.

242. On abolitionism and carcerality, see Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544 (2022); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020).

goals. As former SEC Commissioner Luis Aguilar has noted, bars' main virtue is that they promote accountability by targeting industry-specific investments in human capital.[243] In doing so, they promise stamp-out liability that is, at least on this view, more justifiable than carceral alternatives.

D. Industry Bars Among Competing Interventions and Sanctions Regimes

In this Part, I consider aspects of the social welfare analysis relevant to industry bar policy. I consider the role of licensing and competition policy, as well as the possibility of alternative market mechanisms through disclosure.

1. Licensing and Competition Policy

a. Competition Policy

The relative importance of industry bars as a regulatory intervention, and stakes for professionals, are underscored by the peculiarity of the sanction in broader administrative law practice. Permanent exclusion from an industry is an unusual and typically disfavored means of carrying out regulatory policy, especially when industry is doing it.[244] Securities law tends to overlook the competition-policy dimension that runs throughout FINRA and exchange governance, but it is critically important.[245]

Understood in terms of competition policy, bars involve the industry's undertaking of a concerted refusal to deal, with the government's permission.[246] Law professor Wentong Zheng characterized the "refusal to deal" as the central

243. *See* Commissioner Luis Aguilar, Speech, *Taking a No-Nonsense Approach to Enforcing the Federal Securities Laws* (2012), https://www.sec.gov/news/speech/2012-spch101812laa htm [https://perma.cc/TR3B-NKMN].

244. What is "disfavored" is the underlying anticompetitive behavior. Miller, *supra* note 244 at 875.

245. *But see infra* note 251 and accompanying text. For other important exceptions, *see, e.g.*, WALTER MATTLI, DARKNESS BY DESIGN: THE HIDDEN POWER IN GLOBAL CAPITAL MARKETS (2019); Jerry W. Markham & Daniel J. Harty, *For Whom the Bell Tolls: The Demise of Exchange Trading Floors and the Growth of ECNs*, 33 J. CORP. L. 865, 869-70 (2008). If securities law overlooks competition policy, we might be concerned that securities regulators aren't effectively considering the anticompetitive function—and thus effects—that industry bars are designed to serve. *See, e.g.,* Samuel N. Weinstein, *Financial Regulation in the (Receding) Shadow of Antitrust*, 91 TEMP. L. REV. 447, 448 (2019); Commissioner Robert J. Jackson, Jr., *Competition: The Forgotten Fourth Pillar of the SEC's Mission* (Oct. 11, 2018), https://www.sec.gov/news/speech/speech-jackson-101118.

246. "A concerted refusal to deal is an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms." *Concerted Refusals to Deal under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531, 1531 (1958).

feature of corporations as private regulators.[247] Antitrust law discourages that kind of anticompetitive conduct; in most cases a concerted refusal to deal or a group boycott would be considered per se illegal.[248] As a doctrinal matter, the Supreme Court concluded that antitrust law can take a back seat in regulating anticompetitive practices in the securities markets because of the SEC's role in superintending the SROs against anticompetitive conduct.[249] The 1975 statutory amendments specifically contemplated that the SEC would take into account the competitive effects of regulation and of SRO action.[250] But as Michael Morelli observed, as a result of recent Supreme Court cases we may be facing a new critical juncture for SRO governance. According to Morelli, this time we may no longer be able to rely on legacy doctrinal understandings about the SEC as an antitrust regulator that assume a robust role for oversight by expert agencies.[251]

The more unique the tool, the more unique the need it addresses. This offers a new understanding of exclusion sanctions' role in enforcing the securities laws' higher-order commitments. The securities laws grant to securities SROs a franchise to regulate labor markets, a function that would typically be made by the government.

247. Wentong Zheng, *Corporations as Private Regulators*, 55 U. MICH. J.L. REFORM 649 (2022).

248. *See Klor's, Inc. v. Broadway–Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals . . . to deal . . . , have long been held to be [*per se* antitrust violations]."). Distinctions between impermissible refusals to deal, and permissible self-regulatory action, "tend[] to distract attention from the existence of entrenched private power." Robert Heidt, *Industry Self-Regulation and the Useless Concept "Group Boycott,"* 39 VAND. L. REV. 1507, 1522 (1986).

249. *See, e.g.*, Gordon v. New York Stock Exchange, 422 U.S. 659, 684 (1975); Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation As A Regulatory Technique*, 47 ADMIN. L. REV. 171, 200 (1995); Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486, 1499 (1966).

250. The 1975 amendments sought to reallocate powers between the exchange and its members, and the public through the SEC, about how and on what terms it could engage in anticompetitive conduct. As Richard Booth has written, "the 1975 amendments to the Exchange Act suggest that Congress believed the stock exchanges to be a sort of public trust." Richard A. Booth, *Federalism and the Market for Corporate Control*, 69 WASH. U. L. Q. 411, 443 n.125 (1991).

251. Michael Morelli, *Courts, Competence, and Competition: Brewing Tensions Between Administrative, Antitrust, and Securities Law*, 64 B.C. L. REV. 1615, 1662 (2023) (explaining that the "Supreme Court's de facto reassertion of authority over how Congress delegates authority and how agencies exercise [it] . . . suggests that lower courts will take up" issues about antitrust immunity "and afford less respect to the SEC's views").

b. Occupational Licensing and Contrasts with Lawyer Disbarment

Second, securities law takes a strong view in favor of occupational licensing and registered-professional regulation. Its normative orientation is a path-dependent consequence of the New Deal realignment favoring investor protection, given that the mass affluent are an important widespread constituency favoring modest protection against financial adviser misconduct.

The particulars of occupational licensing look subtly different for stockbrokers than for lawyers, a context that may be more familiar to readers and worth comparing them for a moment. Brokers must pass a series of licensing examinations, depending on the functions they want to serve in firms or the products they want to sell.[252] State licensing and other statutory requirements also prohibit people from becoming licensed if they've been subject to certain disqualifying events, like certain convictions or being enjoined from fraud.[253] Similarly, lawyer licensing typically combines accredited legal education, a bar examination, and character and fitness evaluations.[254]

Where the regimes seem to diverge is with sanctions once licensed.[255] The laws governing lawyers generally do not contemplate the kind of "expedited proceeding" bar that we have seen, reserving the sanction for grievous professional misconduct. Yet it's relatively rare for lawyers to be disbarred, even when their conduct raises significant questions.[256] Some disbarred lawyers are allowed back in, making it more like an "indefinite suspension."[257] A running professional responsibility joke is that the only surefire way to get disbarred is to commingle your IOLTA funds.[258] Lawyers do not, for instance, face

252. *See* 15 Lemke & Lins, *supra* note 27, at § 2:21 (summarizing the different roles of principals, registered representatives, associated persons, and how they must take examinations and do licensing registration with states).

253. *Id.* § 2:26.

254. *See* Restatement (Third) of the Law Governing Lawyers §§ 2, 4 (2000).

255. *See* Veronica Root Martinez & Caitlin-Jean Juricic, *Toward More Robust Self-Regulation Within the Legal Profession*, 69 WASH. U. J. L. & POL'Y 241, 269–70 (2022) (noting relative differences in the perceptions among lawyers and brokers about the risk of getting kicked out of the industry).

256. *See* ABA Center for Professional Responsibility, *Sanctions Imposed 2010*, Survey of Lawyer Disciplinary Systems, Chart II.

257. Brian Finkelstein, *Should Permanent Disbarment Be Permanent?*, 20 GEO. J. LEGAL ETHICS 587, 589 (2007).

258. *Consider* William L. Pfeifer, Jr., *Practical Advice for New Law School Graduates*, GPSolo, May/June 2015, at 32, 34 ("Many outstanding lawyers have been suspended or disbarred solely because of mistakes they made with their trust accounts."); *but see* Danny Cevallos, *Lawyers like Alex Murdaugh make life difficult for the rest of us*, MSNBC (June 4, 2023), https://www.msnbc.com/opinion/msnbc-opinion/alex-murdaugh-lawyer-plaintiff-attorney-financial-charges-rcna87490 ("Client trust accounts are no joke.").

meaningful risk of getting disbarred summarily for failing to respond to increasingly urgent dunning notices from the bar asking for updates to their mailing address. Brokers do.[259]

What to make of the additional stringency for brokers compared to professional rules and penalties for lawyers? One possible explanation for the disparate treatment is that courts are more sympathetic to lawyers, because of common professional identity. More aspirationally, there may be important social expectations and professional norms at play. Lawyers are fiduciaries to their clients and officers of the court, entrusted with responsibilities that might lead lawyers in general to be more cautious when approaching the lines of professional responsibility. Of course, stockbrokers are also intimate with their clients, in the sense that they may hold their clients' interests in their hands by handling vast amounts of money. Brokers often have been able to avoid treatment as fiduciaries, though that era may be coming to an end.[260] Especially when not seen as fiduciaries, a broker's single act of misconduct might erode public trust and lead to significant financial repercussions for clients. Sensing the slack between obligation and compliance, regulators and courts might well treat stockbrokers *as nonfiduciary salespeople* more harshly to promote public confidence in the integrity of financial markets, a treatment that might not be necessary for fiduciaries like lawyers or registered investment advisers.

Finally, occupational licensing policy affects the makeup of the labor pool, directly by removing people and indirectly by shaping expectations about future sanctions. We should not want bar policy to kick out "false positive" good brokers and let "false negative" bad brokers stay. In designing that policy, we should also attend to outcomes in the labor market for brokers.[261] Suppose we care about the distribution of some measures of interest in the pool of potential new financial managers. These measures of interest may include "talent," but also riskiness to investors. A replacement-level financial manager of average skills might not generate much return for a firm or its clients. Yet by targeting those who pose significant risk to clients and the industry, bars rid the high-risk

259. *See, e.g.*, *supra* notes 60-62; Christine D. Memet, Exchange Act Release No. 83711, 2018 WL 3584178 (July 25, 2018).

260. *Compare* Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 VILL. L. REV. 701 (2010), *with* Robinhood Fin. LLC v. Sec. of Commonwealth, — N.E.3d —, 2023 WL 5490571, at *3-4 (Mass. Aug. 25, 2023) (observing that the "once-clear dichotomy between the services offered by broker-dealers, on the one hand, and investment advisers, on the other, has 'blurred,'" and as a result "Federal and State authorities have questioned whether adhering to [that] traditional dichotomy . . . continues to make sense in this evolving marketplace").

261. *See, e.g.,* Bureau of Labor Statistics, Occupational Outlook Handbook, Securities, Commodities, and Financial Services Sales Agents (2020), https://www.bls.gov/oes/2020/may/oes413031.htm [https://perma.cc/J5HK-SPX8].

right side of the distribution, leaving only those presenting lower risk.[262] Still, who replaces an expelled person is a subsidiary concern to whether the person should be expelled in the first place.

2. The False Promise of Mandatory Disclosure

Securities regulation often takes the approach that promotes disclosure of misconduct through publicly accessible industry databases like BrokerCheck. For the most part, securities law thinks it is important for investors to do their own research.[263] Knowing that a financial adviser has had issues with securities regulators or customer complaints in the past can help customers make an informed decision. As Part II showed, BrokerCheck can provide valuable data to the public about the licensing, regulatory, and complaint histories of their stockbrokers.

Given BrokerCheck, some observers might wonder if industry bars are even necessary, since there's a less restrictive alternative in the typical idiom of securities law—mandatory disclosure.[264] Mandatory disclosure, standing alone, is unlikely to be as effective as industry bars at implementing securities law's commitments to reducing agency costs (and error costs) in service of investor protection and the public interest. The problem here is that disclosure mechanisms are porous, allowing certain advisers to remain and compete successfully despite a regulatory intervention that is "supposed" to encourage market discipline. That is so for two reasons, related to its *effectiveness* and *accuracy*.

First, market failures abound with disclosure approaches in the financial advisory space. Although people generally under-consume disclosures anyway, in theory strategies based on disclosure may still work if there are sufficient consumers of the disclosed information on the margin to alter demand for the disclosure's subject. But by contrast with liquid capital markets, in retail markets atomized investors do not effectively impound disclosed information into demand for investment management services.[265] If people are not diligent about reviewing disclosures about financial services professionals, then market

262. A public-interest minded perspective might assess the replacement and churn based on whether the excluded brokers, or their replacements, have greater risk. Perhaps a person barred from the industry, on proof of having done something worthy of the sanction, has below-average skills in adhering to industry regulations or ethics (and in avoiding detection). Still, some fraudsters have been genuinely talented at finance.

263. Tierney & Edwards, *supra* note 175.

264. *See* Harvey J. Levin, *The Limits of Self-Regulation*, 67 COLUM. L. REV. 603, 611 (1967).

265. *See* Tierney and Edwards, *supra* note 14 at *27-28 (noting that "[t]he ordinary ways securities law supposes that 'informational efficiency' in markets will protect [unsophisticated, non-reading] participants," such as "by impounding information into price," "do not protect the unsophisticated" in this market).

pressure is likely to be absent, and "competitive pressure is unlikely to select out of the market terms that informed consumers would not want."[266]

Second, whether disclosure has value as a substitute for industry bars depends on the extent of our faith in disclosure accuracy. As the empirical strategy in this paper reflects, FINRA now discloses some licensing, registration, and disciplinary information to the public through BrokerCheck.[267] Bars are listed as long as the person has a BrokerCheck record.[268]

But scholars have identified many problems with accuracy of BrokerCheck disclosures that *do not involve bars*.[269] For instance, these disclosures may include information about settlements, customer complaints, and arbitration awards, but this information can also be expunged. Notably, Colleen Honigsberg and Matthew Jacob found that brokers who obtain expungement (and thus the removal of misconduct disclosure from BrokerCheck) are more likely to reoffend than those who don't.[270] And as Ben Edwards and I discuss in other work, BrokerCheck features other sources of error in BrokerCheck related to FINRA's choice to use its securities arbitration forum rather than its hearing officer forum, because of the limited opportunity for error correction in arbitration.[271] As a result, mere disclosure produced in the shadow of expungement may well have little value as a metric for investors to assess brokers' risk of recidivism.

If investors know that disclosure is going to be ineffective to allow the market to weed out "bad" brokers, then as a group, investors should rationally prefer a rule that imposes bars more strictly as a prophylactic because self-help and rely-on-the-market will not be effective to account for disclosure about agency cost risk.

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266. Tierney, *supra* note 94, at 882.

267. *See* John Boone Kincaid III, Exchange Act Release No. 87384, 2019 WL 5545514, at 1 n.2 (SEC Oct. 22, 2019); *see also, e.g.*, 15 U.S.C. § 78*o*-3(i); Jonathan Edward Graham, Exchange Act Release No. 89237, 2020 WL 3820988 (SEC July 7, 2020).

268. Michael Andrew DeMaria, Exchange Act Release No. 97511, 2023 WL 3529972, at 3 (May 16, 2023) (observing that FINRA doesn't allow for expungement of disciplinary sanctions like suspensions from BrokerCheck, as it does some other disclosures); *see also, e.g.*, David Zaring, *Regulating Banking Ethics: A Toolkit*, 43 SEATTLE U. L. REV. 555, 571-72 (2020) (describing how FINRA's "list of disciplined brokers and dealers" is available to industry insiders and, to a lesser extent, to the public through BrokerCheck).

269. *See* Benjamin P. Edwards, *Adversarial Failure*, 77 WASH. & LEE L. REV. 1053 (2020).

270. *See* Colleen Honigsberg & Matthew Jacob, *Deleting Misconduct: The Expungement of BrokerCheck Records*, 139 J. FIN. ECON. 800 (2021).

271. *See* Tierney and Edwards, *supra* note 14.

IV. Implications

This last Part turns to big challenges and changes in how we deal with SROs in securities regulation. First, I assess the rise of the most recent movement to contest doctrine and practice over this sanction, which are playing out in increased judicial scrutiny of SEC and FINRA sanctions, and of the role of administrative enforcement in agencies and SROs more broadly. These broader trends help us situate how courts are paying more attention to, and sometimes pushing back against, bar practices. Given that industry bars help promote SRO authority and power, recent court decisions addressing the role of SROs in the constitutional structure raise important questions about the future of industry bars—and how we might make rules governing them work better. I identify several doctrinal reforms that can improve the use of the bar sanction.

The Part ends with some meditations on how politics and past lessons can help us better understand strategies for regulatory and enforcement interventions in financial advisory markets and for their participants. The empirical and historical interventions that this article brings to bear may help us understand how we can make better decisions here in the future. But that is not all, and there is yet something to learn from what's happened before about how to promote "democratization" of administrative law in this way.

A. Modern Challenges to Administrative Justice

1. Blowback Theory: Increased Judicial Scrutiny of Industry Bars and FINRA Sanctions

Thinking of bars solely as a kind of technocratic solution to investor protection and SRO jurisdiction matters obscures other implications of these sanctions. What makes them attractive—their severity—makes them risky for political legitimacy, and thus targets for efforts at legal reform.[272]

Outside of the FINRA context, industry bars got more robust in several dramatic steps between 1990 and 2010. Over that period, securities regulators were endowed with expanded statutory powers to impose industry bars. In the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, for instance, the SEC received a wide range of new statutory authorities.[273] These included authorities to seek civil penalties from courts, impose monetary penalties in administrative proceedings against registered people, bring cease-and-desist proceedings involving disgorgement liability against any person (not just regulated persons), and seek court orders barring people from being officers

272. *See* Zaring, *supra* note 18, at 1170.

273. Pub. L. No. 101-429, §§ 101, 102, 201, 202, 104 Stat. 931 (Oct. 15, 1990).

and directors of public companies.[274] The Dodd-Frank Act of 2010 further expanded the SEC's authorities, allowing for bars for a wider spectrum of wrongful conduct and attaching a more extensive range of collateral consequences. Those included "collateral" bars from participating in ancillary professions, with the idea of solving some of the deterrence problems described above with respect to those with attractive outside options.[275] These statutory authorities introduced meaningful new types of remedial liability and risk exposure to a wealthy and politically powerful constituency.[276]

Scholars of securities and administrative law have studied patterns of regulated industries' responses to reform. John Coffee has suggested, for instance, obstruction at the implementation stage might be an expected response here.[277] Regulated entities have certain power to engage in obstruction in this way, including the threat of bringing litigation challenging agency programs, the potential to raise political blowback through Congress or other stakeholders, or even to threaten the underlying financial regulatory program itself.[278]

In this respect, consider Alex Platt's assessment of backlash against SEC enforcement and obstruction at the implementation stage. Platt surveys how the backlash against SEC administrative enforcement is an outgrowth of, and response to, an accretion of sanctioning power in the enforcement docket described above.[279] Despite expanded statutory authority, Platt contends, the SEC failed to adjust the equilibrium of "procedures commensurate with the stakes of the adjudication" (as he says it had before).[280] This gave rise to an

274. *See* Ralph C. Ferrara, Thomas A. Ferrigno, & David S. Darland, *Hardball! The SEC's New Arsenal of Enforcement Weapons*, 47 BUS. LAW. 33, 33–34 (1991).

275. *See* Slovick, *supra* note 10 ("Before the enactment of the Dodd-Frank Act in 2010, the industry bar provisions in the Exchange Act and the Advisers Act were much narrower because they did not allow for collateral bars."); *see also supra* Part III.C.2.b.

276. *See* Birdthistle & Henderson, *supra* note 87, at 6 (predicting blowback in the form of structural challenges to agency enforcement if regulators "do wield greater authority than their members anticipate or believe lawful").

277. *See* John C. Coffee, *Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1023 (2012).

278. *See, e.g.*, Cary Coglianese & Alex Acs, *Influence By Intimidation: Business Lobbying and the Regulatory Process*, 39 J. L. ECON. & ORG. 747 (2022); James Fallows Tierney, *Contract Design in the Shadow of Regulation*, 98 NEB. L. REV. 874 (2020).

279. *See, e.g.*, Platt, *Backlash*, *supra* note 18.

280. *Id.* at 2. Platt's backlash theory isn't explicitly about the SROs, but it shares a dynamic in common with the regulated entities' view of their regulator. That the distinctions between SEC- and FINRA-imposed exclusion sanctions continue to get blurrier means that the backlash dynamic plausibly extends to FINRA as well. In a similar vein in an article critical of industry bars as excessive, biglaw partner David Slovick has invoked "the SEC's expansive . . . authority to bar market participants conferred by the Dodd-

organized campaign among the securities defense bar to head off the SEC at the pass, as well as widespread attention from securities law scholars about perceived deficiencies in the SEC's administrative proceedings program.[281] Although industry bars are a familiar part of the enforcement ecosystem, they and the broader securities regulatory structure have faced increasing scrutiny among the federal courts, which we turn to next.[282]

2. Structural and Substantive Challenges

Against a broader backdrop in which the judiciary has been contested for decades, coalitions wield power they build through policy and through personnel appointments (to agencies and to judgeships). A central feature of the conservative legal movement has been to raise due process and structural concerns about how regulations are created and enforced.[283] Much of the attention to industry bars has come from heavy hitters of the conservative legal movement, such as Supreme Court Justices Kavanaugh and Gorsuch, and federal court of appeals judges Walker and Edith Jones.[284] Many of these concerns would have been quickly rejected just ten years ago.[285]

Rooted in concerns over regulatory agencies' expansive powers, and the belief that markets operate best when free from bureaucratic oversight, these criticisms hold that many modern administrative practices exceed the scope of government power as originally intended by the framers of the Constitution.[286]

Frank Wall Street Reform and Consumer Protection Act" as a reason to "reconsider[]" how we "assess the propriety of SEC associational bars." Slovick, *supra* note 6.

281. *See infra* note 18.

282. *See* Langvardt & Tierney, *supra* note 54, at 721; Platt, *Unstacking*, *supra* note 21, at 462 & n. 101 (collecting authority).

283. *See, e.g.*, Logan E. Sawyer, III, *Why the Right Embraced Rights*, 40 HARV. J. L. & PUB. POL'Y 729, 740 (2017) (reviewing Jefferson Decker, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* (2016)) (describing the "conservative approach" as "more focused on first principles and individual rights, more welcoming of judicial action, less concerned with legislative compromise, and that has helped produced our deeply ideological contemporary disputes over the regulatory state").

284. *See supra* notes 14 (Walker); 15, 194 (Kavanaugh); 196 (Jones); 218 (Gorsuch).

285. Black, *supra* note 9, at 42 (noting as of 2013 that "parties rarely raise the objection that FINRA is not a government body, and if the objection is raised, courts quickly dispense with it").

286. *See, e.g.*, Amanda Shanor, *The Tragedy of Democratic Constitutionalism*, 68 UCLA L. REV. 1302, 1350 (2022) (explaining that "[t]he critique of the New Deal compromise . . . argue[s] that the framers embraced a natural rights-based, laissez faire understanding of economic liberty—and related stringent judicial review on constitutional grounds—and sought to reflect that conception in the Constitution," a conception that precludes "the unlawful and unconstitutional . . . post-New Deal regulatory state"); *cf.* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 92–94 (2021) (noting that court decisions about "institutional design, interpretive authority, and the role of

At the heart of administrative-law objections to industry bars are the ideas that SROs (and the SEC as overseer) might lack the necessary structural design to ensure fairness, transparency, and accountability.

There are several aspects to these objections. Foremost among these is a lack of accountability, as recognized through mechanisms like the President's removal powers.[287] SROs and similar bodies may not always be subject to the same level of oversight and review that governmental agencies are. There's the lurking concern of unchecked power, of the potential for abuse, of the thought that this should really be a government agency.[288] Crediting these concerns here might have a variety of consequences, like restraining self-aggrandizing regulators, protecting liberty interests against unelected bureaucrats, or ensuring a "public interest" backstop against arbitrary action. While doctrinal solutions are sometimes presented as neutral returns to an ideal original meaning, they can also disproportionately benefit specific interest groups.[289] This is not to discount the genuine ideological arguments, but to identify transparently motivations for legal change.

These doctrinal developments reflect closer scrutiny by courts of securities administrative enforcement processes.[290] They come as SROs have become increasingly governmental, consolidating enforcement activity in a single regulator.[291] And the hits may keep coming.[292] The Supreme Court is considering *SEC v. Jarkesy*, in which the Fifth Circuit had found the SEC's administrative proceedings raised Seventh Amendment, nondelegation, and

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constitutional rights in limiting government power" are all "happening as the Court has come to be dominated by a conservative majority, many of whose members speak and write derisively and suspiciously of government power, especially in its regulatory and bureaucratic incarnations").

287. Kimberly N. Brown, *"We the People," Constitutional Accountability, and Outsourcing Government*, 88 IND. L. J. 1347, 1384–90 (2013).

288. *See* Marc I. Steinberg & Ralph Ferrara, *Procedural framework of SRO enforcement practice*, 25A Securities Prac. Fed. & State Enforcement § 14:4 (2023 ed.); Steven Irwin, Scott Lane, Carolyn Mendelson, Tara Tighe, *Self-Regulation of the American Retail Securities Markets—an Oxymoron for What is Best for Investors?*, 14 U. PA. J. BUS. L. 1055, 1068 (2012) (noting that "the state actor issue is best highlighted in the context of FINRA Rule 8210").

289. *Cf.* Britton-Purdy et al., *supra* note 238, at 1831 ("If purportedly neutral and technocratic visions for rationalizing governance are neither neutral nor, in practice, rationalizing, we need new conceptions of how to democratically discipline administrative decisions.").

290. To be certain, these issues are not new. *See, e.g.*, H. Evan Taylor, 26 S.E.C. 637 (Sept. 19, 1947) (early SEC adjudication noting a tension between Congress's authorization for the SEC to impose bars, and the SEC's role in determining to do so).

291. *See Order Approving Proposed Rule Change Relating to Consolidation of NASD and NYSE*, 72 FED. REG. 42,169, 42,170–174 (July 26, 2007).

292. *See, e.g.*, Longo et al, *supra* note 2; *see also* Amy Jane Longo and Brooke Cohen, *How Courts are Treating SEC Disgorgement 3 Years After* Liu, LAW360 (June 21, 2023).

double-for-cause removal concerns.[293] *Jarkesy* and other cases have raised constitutional concerns about the structure of administrative bodies and the appointment of their officers that could easily apply to FINRA. Moreover, as noted above the D.C. Circuit in July 2023 administratively stayed a FINRA expedited proceeding, pending merits resolution of the claim that FINRA exercises the executive powers of the United States in its expedited proceedings and thus is subject to the Appointments Clause.[294]

Courts have traditionally held that SROs like FINRA are not state actors, and they have not been thought to be government bodies. But that attitude is changing, especially given cases like *Lucia v. SEC*, which held that the Appointments Clause applies to SEC administrative law judges; Judge Walker in *Alpine Securities* said that these ALJs were "near carbon copies" of FINRA's hearing officers.[295] That SROs might now be seen as the product of an impermissible "constitutional loophole" reflect a growing openness among federal judges to rethinking the relationship between the SEC and SROs.[296] Ben Edwards has warned in "Supreme Risk,"[297] and as *Alpine Securities* illustrates,[298] there may yet be weaknesses in the doctrinal fences that have historically separated the SROs from status as "state actors" or from exercising the offices of the United States.[299] Edwards and I have speculated about the implications of

293. *See Sec. & Exch. Comm'n v. Jarkesy*, 143 S. Ct. 2688, 216 L. Ed. 2d 1255 (2023) (granting certiorari to *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022)).

294. *See Alpine Sec. Corp.*, *supra* note 14 (Walker, J., concurring) (identifying additional constitutional issues related to FINRA employees' protections from removal by the president).

295. *Id.*

296. *See* Benjamin P. Edwards, *Supreme Risk*, 74 FLA. L. REV. 543, 606 (2022) (noting that these doctrinal interventions may well create "systematic risks to the financial system").

297. *See generally id.*; *see also* Tierney & Edwards, *supra* note 15.

298. *See Alpine Sec. Corp.*, *supra* note 14. By contrast, a district court concluded that an individual facing non-bar sanctions in a FINRA enforcement proceeding did not establish likelihood of success on the merits, irreparable harm, or the balance of equities, as would be necessary to stay a FINRA enforcement proceeding pending resolution of similar claims to those at issue in *Alpine Securities. Kim*, 2023 WL 6538544 at 14 (distinguishing the imminent "corporate death penalty" from a pending expedited proceeding that was about to conclude in *Alpine Secs.*, from enforcement sanctions from a barely-begun enforcement proceeding in which FINRA had made assurances that it "does not currently seek expulsion and will not seek it 'absent intervening misconduct or unforeseen circumstances'").

299. *See* Tierney & Edwards, *supra* note 14; *see also* James Brady et al., Recent DC Circuit Court of Appeals Case Brings FINRA to the Forefront of the SRO State Actor Controversy, Katten client memo (July 17, 2023), https://katten.com/recent-dc-circuit-court-of-appeals-case-brings-finra-to-the-forefront-of-the-sro-state-actor-controversy ("if Judge Walker's analysis were adopted in a final decision, it would call into question the constitutionality of FINRA's entire enforcement apparatus"); Barry Rashkover et al., *D.C. Circuit Questions Constitutionality of FINRA Hearing Officers, Enjoins Disciplinary Proceeding,*

concluding, against longstanding precedent, that functions like FINRA enforcement should be treated as state action. Concluding that FINRA's hearing officers exercise the executive powers of the United States could expose self-regulation to the panoply of claims, so "the broader consequences will ultimately depend on the . . . specifics."[300] In our view, a decision "declaring SROs unconstitutional" would "unravel economic power structures," and a "nondelegation" ruling would potentially "render unenforceable large swaths of the [rules] that enable American capital markets to operate."[301]

Finally, some recent court challenges have focused on challenging bars as categorically impermissible or excessive under the circumstances. Recent Supreme Court cases have fueled these substantive challenges for reasons that, according to securities law scholar Theresa Gabaldon, look more like lawmaking by soundbyte.[302] Recent Supreme Court cases like *Liu v. SEC* and *Kokesh v. SEC* have re-evaluated the remedial/punitive distinction with respect to another sanction, disgorgement, holding that it operates as a penalty for purposes of the statute of limitations, and that it may also be punitive to keep disgorged profits in the federal treasury rather than return it to victims.[303] In *Kokesh*, the statute at issue was a statute of limitations governing "penalties," and the court's holdings about the contours of punitive and nonpunitive sanctions sparked renewed interest in fitting within some other doctrinal bucket that enabled "remedial" but not "punitive sanctions."[304] We've seen that courts have applied the same "punitive" framework to industry bars, though I've suggested it's perhaps not for good reason.[305] The remedial/punitive distinction shows up as a limit on injunctions, too.[306]

Sidley client memo (July 6, 2023), https://www.sidley.com/en/insights/newsupdates/2023/07/dc-circuit-questions-constitutionality-of-finra-hearing-officers ("Such a ruling could also affect the regulatory programs of other self-regulatory organizations with analogous programs.").

300. If hearing officers are inferior officers, they would potentially be accountable to the President through appointment (as in *Lucia*) or removal, and there may be other implications depending on the outcome of *Jarkesy*.

301. Tierney & Edwards, *supra* note 14.

302. *See supra* note 12, 197, 208, 210.

303. *See Kokesh*, 581 U.S. at 1747-49; Liu v. SEC, 140 S. Ct. 1936, 1747-49 (2020); *see, e.g.*, SEC v. Sharp, 626 F. Supp. 3d 345, 371 (D. Mass. 2022) (discussing the interplay of "remedial" and "punitive" purposes at issue in *Kokesh* and *Liu*).

304. *See, e.g.*, Dunstan Prial, *Kokesh Spread Could Pose Risk to SEC Enforcement Power*, LAW360 (June 29, 2018); Weitman, *supra* note 9.

305. See supra Part III.C.1.

306. *SEC v. Gentile*, 939 F.3d 549, 560-561 (3d Cir. 2019).

B. Administrative Challenges and the Future of SRO Enforcement

Built on maximalist assumptions about the value of industry self-regulation, it's understandable that we'd see the Exchange Act authorize SRO bars to reinforce their regulatory authority.[307] It's equally understandable that we'd see an SRO expand its enforcement activity out into the authority space which it has been given. The SEC has long defended its approval of FINRA's power to impose bars as a kind of decision about "the relation of remedy to policy" being "peculiarly a matter" for the Commission, which Congress "empowered . . . to oversee" self-regulation.[308]

Aggrandizement theorists would hold that regulatory agencies, like FINRA, have inherent incentives to extend their jurisdiction and increase their powers as this can lead to increased resources, relevance, and influence in the regulatory landscape.[309] While expansion can enhance efficiency and effectiveness in oversight, it can also lead to an over-concentration of regulatory power, raising concerns about accountability and due process. The legitimacy of and public confidence in FINRA's practices, particularly when it bars individuals from the industry, hinge on its ability to do so impartially and justly.

Yet there is method mismatch in designing an effective strategy of delegating power through sanctions policy in a time when the role of delegation—both to

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307. The supposed benefits of industry self-regulation are well known. Based on the notion that complex questions of industry governance should be answered by industry experts, see Gus Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191, 1242 (2014); *cf.* Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 305 (1973), what I call the functional approaches to SRO governance approaches emphasize that brokers themselves "are in theory better able to enforce exchange rules and federal securities law than an outside regulator." Onnig H. Dombalagian, *Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System*, 39 U. RICH. L. REV. 1069, 1094 (2004) (describing the theory, and collecting authority); *see also, e.g.*, Brief of the Securities and Exchange Commission, Berger v. SEC, 2009 WL 6844152, at *30 (2d Cir.) ("*Berger* Brief"). SRO's supposedly superior institutional legitimacy and competence has been one of the important rhetorical moves defending exchanges' power to exclude from the industry. *See id.* Self-regulation, under this theory, is preferable because it is faster, easier, more flexible, can reach beyond law to market's ethics, and is ultimately more likely to induce voluntary compliance. *See, e.g.*, Jennings, *supra* note 126, at 678; Tamar Hed-Hofmann, *The Maloney Act Experiment*, 6 B.C. INDUS. & COM. L. REV. 187, 210–12 (1965). That flexibility is important, for "[i]n transactional settings, . . . law is one of several constraints on individual behavior and often not the important one." E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1577 (2004). The SEC, for its part, has argued that the system of self-regulation entails allocating "most of the load of keeping [regulated persons] in line" and ensuring that they "have the sanction of discharge for refusal to answer what is essential to that end." *Berger* Brief, *supra* this note, at *40 (cleaned up).

308. *Berger* Brief, *supra* note 307, at *42.

309. *See* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 373 (2016) (describing theory).

agencies like the SEC, and then further to industry self-regulatory organizations—is being challenged. Indeed, delegation is the subject of the latest contestation by a political coalition to promote a vision of political accountability and individual liberty that seeks to place certain subjects as off limit for regulation.[310] We probably should not expect that the SEC, FINRA, or the other SROs will continue to get deference about the relationship of "remedy to policy."

Prescribing too few industry bars will undermine higher-order commitments in securities law—but too many may be undesirable too, if it hastens anti-administrativism seen in recent years, especially related to the SEC's work.[311] These legal challenges "can have an outsized effect by sowing doubts about administrative legitimacy and thereby limiting the progressive potential of—and public support for—administrative government in the future."[312]

In our current conjuncture, making SROs more accountable is likely going to mean FINRA reduces the activity level of its regulation and enforcement. Law and political economy scholars have described this mode of challenging administrative regulation and pursuing the underlying interests sought to be served as "an aggressive application of public-choice theory's market-modeled skepticism of the state to legislation and administrative regulation," with the effect of "render[ing] democracy subject to the market, rather than subjecting the market to democratic rule."[313]

If self-regulation is valid, then of course the rule sets and practices we adopt would rely on the functionalist principle that industry participants have the expertise, incentive, and integrity necessary to police their own behaviors effectively. But the legal challenges I have described are not mere intellectual housekeeping. If accepted, they would have real world implications for when FINRA can enforce its rules. If that's the way the wind is blowing, ought we even be SRO-ing?[314]

In other words, if we relax the securities laws' core assumptions about the relative desirability of self-regulation, we face uncharted territory for financial

310. *See, e.g.*, Britton-Purdy et al., *supra* note 238, at 1827; KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 208 (2019) ("The key to understanding the basis of power and the resulting distribution of wealth lies . . . in the process of bestowing legal protection on select assets and to do so as a matter of private, not public, choice.").

311. Anti-administrativism denotes a rhetorical and legal strategy to undermine the legitimacy, effectiveness, and authority of federal regulatory action, in particular toward dismantling the New Deal settlement over the scope of democratic control over the economy. *See, e.g.*, Gillian E. Metzger, *Foreword—1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8–51 (2017).

312. *Id.* at 5.

313. Britton-Purdy et al., *supra* note 238, at 1807.

314. *Cf.* Hannibal Buress, *The Eric André New Year's Eve Spooktacular*, THE ERIC ANDRE SHOW (Dec. 31, 2012) ("Why are you booing me? I'm right!") (meme).

regulation. In this context, initial endowments and existing rules make certain forms of regulation sticky. I would welcome a rethink of how we do SRO governance, with a goal of making it more effective and equitable, and with a stronger emphasis on the role of financial regulation as serving the public good. For now, the possibility of that accountability through monitoring is remote, given the volume of SROs' rulemaking work and the number of enforcement and expedited proceedings that the SROs produce.[315] More stringent public interest oversight about how SROs wield their consequential powers would be welcome, but not dismantling securities law and leaving undone the work of financial market regulation.[316]

C. Doctrine and Practice in Industry Bars

Securities law prioritizes public welfare over the industry for reasons that flow from regulatory turf protection and confidence-promotion. What flows from this include important implications for doctrine and institutional design. As the SEC is the primary institution through which the public exerts this influence, directly against the industry and indirectly through its supervision of FINRA, the prescriptions begin with the agency.

First, is the distinction between 19(f) and 19(e)(2) justifiable? Section 19(f) effectively acts like a rubber stamp whenever the SRO decides to bar a person in an "expedited proceeding." What's more, the question of proportionality—what is 'excessive'—is not merely a legal or doctrinal problem. Are FINRA's industry bars serving the public interest, as the Commission dutifully acknowledges each time it considers a petition for review? Should we be satisfied with a bare conclusion that industry bars "are not punitive where they are imposed 'to protect the public'"?[317] My own view is that doing proportionality balancing in all the 19(f) bars every year would push too far in the direction of more adjudication costs than are worth the benefits in improved accuracy. Nor is it a question that is amenable to case-by-case analysis under the current statutory

315. *See* Tierney, *supra* note 77 (describing monitoring challenges associated with the high volume of SRO rulemaking); SEC Office of Inspector General, The Inspector General's Statement on the SEC's Management and Performance Challenges 2 (Oct. 2023), https://www.sec.gov/files/statement-secs-management-and-performance-challenges-october-2023.pdf (noting that the pace of rulemaking is a top management challenge, and describing the "strains that [the rulemaking] pace and workload pose[] for the [SEC] workforce').

316. *Cf.* Amna Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497 (2023) (outlining a scholarly positionality that "rethink[s] the kinds of laws, policies, norms, relationships, and modes of organization that we might build to govern society, and an effort to democratize relations of power: to have fundamentally different people at the helm.").

317. Ottimo, *supra* note 30, at *8; Matter of Ortiz, Exchange Act Release No. 58416, 2018 WL 3891311, at *9 (Aug. 22, 2008).

framework; it is ultimately a question of institutional design that is not currently being asked.

Second, and for that reason, the SEC should engage in a programmatic analysis of its industry bar program. The main problem is that securities regulators and the regulated community fight over these matters in one-off situations, in particular settlements or review proceedings. There ought to be more programmatic level reflection about whether a sanctions program could be improved in either direction.[318] The Division of Economic Risk and Analysis is very good and could get at some of the empirical questions outlined above with data that's not available to me.

Third, contractarian theory makes poor sense, and the courts and the SEC should revisit it. Recall that contractarian theory holds that a FINRA member has agreed to be bound to the disciplinary rules so can't complain about being held to them.[319] But today the SROs look less like private clubs than privately owned public utilities, especially as brokers have been required to be FINRA members.[320] Exchanges long ago abandoned the voluntary membership structures upon which contractarian theory was predicated. Instead they incorporated, demutualized, and consolidated. In addition, contractarian theory

318. This is not to say that the SEC does not contemplate the institutional design choices of its adjudications programs. To the contrary, consider how the SEC responded in fact to an emerging FINRA practice that is relevant to industry bars. The Exchange Act contemplates that people meeting certain criteria, such as having been suspended by a regulator or having committed certain crimes, are subject to a "statutory disqualification." *See supra* note 34. Statutory disqualifications are akin to rebuttably presumptive exclusion from the industry, as firms cannot remain FINRA members without relief from the disqualification. What's more, a person who is disqualified can't remain in the industry, and thus is *effectively* barred, unless the firm gets relief from FINRA, which usually requires the firm to sponsor a person. So those who are subject to disqualification (and aren't so special that the firm will pay to sponsor them) may find themselves unable to get relief from the disqualification.

In a 2018 decision by its highest adjudicatory body, FINRA announced that it would be deeming people as statutorily disqualified if they settled any enforcement action with state regulators that even *alleged* a violation of certain fraudulent, manipulative, or deceptive conduct — even if the settlement document itself made no recitals or findings with respect to that conduct. *See* Allan Wolfe, File No. SD-2157, slip opinion at *8 (FINRA NAC Dec. 20, 2018). FINRA announced the rule in a context that insulated this rule from SEC oversight and review, but the SEC put a stop to FINRA's interpretation in summer 2020 when the first opportunity arose in a later case. Acosta, 2020 WL 3428890, at *4-11. Disclosure: I wrote that opinion while on the SEC's staff. The SEC should continue to rigorously police FINRA bars to ensure that they comport with the underlying statutory policy that bars should be reasonably expected to reduce the total expected agency costs across broker-client relationships.

319. *See supra* notes 93-94;; Hannan, *supra* note 164, at *3 ("Hannan also claims that he never agreed to abide by the rules of [FINRA's predecessor,] the NASD. However, the fact that he was unaware of this obligation cannot excuse his non-compliance.").

320. Dombalagian, *supra* note 307, at 1074–75.

rests on a distinction between "governmental" and "self-regulatory" action that is increasingly tenuous in light of the overlapping and cascading collateral consequences that securities law applies for these sanctions. Brokers find that the "voluntary" choice to register with one regulator can expose them to exclusion from industries in which they've never tried to work.

Finally, other reforms may be directed at FINRA. Among other things, FINRA might consider implementing proportionality itself by using more time-limited suspensions rather than bars to secure compliance.[321]

D. On Regulation and Democratic Control over the Economy

How securities industry bars came to reflect a combination of investor protection and SRO jurisdictional purposes is a matter of how people subject to regulatory policies influence change. Through concerted effort, stakeholders pressure FINRA, the SEC, and Congress to enact or change relevant legal authority, exercise power by making rules, and shift their enforcement strategies or regulatory focus. It's valuable to have processes by which regulated communities, and the broader public whose interests are at stake in effective regulation, participate in and influence regulation. And perhaps we ought to strive for an administrative law that is responsive and adaptive, rather than static or solely shaped by first-mover advantages and capture.

These problems relate to representativeness and the ways of securing change, either to rig the rules in one's favor or to unrig them. Reform is often achieved through the administrative process by building coalitions to influence elected officials who shape personnel—and thus policy—within agencies.[322] As often, reform is stymied by the collective action problems that hamper coalition-building and the opportunities for regulatory capture that it produces—a problem made worse by "self-regulatory" approaches to market regulation.

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321. FINRA is authorized to impose suspensions. In addition, while a "right to reapply" may be available for people the SEC bars, *see* 17 C.F.R. § 201.193, FINRA doesn't have a safety valve like that. *Cf. supra* note 59.

322. Thanks to Mark Rosen for this point. The progressive securities law scholar Steven Ramirez has suggested that interest convergence, which postulates that meaningful advancements for marginalized groups occur when these groups' interests align with those of dominant groups, is "a historical truism applicable to all progressive reform." Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do about It*, 71 WASH. & LEE L. REV. 1583, 1585, 1587 & 1605 n. 117 (2004) (defining interest convergence as the theory of change in which "reform occurs when the interests of the racially oppressed align with the interests of the people who have the power to bring about reform," and arguing that today "the operative term" for dominant groups should be "those elites with power over a given issue").

Beyond the self-regulatory project itself, there is a palpable lack of "democracy" in recent efforts to dismantle economic regulation in service of individual rights claims as trump cards. In other words, who should get to decide how securities regulation should gatekeep access to its labor market, and how should we weigh individualized claims about the industry "death penalty"? As Laura Portuondo has characterized Jamal Greene's critique of "the Court's current approach to rights," the problem is that it "strictly polices the boundaries of constitutional rights and strictly forbids their infringement, distort[ing] our constitutional jurisprudence."[323] Anya Bernstein and Glen Staszewski, meanwhile, have argued that this mode "move[s] power from those parts of government most responsive to pluralistic contestation—Congress and the agencies—to those least subject to it—the President and the Courts," thus "undermin[ing] more contestatory government institutions and empower[ing] more unilateral ones in their stead."[324]

The problems we face, in other words, do not flow from too much democracy and too little protection for market actors. At minimum, securities law ought to promote accountability of financial regulators like the SROs, through greater public participation in the regulatory process, so they can have more voice in rule-making and oversight. As law professor Evan Bernick has written, non-reformist approaches to this problem would be "characterized by a desire, not merely to facilitate participation in policymaking but to shift power over policy . . . that is widely recognized as unbalanced at present to those who suffer from the imbalance."[325]

Thus, we ought not to declare victory based on the work of past coalitions but instead to continue to contest administrative law. Luke Herrine has called for a return to the "moral economy" approach that would tie policymaking, not to technocratic cost-benefit analyses, but to "to a notion of the 'public interest' that is defined via ongoing political contestation." Market structuring will remain a

323. Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L. J. 1493, 1562 (2023) (citing Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 65 (2018)).

324. Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1766 (2023); *see also, e.g.*, Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in A Second-Best World*, 98 N.C. L. REV. 1, 49 (2019) (explaining that the problem with accountability being "too attenuated" from "electoral politics" is that "the judiciary will become simply a substitute," such that "[o]nce armed with constitutional authority, . . . and then ennobled by the public choice insight about the risk of capture of the political branches, . . . the domain of politics [will be] limited to confirmation of first-order constitutional proclamations of rights").

325. Evan D. Bernick, *Movement Administrative Procedure*, 98 NOTRE DAME L. REV. 2177, 2207 (2023) (collecting literature on nonreformist approaches, and observing that they aim to "'emphasize[] the inevitability of political conflict and build[] democratic legitimacy around' [it] rather than attempt[] to elide it by achieving or declaring a settlement") (quoting Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 14 (2022)).

topic of debate about the "moral economy" vision of consumer protection and the degree of contested deliberation over regulation in the public interest.[326]

Conclusion

Securities law's vision of industry exclusion has been contested since its earliest days. It pits labor in capital markets against the exchanges as institutions, member firms and their owners, and investor clients to whom securities law long ago allocated distributive commitments. In this way, it is something of a continuation of longstanding fault lines about what financial regulation is trying to accomplish—pitting market fundamentalists against successors to the agrarian, progressive reformer, and populist visions of what market regulation can accomplish. By situating the history, theory, and practice of SRO sanctions within the political economy of securities law's development, this article's approach offers to unveil hidden linkages between these justifications for SRO action and the securities laws' broader normative aims. Thinking more capaciously about "investor protection" and the "public interest" in the framework of administrative enforcement sanctions might require looking beyond the traditional focus on market efficiency and fraud prevention. Investor protection is not just about safeguarding financial assets, but ensuring fairness and integrity of the broader system in which markets play a capital-allocation function.

Industry bars face an uncertain future at a time of intensifying scrutiny of the role of SROs in the securities regulatory structure. The crux of the judicial and political challenges lies in whether SROs, in their current form, can be reconciled with a constitutional framework that demands clear lines of accountability and oversight for entities exercising public power. It is a debate between different visions of accountability—through industry-led technocracy, judicial review, or public control. As these debates unfold, they underscore the need for a reevaluation of the role that SROs play in market regulation and the mechanisms through which their actions are reviewed and constrained to ensure alignment with the public interest. They extend beyond Section 19(d) to the realm of SRO rulemaking, a process foundational to the regulatory framework governing securities markets.[327] Legal scrutiny invites a reconsideration of how SROs develop and implement rules, ensuring that these processes are responsive to broader societal values and objectives.

326. Luke Herrine, *At the Nexus of Antitrust & Consumer Protection*, 2023 UTAH L. REV. 849, 853 (2023) (explaining that a moral economy approach "motivate[s] a shift . . . away from correcting for discrete market failures or maximizing a monetized measure of net social benefit and toward imposing substantive standard of fairness that balance the interests of different market participants," which he says offers a "more avowedly political—and, for its left-leaning advocates, democratic—vision of administrative governance").

327. *See, e.g.*, Tierney, *supra* note 77.

Appendix

Tbl. 2. Summary Statistics

Variable	Proportion complete	Mean	SD	Minimum	25th %ile	50th %ile	75th %ile	Maximum	Histogram
Count	1.00	337.68	122.63	21.00	291.00	345.00	437.00	504.00	
8210 alleged	1.00	0.78	0.12	0.58	0.66	0.78	0.88	0.94	
8210 found	0.96	0.12	0.04	0.04	0.10	0.11	0.13	0.18	
conversion alleged	1.00	0.15	0.05	0.06	0.11	0.16	0.18	0.24	
conversion found	0.88	0.03	0.02	0.00	0.01	0.02	0.03	0.06	
fraud alleged	1.00	0.22	0.08	0.07	0.18	0.23	0.28	0.43	
conversion found	0.96	0.05	0.03	0.01	0.03	0.04	0.07	0.13	
expedited rule 9552	0.84	0.34	0.17	0.00	0.19	0.39	0.46	0.63	
expedited rule 9553	0.40	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
outside business activities alleged	1.00	0.06	0.02	0.01	0.04	0.05	0.07	0.10	
outside business activities found	0.84	0.01	0.01	0.00	0.01	0.01	0.02	0.03	
private securities transactions alleged	1.00	0.06	0.02	0.04	0.05	0.06	0.07	0.11	
private securities transactions found	0.88	0.01	0.01	0.00	0.00	0.01	0.01	0.02	
exam violation alleged	1.00	0.02	0.02	0.00	0.01	0.02	0.02	0.10	
exam violation found	0.48	0.01	0.00	0.00	0.00	0.00	0.01	0.01	
U4 violation alleged	0.96	0.04	0.02	0.00	0.02	0.04	0.05	0.08	
U4 violation found	0.76	0.02	0.01	0.00	0.01	0.01	0.02	0.05	
suitability found	0.88	0.01	0.01	0.00	0.01	0.01	0.02	0.03	
suitability alleged	0.92	0.05	0.02	0.02	0.04	0.05	0.06	0.09	
disqualification alleged	0.60	0.01	0.01	0.00	0.00	0.01	0.01	0.05	
disqualification found	0.84	0.03	0.03	0.00	0.01	0.02	0.05	0.08	
just and equitable alleged	0.88	0.49	0.37	0.00	0.02	0.65	0.79	0.92	
just and equitable found	0.80	0.04	0.04	0.00	0.01	0.03	0.08	0.11	

Fig. 4. Types of FINRA Bars by Types Alleged

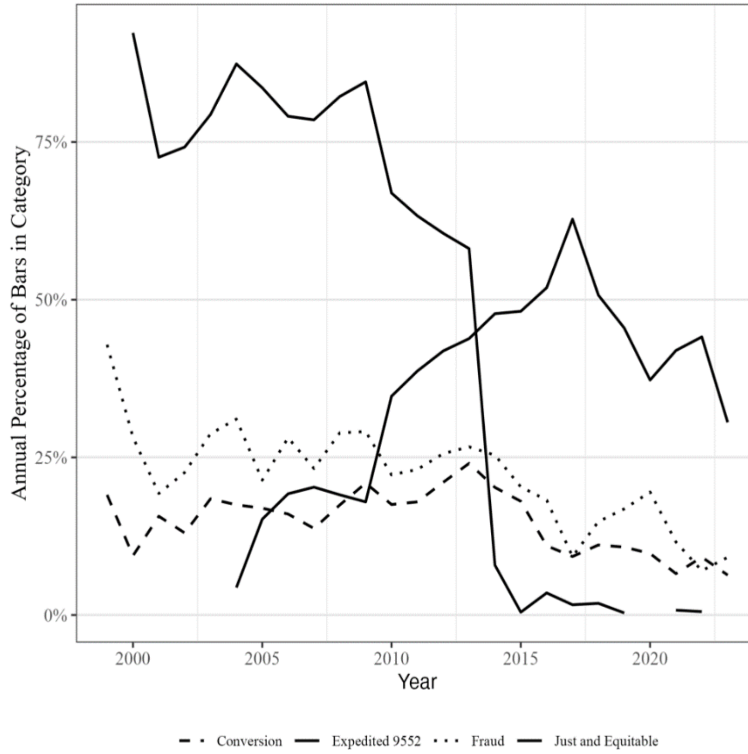

Fig. 5. Types of FINRA Bars by Conduct Found

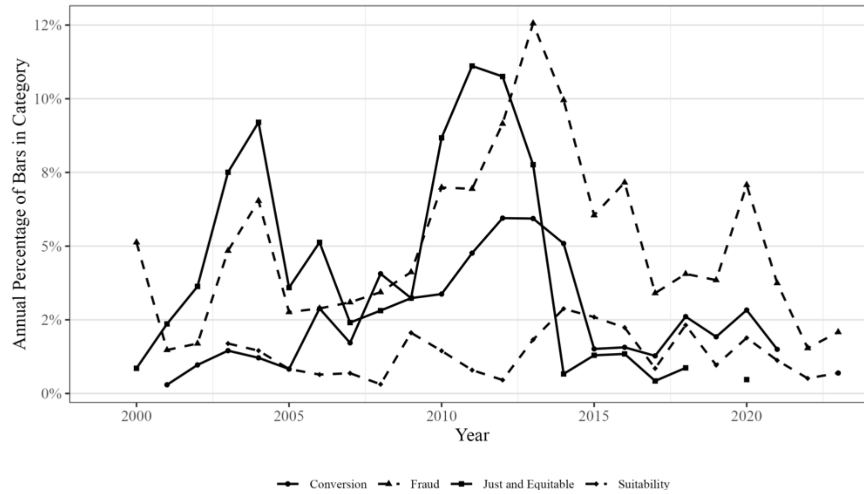

Fig. 6. Dispositions of FINRA Bars (by Proportion)

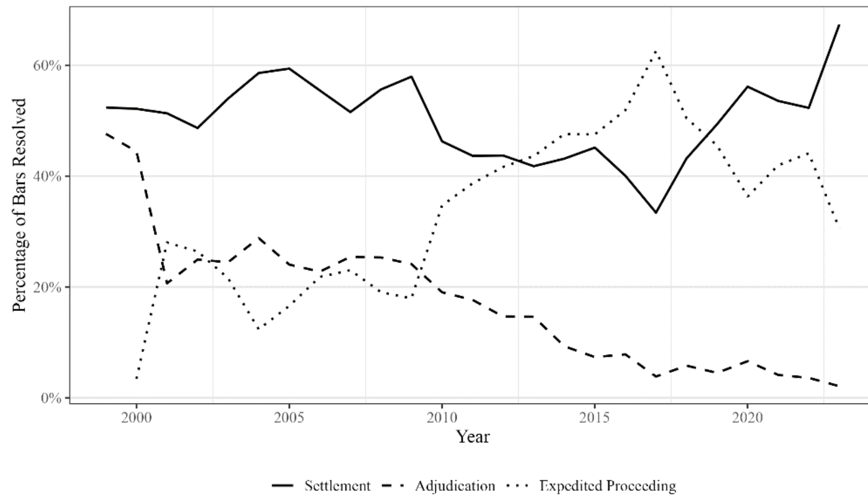

Fig. 7. Dispositions of FINRA Bars (Count)

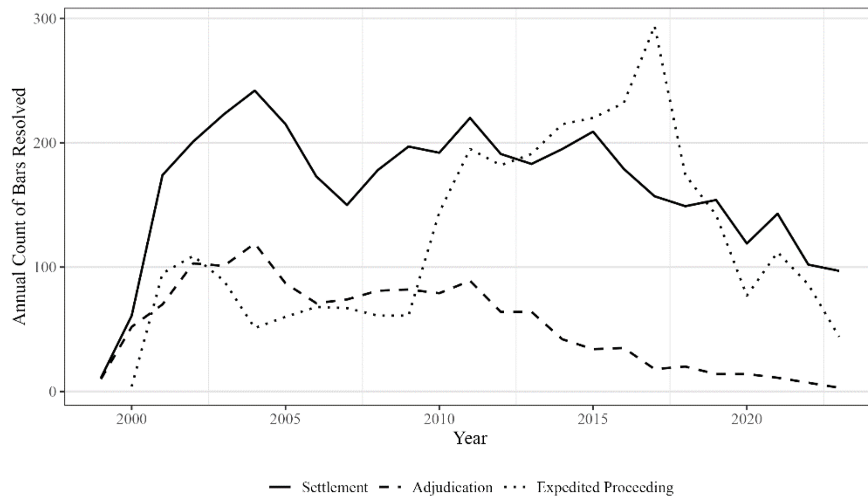

Fig. 8. BrokerCheck Expedited Proceedings Robustness Check (%)

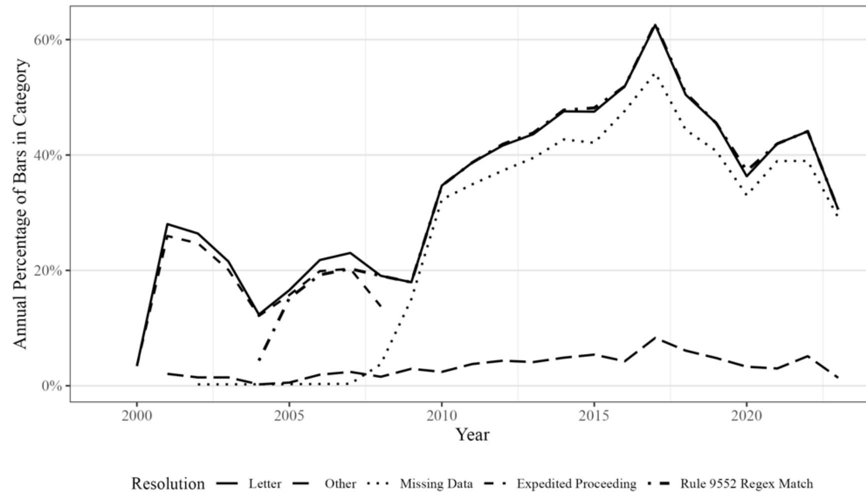

Fig. 9. BrokerCheck Expedited Proceedings Robustness Check (Count)