The Pioneers, Waves, and Random Walks of Securities Law in the Supreme Court

*Elizabeth Pollman**

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It is a fraught moment for securities law in the courts. Consider the saga of one new set of rules. In March 2022, the U.S. Securities and Exchange Commission (SEC) proposed a climate-related disclosure rule that would require public companies to report about their greenhouse gas emissions, climate-related risks reasonably likely to have a material impact on their business, and relevant risk management processes.[1] SEC Chair Gary Gensler explained, "Our core bargain from the 1930s is that investors get to decide which risks to take, as long as public companies provide full and fair disclosure and are truthful in those disclosures."[2] And "[t]oday, investors representing literally tens of trillions of dollars support climate-related disclosures because they recognize that climate risks can pose significant financial risks to companies, and investors need reliable information about climate risks to make informed investment decisions."[3]

Almost immediately, the proposed rule sparked strong support and a vociferous uproar. Thousands of comment letters poured into the SEC.[4]

* Professor of Law, University of Pennsylvania Carey Law School. Special thanks to Chuck O'Kelley, Bob Thompson, Adam Pritchard, Jacob Simmons, Sarah Haan, and the participants and editors involved in the Berle XV Symposium.

1. Press Release 2022-46, U.S. Sec. & Exch. Comm'n, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosure for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 [https://perma.cc/U4P6-FKGS].

2. *Id.*

3. *Id.*

4. Press Release 2024-31, U.S. Sec. & Exch. Comm'n, SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 6, 2024), https://www.sec.gov/news/press-release/2024-31 [https://perma.cc/5CJY-4ZDZ] [hereinafter Final Rules Press Release] (noting that

Many investors expressed the need for such climate-related disclosures.[5] However, vehement opposition to the proposed rule simultaneously staked out a line of attack. Two dozen state attorneys general collectively objected to the proposed rule on three separate bases.[6] They asserted that the proposed rule exceeded the SEC's authority, violated First Amendment rights, and would be unable to withstand arbitrary-and-capricious review.[7] Groups of legal scholars took contrasting views of these issues that go to the core of the SEC's power and role in the administrative state.[8] Individual SEC commissioners also waded into the debate, on one side asserting that the SEC's authority for disclosure rulemaking is not limited to material information and on the other side proclaiming that the SEC is not the "Securities and Environment Commission" and it lacked authority to mandate disclosures that "may not comport with First Amendment limitations on compelled speech."[9]

After these battlelines were drawn, and nearly two years elapsed, the SEC issued final rules on climate-related disclosures.[10] As foreshadowed,

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24,000 comment letters and 4,500 unique letters were submitted in response to the SEC's proposing release on climate-related disclosures).

5. *See, e.g.*, Caroline A. Crenshaw, Comm'r, U.S. Sec. & Exch. Comm'n, Statement, A Risk by Any Other Name: Statement on the Enhancement and Standardization of Climate-Related Disclosures (Mar. 6, 2024), https://www.sec.gov/news/statement/cresnshaw-statement-mandatory-climate-risk-disclosures-030624 [https://perma.cc/Q2KE-NHUH] (discussing investor support for climate-related disclosures); *see also* Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1454–55, 1481 (2021) (discussing institutional investors' requests for climate-related disclosures).

6. Comments on Proposed Rule Amendments titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" by the Attorneys General of the States of West Virginia, Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Virginia, and Wyoming (SEC File No. S7-10-22) (June 15, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131409-301574.pdf [https://perma.cc/D74D-VV75].

7. *Id.*

8. Comments on Proposal on Climate-Related Disclosures for Investors (File No. S7-10-22) (Apr. 25, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf [https://perma.cc/9NQV-SD3F] (twenty-two professors of law and finance opposing the SEC's proposed climate-risk disclosure rule); Comments on Enhancement and Standardization of Climate-Related Disclosures for Investors (S7-10-22) (June 6, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf [https://perma.cc/98TD-LEHP] (thirty law professors of securities law and capital markets regulation supporting the SEC's proposed climate-risk disclosure rule).

9. Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, Speech, Living in a Material World: Myths and Misconceptions About "Materiality" (May 24, 2021), https://www.sec.gov/news/speech/lee-living-material-world-052421 [https://perma.cc/58DL-NLMQ]; Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, Statement, We Are Not the Securities and Environment Commission—At Least Not Yet (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 [https://perma.cc/5BT7-HWBP].

10. Final Rules Press Release, *supra* note 4.

challengers including industry groups, oil and gas companies, and state attorneys general swiftly brought suit.[11] In an interesting twist, environmental groups also challenged the final rules, but for a different reason—not going far enough to protect investors.[12] The SEC had scaled back the final rules from its more ambitious proposal that had been less focused on financial materiality and had included greater disclosure, including "Scope 3" emissions from a company's "value chain."[13] The upshot was a set of final rules that had endured extensive public comment and scrutiny, detailed calibration by the agency, and a launch that seemingly failed to please its likely fans and nonetheless still vexed its detractors. Barely more than a week after the SEC approved the new rules, the Fifth Circuit Court of Appeals issued an emergency stay that halted them from taking effect while the court considers the lawsuit.[14]

What will be the fate of the SEC's climate-related disclosure rules? The answer now lies in the federal courts. And this story is not alone. Issues ranging from the relatively ordinary, such as stock buyback disclosure rules, to the more existential, such as constitutional challenges to the SEC's administrative law judges and proceedings, have recently been working their way through the federal courts.[15] Is this turbulent age of attacks on the SEC's authority and rulemaking a radical departure from the past or just the next step down the expected path?

This brings us to the Berle XV symposium and Adam Pritchard and Robert Thompson's magnificent book, *A History of Securities Law in the Supreme Court*.[16] Pritchard and Thompson provide a dazzling tour of a nearly-hundred-year history, rich with deep securities law expertise, archival insights, and observations that can only be fully gleaned through the complete arc of securities law in the Supreme Court to date. They argue that "[o]verall, this history shows securities law at the center of the key shifts in the Supreme Court's jurisprudence over the twentieth century."[17] Put differently: "The work of the Supreme Court in securities law has its own unique story, but it also provides an accessible window to larger trends visible in the Court's jurisprudence."[18] In their introduction,

11. Hiroko Tabuchi, *Court Temporarily Halts S.E.C.'s New Climate Rules*, N.Y. TIMES (Mar. 15, 2024), https://www.nytimes.com/2024/03/15/climate/sec-climate-rules-lawsuit.html.

12. *Id.*

13. *Id.*

14. *Id.*

15. Chamber of Com. of the USA v. SEC, No. 23-60255, 88 F.4th 1115 (5th Cir. 2023); SEC v. Jarkesy, 34 F.4th 446 (5th Cir. 2022), *reh'rg en banc denied*, 51 F.4th 644 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023) (mem. op.).

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

17. *Id.* at 11.

18. *Id.* at 10.

Pritchard and Thompson identify these larger trends as including the "triumph of the administrative state" following the Great Depression and New Deal legislation, the post-war "era of deference," a resurgence in the securities docket and an "activist Court" under Chief Justice Earl Warren that "took on the role of partner to the agency," followed by a "counterrevolution" in securities law led by Justices Lewis Powell and William Rehnquist, and the "random walk" of the subsequent era that "reflects a lack of both engagement and expertise."[19]

Histories are often told chronologically. After the book's introduction with its observation of trends, Pritchard and Thompson largely eschew the rigidity of such a large-scale chronological frame, however, to instead organize chapters by subject such as policing the SEC, insider trading, and private litigation.[20] Each chapter provides a detailed historical exploration of its subject, highlighting two threads that the book brings together in its conclusion. The first thread is "how the Court's view of the securities laws and the SEC changed over time."[21] The second thread is "the influence that individual justices have had on the path of securities laws."[22]

This Essay explores lessons from Pritchard and Thompson's book through a re-imagined framing of these larger trends and threads. Specifically, it considers how the history of securities law in the U.S. Supreme Court, and the SEC's place within this history, might be understood through three different visions or focal points that could also shed light on the current moment and future ahead. Part I examines the individuals—pioneers and counterrevolutionaries—driving this history. Part II explores how the arc of securities law in the Supreme Court has occurred in waves, with the SEC pushing to expand its reach and the Court taking different approaches over time depending on its composition and circumstances. Part III considers the shift from securities law as a bellwether of Supreme Court jurisprudence to a random walk. Each vision or set of focal points briefly draws from the Pritchard and Thompson book, which this Essay commends to readers to fully appreciate its broad and deep insights.

I. THE PIONEER AND THE COUNTERREVOLUTIONARY

People are the drivers of history. There are many important people in the history of securities law in the Supreme Court: Louis Brandeis, Ferdinand Pecora, Franklin Delano Roosevelt, James Landis, Hugo Black,

19. *Id.* at 8–16.

20. *Id.* at 17 ("We organize the chapters of the book by subject, rather than strictly chronologically. Our goal is to show the main trends identified earlier as they played out in particular areas of securities laws.").

21. *Id.* at 251.

22. *Id.*

William O. Douglas, Adolf Berle, Earl Warren, William Rehnquist, and many more.

Two stars shine above all others, however, in Pritchard and Thompson's telling: Felix Frankfurter and Lewis F. Powell, Jr.[23] In their words, "Frankfurter and Powell, with their diametrically opposed views of the appropriate balance between the administrative state and capitalism, bookend our history of the securities laws in the Supreme Court."[24] It was Frankfurter and Powell's "contrasting ideologies" that "manifested themselves in [the] two key shifts in the Supreme Court's approach to securities laws."[25]

Frankfurter was a key pioneer of U.S. federal securities laws. During his time as an academic, Frankfurter devoted effort to the study of government regulation of business, even prophesying the rise of the administrative state in a 1914 public utilities lecture.[26] Years later, during the depths of the Great Depression, Roosevelt became president and not long after requested that Frankfurter help clean up his administration's early attempt at financial reform legislation—a bill on securities offerings.[27] The stock market crash of 1929 had fueled populist anger against investment bankers, brokers, and executives, making stock exchange and securities legislation a priority on Roosevelt's "First Hundred Days" agenda.[28] Frankfurter supervised his protégés, Ben Cohen, Tom Corcoran, and James Landis, through the process of writing and lobbying for the legislation that became the Securities Act of 1933.[29] The following year, Frankfurter was a key supporter of the Securities Exchange Act of 1934, which set out periodic reporting requirements and the anti-fraud provision of Section 10(b).[30]

Critically, the Exchange Act also created a new agency to administer securities law—the SEC.[31] Frankfurter viewed "big business as an enemy to be defeated" and "governance by experts" as the path to taming the dangers of speculative finance and Wall Street businessmen that promoted fraudulent schemes, misdirected capital resources, and created social waste.[32] As he wrote to Roosevelt, "the real trouble with capitalism is the capitalists."[33]

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23. *See id.* at 8.
24. *Id.*
25. *Id.*
26. *Id.* at 2.
27. *Id.*
28. *Id.* at 2, 21, 37.
29. *Id.* at 20–21.
30. *See id.* at 25–27.
31. *Id.* at 26.
32. *Id.* at 3–4, 36.
33. *Id.* at 4 (quoting Frankfurter).

Frankfurter served on the Supreme Court from 1939 to 1962, a period which early on reflected a major shift away from the *Lochner* era's "judicial hostility to legislative interference with freedom of contract" and towards an "embrace of agency expertise and social control of finance."[34] Frankfurter's belief in administration by experts came to fruition in the 1940s and 1950s, and the Court deferred to the SEC for decades of the agency's early existence, with his colleagues sharing his New Deal convictions and sometimes even expressing more willingness to defer to the agency.[35] Although Frankfurter did not have the influence on the Court that might have been expected of a pioneer, he made unique contributions to the creation and passage of landmark U.S. federal securities laws and served on the Court that solidified the centrality of these laws and the regulatory body of the SEC for providing oversight over the world of finance.

Lewis Powell, by contrast, was a strong believer in free enterprise and "saw the SEC as an agency prone to overreaching."[36] While he shared in common with Frankfurter an interest in business regulation, the two had completely different approaches. Powell graduated from law school in 1932, the year that Roosevelt was elected.[37] Until his nomination to the Supreme Court in 1971, Powell practiced as a corporate lawyer in Richmond, Virginia, working on numerous registered offerings and securities law matters.[38] As Pritchard and Thompson explain, "Powell's experience as a corporate lawyer gave him faith in the integrity of American businessmen."[39] He had a generally favorable view of the Securities Acts as "remarkably well drafted for their intended purposes" and considered the SEC "to be one of the better independent Agencies" because it "served its basic purpose well."[40] But Powell was troubled by the Roosevelt administration and appointees' "war against capitalism" and "the SEC's perceived adversarial attitude toward business" and how it "always has sought to expand its reach."[41] The summer before President Richard Nixon appointed Powell to the Court, Powell had penned a memo entitled "Attack on the American Free Enterprise System," in which he called for corporate

34. *Id.* at 8.

35. *Id.* at 9, 57–58, 68 (noting Frankfurter's limited influence on the Court and the majority's willingness to give greater deference to the SEC); *see id.* at 75 ("Frankfurter believed passionately in the administrative state—but he was equally fervent in his belief that the rule of law must apply to agencies if they were to survive.").

36. *Id.*

37. *Id.* at 4.

38. *Id.* at 4–5.

39. *Id.* at 5.

40. *Id.* (quoting Powell).

41. *Id.* at 6.

America to be more aggressive in countering the liberal calls for government intervention.[42]

Powell's appointment to the Supreme Court ushered in the second key shift in the Court's approach to securities law—a "Counterrevolution."[43] Beginning in the mid-1970s, the Court expressed more skepticism toward the SEC and securities class actions. As Pritchard and Thompson succinctly note: "The SEC's decades-long winning streak would come to an abrupt halt."[44] Powell's experience as a corporate lawyer burnished his credentials as a subject matter expert, and a majority of his colleagues often joined him in favoring private ordering and curbing deference to administrative experts.[45]

Whereas expansive interpretations of the scope of securities laws had been the norm since 1937, Powell's era starting in 1972 starkly reversed the trend with almost-two thirds of the Court's decisions on securities law taking a restrictive approach.[46] In addition, the Court doubled the number of securities law cases heard by the Court during Powell's tenure.[47] Pritchard and Thompson highlight how "Powell had the support of a cadre of other like-minded justices, but the differences in how those justices voted before Powell's arrival and after his departure demonstrates how one knowledgeable and committed justice can influence the Court's jurisprudential outcome."[48] Since Powell's retirement from the Court in 1987, securities law has received considerably less attention. In Pritchard and Thompson's narrative, "Without a justice having knowledge or specific interest in securities laws, the Court produced a seemingly random pattern of results."[49]

What might Frankfurter and Powell as "bookend[s]" of major shifts in the Court's approach to securities law help us understand about the present moment and near future? Is the story of securities law in the Supreme Court at core a story of power and politics, with notable individuals as the

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42. *Id.* at 8–9.

43. *Id.* at 8, 14.

44. *Id.* at 9.

45. *Id.* at 9, 15 ("Powell emerged as the intellectual leader of this new Court, at least in the field of securities law.").

46. *Id.* at 9–10 (noting three-fourths of the U.S. Supreme Court's securities decisions between 1933–April 1972 were "expansive" and nearly two-thirds were "restrictive" between May 1972 and June 1987 when Justice Powell retired).

47. *Id.* at 15.

48. *Id.*

49. *Id.* at 252; *see also* John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 3 (2015) (observing the Roberts Court's decisions on securities litigation have been "generally preservative and modest in their effects, whether expansive or restrictive"); Eric C. Chaffee, *The Supreme Court as Museum Curator: Securities Regulation and the Roberts Court*, 67 CASE W. RSRV. L. REV. 847, 850 (2017) (comparing the Roberts Court on securities fraud and litigation issues to "a museum curator maintaining historical relics from bygone eras").

dynamic force behind legal change? Will there be no further significant shifts until another towering figure akin to Frankfurter or Powell appears? Pritchard and Thompson's careful research and analysis does not claim to use history to answer these questions, but readers engaging the book in this fraught moment might certainly wonder. This Essay takes up these broader questions and reflections again after first turning to two other re-imagined visions or focal points.

II. RIDING THE WAVES

Instead of centering attention on the great stars in the history of securities law in the Supreme Court, one could also read Pritchard and Thompson as a story about how securities law in the Supreme Court has developed in waves. Individuals still matter in this vision, but the bigger picture is one of ebbs and flows, with the various institutions and the broader set of circumstances constituting or driving the patterns of change.

The precursor to the first wave was the 1929 stock market crash and ensuing depression of the early 1930s that ravaged the nation and created a political opportunity for carrying out "populist attacks against the money-eyed interests."[50] Outrage generated by Senate hearings led by Ferdinand Pecora set up Roosevelt to push for securities legislation soon after taking office.[51] These events catalyzed not only the passage of the Securities Acts and creation of the SEC, but also imprinted upon the individuals who became justices of the New Deal Court. The rise of securities laws and the administrative state might be understood largely as a reaction to the political and economic circumstances of the time.

As the first wave of federal securities law cases came before the Court, it was not a single justice who shaped the judicial response but rather a "cadre of justices who believed in social control of finance" because they had been "scarred" by recent events and had "front-line experience in battle" by the time that Roosevelt handpicked them for appointment.[52] Further, shortly after its creation, the SEC engaged in a broad range of activity that took a muscular approach to regulatory oversight. For example, under the leadership of Douglas, the SEC tackled the New York Stock Exchange's trading practices, began breaking up public utilities under the Public Utility Holding Company Act (PUHCA), and reshaped bankruptcy reorganizations under the Chandler Act.[53] According to Pritchard and

50. PRITCHARD & THOMPSON, *supra* note 16, at 1.
51. *Id.* at 2.
52. *Id.* at 9, 11.
53. *Id.* at 38.

Thompson, "[t]oday's securities lawyers would not fully recognize the New Deal SEC" as it covered such expansive terrain.[54]

Cases relating to PUHCA and the Chandler Act dominated the Court's securities docket for the first two decades after the enactment of the securities laws.[55] And these cases provided the "first testing ground for working out how judicial review fit with the newly empowered administrative state."[56] Pritchard and Thompson explain, "Agency power is delegated by Congress . . . . Grants of authority vary in their specificity, and judicial interpretation of those grants afford the agency more or less power."[57] By the 1940s and 1950s, the Court was packed with Roosevelt's appointees who believed that government power was needed to tame the excesses of capitalism and the path to doing so was to defer to the SEC's expertise.[58] And while these particular types of cases had largely run their course by the 1960s, other important issues came to the Court such as the definition of a security and the meaning of a "public" offering, and the pattern of deference to the SEC continued.[59]

By the 1960s, the wave crested with a resurgence in the securities docket and the Warren Court's expansion of securities fraud law. The Court's purposivist approach went beyond implementing the textual directives of the securities laws to a more free-wheeling, transformational mode of interpretation.[60] In the Court's first interpretation of the Investment Advisers Act of 1940, it took an "expansive view of fiduciary duty under federal law" and recognized that advisers typically were fiduciaries.[61] In another blockbuster case, the Court validated an implied private right of action in securities laws, going beyond the statutory text to embrace private lawsuits as a supplement to SEC enforcement.[62] In combination with the 1966 revision of Rule 23 of the Federal Rules of Civil Procedure, the decision lay the foundations for large-scale securities fraud class actions.[63]

The next wave, the 1970s counterrevolution, might be understood as a reaction to the nearly half-century's worth of developments that had

54. *Id.*

55. *Id.* at 49, 55.

56. *Id.* at 55.

57. *Id.* at 89.

58. *Id.* at 55.

59. *Id.* at 65–66, 90–94.

60. *Id.* at 14.

61. *Id.* at 14 (discussing SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963)); *see also* Arthur B. Laby, SEC v. Capital Gains Research Bureau *and the Investment Advisers Act of 1940*, 91 B.U. L. REV. 1051, 1053 (2011) (discussing *Capital Gains* and noting that "the SEC and the courts have constructed a towering regulatory edifice for advisers" based on the case).

62. J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (finding an implied right of action for private plaintiffs in connection with the antifraud prohibition of the Exchange Act Section 14(a)); *see also* Mills v. Electric Auto-Lite, 396 U.S. 375 (1970) (extending *Borak*).

63. PRITCHARD & THOMPSON, *supra* note 16, at 169.

preceded it. In 1972, Lewis Powell and William Rehnquist replaced Hugo Black and John Harlan on the Court, and thereby shifted its composition away from the Democratic dominance of the previous decades. As Pritchard and Thompson recount, the Court of the 1970s could be described by three trend lines: "worry over the adverse impacts of class actions"; "willingness to construe the elements of Rule 10b-5 actions narrowly"; and "hostility to implied private rights of action."[64] Famously in Chief Justice Rehnquist's words, Rule 10b-5 had become "a judicial oak which has grown from little more than a legislative acorn."[65] And in three cases—*Blue Chip Stamps*, *Ernst & Ernst*, and *Sante Fe*—the Court narrowly construed Rule 10b-5 to keep this judicial creation in check.[66] The cases had ripple effects as "[t]hese narrow readings reversed the trend in the Second Circuit and other lower courts to expand the securities laws."[67] Furthermore, the Court also applied its restrictive approach to cases involving the definition of a security and curtailed the expansion of federal securities law to preserve the role for state corporate law.[68]

Through these waves, we see the push and pull of contrasting ideologies between faith in the expertise of administrative agencies and a belief in free enterprise and the need to rein in agency overreach. Bringing focus back to the present moment, we might ask if it can be construed as a wave building again after the diminishment of the Court's securities docket since Powell retired. SEC Chair Gary Gensler has earned a reputation as an ambitious rulemaker and aggressive regulator, provoking the ire of many on Wall Street as well as a number of industry groups, state officials, and others willing to battle in the federal courts.[69] Perhaps where we come out will depend on what kind of wave we are in with the Court?

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64. *Id.* at 177.

65. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

66. *Id.*; Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Sante Fe Indus. Inc. v. Green, 430 U.S. 462 (1977). Notably during this period, the Court also held that shareholders did not have an implied private cause of action for damages against corporate directors under a criminal statute which prohibits corporations from making certain contributions or expenditures in connection with specified federal elections. *See* PRITCHARD & THOMPSON, *supra* note 16, at 189; Cort v. Ash, 422 U.S. 66, 68–69 (1975).

67. PRITCHARD & THOMPSON, *supra* note 16, at 271.

68. *Id.* at 97–102, 226–31.

69. *See, e.g.*, Declan Harty, *Wall Street Strikes Back: Firms Slam Biden's Top Finance Cop with Lawsuits*, POLITICO (Feb. 2, 2024), https://www.politico.com/news/2024/02/01/gary-gensler-wall-street-showdown-00139045; Stefania Palma, *Has Gensler's SEC Pushed Wall Street Too Far?*, FIN. TIMES (Feb. 18, 2024), https://www.ft.com/content/29e5c880-edbe-4227-879d-7b401f36b697; Felix Salmon, *Behind SEC Chair Gary Gensler's Wins and Losses*, AXIOS (Sept. 11, 2023), https://www.axios.com/2023/09/11/gary-gensler-sec-private-funds-rules.

III. FROM BELLWETHER TO RANDOM WALK

Finally, a third vision of the history of securities law in the Supreme Court emerges from Pritchard and Thompson's concluding chapter. Looking at the arc of history from a highly abstracted view, it might be said that after the passage of the Securities Acts the SEC had a "long win streak," followed by a period of skepticism strongly influenced by Justice Lewis Powell, and now we have a "random walk" that often ranges from "trivial" to "mediocre."[70] But in closing, Pritchard and Thompson remind readers that this basic narrative "does not exhaust the lessons provided by this slice of the Court's docket."[71]

A key source of those lessons, the authors suggest, is in thinking about securities law as a bellwether. For more than half of the history of securities law in the Supreme Court, it provided a window into administrative law and key transitions in U.S. law. For example, the securities laws passed in Roosevelt's New Deal were harbingers of a more general expansion of federal legislative power over the economy in response to the Great Depression. A sea change occurred in a short span of years in which President Roosevelt, Congress, and the Supreme Court embraced the social control of finance. The Warren Court of the 1960s, which became known for its liberalism, revealed its ardently purposive approach to statutory interpretation through its securities law cases. And in the 1970s, the impact of President Nixon's appointment of strict constructivists to the Court was more discernible in securities law than in constitutional law, the field which had motivated his agenda.

Further, the authors add to these examples of securities law's bellwether status the observation that the history of securities law offers a vantagepoint into understanding the work of the Court more generally. Pritchard and Thompson write, "[O]ur narrative provides three distinct illustrations of the Court at work: one driven by ideological consensus, the second dominated by an individual with expertise unmatched by his colleagues, and the third seemingly random."[72] On the first, the authors highlight the broad consensus achieved largely through Roosevelt's deft choices in appointments—"th[e] combination of executive branch experience, trial by fire during the Court-packing battle, political advising, and political ambition produced justices who were of one mind with Roosevelt on the central question of government control over the economy."[73] Although Frankfurter had made notable contributions to the securities laws, no individual justice was leading the way in achieving Roosevelt's reform

70. PRITCHARD & THOMPSON, *supra* note 16, at 256, 266, 272.
71. *Id.* at 273.
72. *Id.* at 252.
73. *Id.* at 259.

agenda in finance, and in fact Frankfurter's limited attempt to bring judicial scrutiny to bear on the agency did not carry the day. The numbers reflect that the Court's securities law decisions stirred little disagreement before 1972.[74] And in the 1970s, "Powell dominated his era, but that period also demonstrates the critical importance of counting to five in Supreme Court lawmaking."[75] In pivotal cases of the 1970s, Powell had to attract the median justice to his side. After Powell's retirement, the Court had neither an ideological consensus nor a strong leader in the field of securities law, contributing to the trend toward fewer decisions in the area, more unpredictability, and generally less significance. With the evolving composition of the Court over the years and the work of its members, we see a body of law that has shifted from bellwether status to a random walk.

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Although Pritchard and Thompson do not attempt to predict the future of securities law in the Supreme Court, their detailed history provides an extraordinary resource for contextualizing the present moment. In the moment itself it might be difficult to discern whether any notable individuals will rise to the level of past pioneers and counterrevolutionaries and whether a new wave of developments is building toward a larger shift, but one might be better positioned to observe trends as they arise once one becomes acquainted with the past.

Readers might particularly benefit from the concluding chapter's vision of securities law's transformation. Notably, during the period of securities law's bellwether status, the Court varied between deference to the SEC and judicial skepticism of overreach. Current debates, such as reflected in the litigation concerning the climate-related disclosure rules, have parallels to the past in which the scope of the agency's authority and the proper scrutiny to apply to administrative rulemaking and enforcement have provoked repeated inquiry. The Court has crafted and re-crafted various answers to questions of boundaries.

Further, while history helps us see that some debates are not new, and a permanent and definitive answer will likely be elusive, it also illuminates areas in which change is afoot. While securities law appears unlikely to return to bellwether status, the random walk might not continue in the same way as decades past.

One indication of this potential change appears in the relatively small appearance made by the First Amendment in Pritchard and Thompson's

74. *Id.* at 257 (noting that less than twenty percent of the Court's securities docket in this period generated any substantial opposition).

75. *Id.* at 251.

history. As they note, "[t]he question of potential First Amendment limits on the SEC's authority did not make it to the Court until the 1980s, after the Court began to extend limited constitutional protection to 'commercial speech' in cases like *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*."[76] But as they document, in 1985 the Court sidestepped the First Amendment issue that arose in *Lowe v. SEC*, involving the publication of nonpersonalized investment advice and commentary in securities newsletters.[77] Pritchard and Thompson then assert that the Court's larger embrace of corporate constitutional rights in cases such as *First National Bank of Boston v. Bellotti* and *Citizens United v. Federal Election Commission* "did not implicate the securities laws."[78] They conclude this point by noting that "[s]ecurities law and corporate law continued as separate bodies of law" despite the considerable controversy provoked by this series of cases.[79]

Returning to this Essay's starting point, with recent litigation involving disclosure rules ranging from climate to stock buybacks, we see that securities laws may no longer continue to avoid First Amendment scrutiny. Although for many years observers believed the First Amendment was inapplicable to securities regulation,[80] recent cases in the federal courts

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76. *Id.* at 118; 447 U.S. 557 (1980) (establishing a four-part test for commercial speech regulation).

77. 472 U.S. 181 (1985) (holding that petitioners' publications fell within a statutory exclusion of the Investment Advisers Act for bona fide publications).

78. PRITCHARD & THOMPSON, *supra* note 16, at 121; 435 U.S. 765 (1978) (striking down on First Amendment grounds a state statute prohibiting corporate expenditures for the purpose of influencing the vote on ballot referenda); 558 U.S. 310 (2010) (striking down on First Amendment grounds a federal statute prohibiting corporations from using general treasury funds for independent political expenditures). In their reasoning, *Bellotti* and *Citizens United* notably referred to dissenting shareholders having access to "the procedures of corporate democracy" to protect against abuse. 435 U.S. at 794; 558 U.S. at 362, 370. The proxy and shareholder proposal rules of Section 14(a) of the Exchange Act and SEC Rule 14a-8 are often conceived of as mechanisms for "corporate democracy." *See* Report of the SEC, Proposal to Safeguard Investors in Unregistered Securities, H.R. Doc. No. 672, 79th Cong., 2d Sess. 18 (1946) (stating that proxy rules are "probably the most useful of all the disclosure devices established by our various acts and represent an effective contribution to corporate democracy"); Sarah C. Haan, *Civil Rights and Shareholder Activism:* SEC v. Medical Committee for Human Rights, 76 WASH. & LEE L. REV. 1167 (2019) (discussing Rule 14a-8 shareholder proposals and conceptions of "corporate democracy"); Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 579–81 (2021) (discussing Rule 14a-8 shareholder proposals and "corporate democracy"); *see also* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 262 (2016) (discussing "issues of democratic transparency, participation, accountability and enforcement" that arise in shareholder proposal settlements concerning corporate political spending and disclosure).

79. PRITCHARD & THOMPSON, *supra* note 16, at 121.

80. Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 223 (1990) ("The received wisdom for fifty years has been that the [F]irst [A]mendment is inapplicable to speech relating to the operation of securities markets."); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 318 (2018) (noting that "[m]any activities that are colloquially considered 'speech' are not subject to constitutional challenge, let alone review or decision: the regulation of

suggest this could be the next "jurisprudential train wreck."[81] Increasingly, securities laws are being challenged under doctrinal frameworks of compelled or commercial speech, with debate brewing over the relevant standard of scrutiny.[82] Likewise, other indications of potential change appear on the horizon from other areas of doctrinal evolution in the Court, from the birth of the new "major questions doctrine" to attempts to dismantle or dramatically reshape the deferential *Chevron* review for an agency's reasonable interpretation of an ambiguous statute.[83] Instead of securities law as a bellwether for the Court's direction, it could conversely be one of many areas of law impacted by seismic shifts in administrative law and other key legal transitions.

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contracts, commercial and securities fraud, conspiracy and solicitation, workplace harassment, the compelled speech of tax returns, and large swaths of the administrative state, including antitrust, securities, and pharmaceutical regulation, to name just a few").

81. *See, e.g.*, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (striking down the SEC's conflict minerals disclosure rule on First Amendment grounds); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 616 (2006) (arguing there is an "impending jurisprudential train wreck in the realm of securities regulation"); Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 247–54 (2021) (discussing how *Citizens United* "launched a thousand ships in corporate governance" and "securities regulation increasingly appears to be on a collision course with the First Amendment").

82. *See, e.g.*, Sarah C. Haan, The First Amendment and the SEC's Proposed Climate Risk Disclosure Rule (June 16, 2022) (manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4138712 [https://perma.cc/D5U9-FYH9] (examining securities disclosure and the First Amendment through the lens of debate concerning the SEC's climate-related disclosure rule); Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033 (2022) (exploring whether greenwashing can be regulated consistent with the First Amendment); Sean J. Griffith, *What is "Controversial" About ESG? A Theory of Compelled Commercial Speech under the First Amendment*, 101 NEB. L. REV. 876, 882 (2023) (arguing the SEC's proposed climate-related disclosure rules likely "could not survive a First Amendment challenge").

83. *See, e.g.*, Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) (exploring significant recent developments in the major questions doctrine); Jody Freeman & Matthew Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1 (2023) (observing how the major questions doctrine could make it more difficult for the federal government to address new problems under broadly worded statutes and examining how the doctrine could make the policymaking process less democratic); Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 251 (2024) (identifying two justifications for the major questions doctrine and arguing that both "run into serious objections"); Donna M. Nagy, *The SEC and "Major Questions Doctrine" Questions*, 26 U. PA. J. BUS. L. (forthcoming 2024) (manuscript on file with author) (predicting that because of clear congressional authorization and a longstanding history, SEC disclosure rules will survive under the major questions doctrine); Amy Howe, *Supreme Court Likely to Discard* Chevron, SCOTUSBLOG (Jan. 17, 2024), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/ [https://perma.cc/F9NX-YHTD] (discussing Supreme Court argument in *Relentless, Inc. v. Dep't. of Commerce* and *Loper Bright Enters. v. Raimondo*).

CONCLUSION

After the pioneers, waves, and random walks that have animated the history of securities laws in the U.S. Supreme Court, we might now be on the precipice of a new chapter. Pritchard and Thompson's superb book, *A History of Securities Law in the Supreme Court*, illuminates with rich archival detail how the Court's view of the securities laws and the SEC have changed over time and how individuals have influenced this history. The book provides an invaluable resource for understanding nearly a century's worth of Supreme Court jurisprudence in the area of securities law and much needed context for appreciating what is coming next.