The SEC, the Supreme Court, and the Administrative State

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INTRODUCTION

To paraphrase Gilbert & Sullivan, the SEC is the very model of a modern administrative agency. Although it was not the first federal regulatory agency, it was a centerpiece of the New Deal. A who's who of New Deal stalwarts participated in its creation.[1] Two of its first three chairs, Joseph P. Kennedy and William O. Douglas, viewed themselves as viable candidates for the Presidency. Douglas's successor Jerome Frank was appointed to the Second Circuit. One of its early staff attorneys, Louis Loss, became a professor at Harvard Law School and the intellectual founder of

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1. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 39–72 (3d ed. 2003).

securities law as an academic discipline. For an ambitious lawyer, the early SEC was the place to be.[2]

As Pritchard and Thompson's meticulously researched and insightful book points out, the SEC also enjoyed an extended honeymoon with the Supreme Court beginning when President Roosevelt's appointees began to take their seats.[3] With only minor exceptions, the Court found the agency's exercise of its powers to be consistent with the Constitution and its governing statutes.

The SEC was therefore at the forefront of what has come to be known as the administrative state, or a system of governance in which a large portion of society's rules of conduct are written, enforced, and adjudicated by regulatory agencies under deferential oversight from the courts. After some initial major setbacks in the Court,[4] the combined legislative, executive, and judicial functions of the so-called fourth branch were mostly uncontroversial by the postwar era.[5]

The brief return of Republican control of the Presidency, House, and Senate in 1953 did not overthrow the New Deal model of federal regulation through independent agencies. But personnel and budget matter also, and under Presidents Truman and Eisenhower, the SEC exercised its statutory powers less aggressively, in what Pritchard and Thompson call a "decade-long slumber."[6]

The SEC awoke from that slumber newly invigorated in the 1960s under Chairman William Cary. The agency made creative and mostly successful use of its own general-purpose antifraud rule, Rule 10b-5,[7] to combat insider trading. The SEC found a sympathetic ear in the Second Circuit, enabling it to plant the seeds of insider trading law.

The SEC's honeymoon period in the Supreme Court ended abruptly in the 1970s, complicating its battle against insider trading. Pritchard and Thompson refer to this as a "counterrevolution."[8] I think it more accurate to call it a "retrenchment," for nothing in the Court's 1970s and 1980s

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2. *See* Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 160 (1990) ("Some observers have attributed [the SEC's] success to the early personnel of the agency . . . .") (footnote omitted).

3. ADAM C. PRITCHARD & ROBERT B. THOMPSON, A HISTORY OF SECURITIES LAW IN THE SUPREME COURT 8–9 (2023).

4. *See* Crowell v. Benson, 285 U.S. 22, 54–65 (1932) (restricting power of agency to adjudicate "fundamental or 'jurisdictional'" facts); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the [agency] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

5. *See* Peter L. Strauss, *The Place of Agencies in the Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

6. PRITCHARD & THOMPSON, *supra* note 3, at 126.

7. 17 C.F.R. § 240.10b-5 (2024).

8. PRITCHARD & THOMPSON, *supra* note 3, at 14.

securities law jurisprudence called into question the basic model of governance by administrative agency.

Because Pritchard and Thompson focus on the relationship between the SEC and the Supreme Court and the evolution of legal doctrine, they provide a largely monocausal explanation of the retrenchment—Justice Powell did it. Powell was an experienced corporate and securities law practitioner with extensive knowledge of the securities laws and their practical application. He also had great faith in the free enterprise system and tended to give statutory text priority over legislative purpose. These intellectual commitments, together with the passing of the New Deal generation from the Court, put Powell in a perfect position to lead the retrenchment. Once he retired, the Court began a "random walk," neither consistently expanding nor contracting the SEC's powers.

My objective is to widen the focus from the interaction between the SEC and the Supreme Court and explore a few intellectual, political, and cultural trends that contributed to the retrenchment. I will use those explorations to ask and suggest answers to two still broader questions: Would the retrenchment have happened, perhaps with some delay, had Justice Powell never served on the Court? And what do the retrenchment and its aftermath portend for the administrative state?

I begin by discussing the Progressive Era belief in governance by administrative experts and its influence on the New Deal in Section II. Section III describes the growth of an intellectual movement skeptical of regulators' ability to improve consumer outcomes and a resulting shift in regulatory principles. Section IV turns to current developments in the relationship between the judiciary and the regulatory state and considers the SEC's future. Section V concludes.

I. The Growth of Economic Regulation

Early federal regulatory agencies such as the Interstate Commerce Commission (1887)[9] and the Federal Trade Commission (1914)[10] were the product of the Progressive Era of the late nineteenth and early twentieth centuries. State governments engaged in their own burst of regulatory activity during the same period. For example, between 1885 and 1922, thirty-seven states created public utility commissions.[11]

9. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

10. Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

11. George L. Priest, *The Origins of Utility Regulation and the "Theories of Regulation" Debate*, 36 J.L. & ECON. 289, 296–97 (1993).

Legislatures created these early regulatory bodies to reduce consumer harm from natural monopolies.[12] Public utilities were thought to be natural monopolies, subject to declining marginal costs across the entire relevant range of output. A single provider would therefore dominate any one geographic area. Utility commissions had the authority to control the utility's prices and rates of return and therefore, in principle, to ensure that the public enjoyed competitive pricing notwithstanding the absence of actual competition.

Influential progressive economists of the period believed that natural monopoly was not limited to the utility sector. Instead, they saw it as a pervasive feature of industrial life.[13] In their view, new technologies relentlessly produced such economies of scale that larger firms would always be more efficient than smaller firms. Absent government action, monopoly pricing would be the norm rather than the exception.

As new technology-driven industries arose, therefore, new regulatory agencies sprouted alongside them. Eventually, federal agencies regulated railroads, long-distance trucking, airlines, telecommunications, hydroelectric power, and energy distribution, all on the grounds that the industry was insufficiently competitive.[14] The agencies often had the authority to regulate prices, output, entry, and/or the type or locations of service. In short, these so-called "economic" regulations constrained core business decisions and industry structure.

To the extent that these far-reaching regulatory powers seemed a step in the direction of central planning, some progressives found this all to the good. Economists Wesley Clark Mitchell and John Commons did not merely believe that monopoly was the endpoint of most technology-heavy industries. They concluded that regulated monopolies were superior to "ruinous" competition by individually self-interested firms.[15]

These economists argued that the system of command that operates within a large firm is more efficient than the chaotic, wasteful system of coordination among firms through markets.[16] They drew, in turn, on Frederick Winslow Taylor's description of management as the science of minimizing the cost of a unit of output and Thorstein Veblen's notion of business decision-making as fundamentally a matter of tinkering with the dials rather than reacting to market signals.[17]

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12. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 15–16 (1982).

13. *See* THOMAS C. LEONARD, ILLIBERAL REFORMERS 56–57 (2016).

14. *See* BREYER, *supra* note 12, at Appendix I (listing federal agencies and their missions).

15. *See* Richard A. Gonce, *John R. Commons's "Five Big Years": 1899–1904*, AM. J. ECON. & SOCIO. 755, 764 (2002).

16. LEONARD, *supra* note 13, at 55–57.

17. THORSTEIN VEBLEN, THE ENGINEERS AND THE PRICE SYSTEM (1921); FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911).

If managing a business is merely a matter of optimizing the technical processes of production and distribution, then, in principle, it is amenable to the centralized control of a planner who has the relevant data. Taken to its logical extreme, each industry should consist of a single firm directed by technical experts. Moreover, to ensure that the industry pursues the public good rather than the maximization of (monopoly) profits, those experts must be agents of the government.

President Franklin D. Roosevelt's "brain trust" included a few committed central planners. In 1932, Rex Tugwell predicted in the pages of the *American Economic Review* that the country might soon establish a "consultative" planning body (as he had suggested to FDR):

> [I]t will be a c lear recognition, one that never can be undone, that order and reason are superior to adventurous competition. It will demonstrate these day by day and year by year in the personnel of a civil service devoted to disinterested thinking rather than romantic hopes of individual gain.[18]

Tugwell also advised Roosevelt that it was essential for the government to allocate capital to ensure that scarce funds would flow to the industries in which they were most needed.[19]

Roosevelt did not endorse Tugwell's vision of a planned economy. For securities markets, he favored a model based on the disclosure of material facts over one that would require companies to receive government permission to offer securities to the public.[20] The Securities Act of 1933 embodied the "full disclosure" philosophy. William O. Douglas famously criticized the Securities Act for not going far enough. In his view, the Act failed to recognize that the triumph of big business was inevitable and required an equally big and intrusive government response. The government's control of business

> must envisage a wide range—from the increments of profit and control (which are incident to the constitution and form of the organization) to the terms and conditions of the organization, the kind and amount of securities which may be issued, the terms on which they

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18. Rexford G. Tugwell, *The Principle of Planning and the Institution of Laissez Faire*, 22 AM. ECON. REV. PAP. & PROC. 75, 84 (1932). Tugwell's largely appreciative account of Soviet central planning is similarly naïve. *See* Rexford G. Tugwell, *Experimental Control in Russian Industry*, 43 POL. SCI. Q. 161, 175–76 (1928) (contending that there is no "evidence of rigging" in Soviet data showing that factories invariably and precisely meet their planning quotas, and attributing this success to effective state allocation of capital).

19. SELIGMAN, *supra* note 1, at 40–41.

20. *Id*. at 51-72.

> may be issued, and the persons to whom they may be sold. Ultimately this may run to fascism or socialism.[21]

While the New Deal rejected central planning, it was clearly influenced by the underlying theory that disinterested experts could produce a more stable and fair economic system than self-interest mediated through markets.[22] As Pritchard and Thompson describe, this mindset affected the securities laws—most notably through the Public Utility Holding Company Act, a far-reaching statute giving the SEC the authority to remake the entire corporate and financial structure of the electric and gas utility industries, and the Chandler Act, which gave the SEC a powerful advisory role in corporate bankruptcy reorganizations. Other agencies regulating communications, aviation, and natural gas transmission, among others, were restructured and given enhanced authority during the New Deal.[23]

The reality, of course, did not match the theory. When it came to economic regulation, agency expertise was simply a synonym for agency resources and agency power. A regulatory agency, if it chose, could throw substantial manpower and money into an investigation of a firm's cost structure or its financial and business decisions.

For example, Section 11(a) of PUHCA ordered the SEC, among other things, "to examine the corporate structure of every registered holding company and subsidiary company thereof, . . . to determine the extent to which the corporate structure . . . may be simplified".[24] Section 11(b) ordered it to "require by order, after notice and opportunity for hearing, that each registered holding company . . . take such action as the Commission shall find necessary to limit the operations of the holding-company system . . . to a single integrated public-utility system".[25] To undertake this task, the SEC undertook minute examination of the details of the corporate structure, locations of generation plants, transmission lines, and service

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21. William O. Douglas, *Protecting the Investor*, 23 YALE REV. 522, 530 (1934).

22. PRITCHARD & THOMPSON, *supra* note 3, at 31 ("The New Deal vision was that administrative experts, not business leaders, should control the direction of the economy.").

23. *See, e.g.*, Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. § 151 et seq.) (replaced the Federal Radio Commission with the Federal Communications Commission (FCC)); Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (transferred federal responsibilities for non-military aviation from the Bureau of Air Commerce to a new, independent agency called the Civil Aeronautics Authority (CAA), which was later split into the Civil Aeronautics Board (CAB) to regulate carriers and the Civil Aeronautics Administration (later, the Federal Aviation Administration) to control air traffic); Natural Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 821 (codified at 15 U.S.C. § 717 et seq.) (gave the Federal Power Commission (FPC) (later, the Federal Energy Regulatory Commission) control over the regulation of interstate natural gas sales).

24. Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, § 11(a), 49 Stat. 820 (codified at 15 U.S.C. § 79 et seq.) (repealed 2005).

25. Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, § 11(b), 49 Stat. 820 (codified at 15 U.S.C. § 79k) (repealed 2005).

areas, directions and levels of power flows, and costs and revenues of holding company systems.[26]

Other agencies carried out case-by-case factfinding on a similar scale incident to their control over prices or entry. The Civil Aeronautics Board had the authority to determine the routes carriers could fly and the rates they could charge.[27] In the exercise of this authority, the Board, among other things, examined commodity and passenger flows among cities and regions.[28] The Federal Communications Commission had the authority, among other things, to assign frequencies to stations, determine the type and power consumption of equipment, and stipulate the time during which a station could operate.[29] Its decisions on spectrum allocation attracted widespread participation of potential operators and could generate thousands of pages of testimony and other submissions.[30]

In such a system, a high level of judicial deference was inescapable. What was a court to do when told that an agency had determined, after a lengthy field examination, analysis of voluminous data, and weeks of testimony, that a specific carrier's rate for a given route was excessive or a specific utility's properties were incapable of interconnection? *De novo* factfinding seems utterly out of the question. And how was a court to determine whether the agency was conveniently recharacterizing policy preferences as findings of fact when no judicial personnel had participated in the investigation?

The era of deference to agency judgment, then, undoubtedly had something to do with the Court's personnel. But it also had a great deal to do with the types of decisions regulators were empowered to make during the immediate post-New Deal era and the essentially adjudicatory procedures used to make those decisions. Whether agency personnel in fact had any special knowledge, training, or experience, they were "expert" because no court could easily replicate their work and would have recoiled from the attempt.

II. THE RETRENCHMENT

Justice Powell was the central figure in the Court's securities law retrenchment. But was he an essential figure? Several intellectual and economic trends intersected in the 1970s, creating pressure to stop the

26. *See, e.g.*, Cities Service Power & Light Co., 14 S.E.C. 28 (1943).

27. *See* Civil Aeronautics Act of 1938, ch. 601, §§ 401 (certificate of public convenience and necessity), 1002(d) (authority to prescribe rates and practices), 52 Stat. 973.

28. *See, e.g.*, Directional Freight Rates, 15 C.A.B. 873 (1952).

29. *See* Communications Act of 1934, ch. 652, §303, 48 Stat. 1064.

30. *See, e.g.*, General Mobile Radio Serv., 13 F.C.C. 1190, 1192 (1949).

continual expansion of administrative discretion. This section will examine those trends.

A. Setting the Stage

At the peak of the SEC's honeymoon period, the most prominent voice against central planning was that of Friedrich Hayek.[31] Hayek noted that information about supply and demand is widely dispersed. No one person or organization—even a planning bureau—has access to more than a fraction of that localized information. Fortunately, prices act as a statistic for this dispersed information. Just as a glance at a baseball player's batting average or runs batted in tells me whether he is having a good or a bad year without watching every at bat, so too the price of wheat tells me about supply and demand conditions without knowing the output of every farm or the production of every bakery. Suppressing the price mechanism in favor of central planning destroys the most useful economic data of all.

Hayek's principal target, however, was European socialism, not American administrative agencies. He taught at the London School of Economics during the postwar period as the Attlee government began to nationalize the coal, electricity, railway, and steel industries, among others. By contrast, state ownership of the means of production never became significant in the United States, making Hayek's analysis appear less relevant to American political economy. Indeed, the *New York Times* review of *The Road to Serfdom* concluded that Hayek's "sad and angry little book" had ignored benign examples of "planning scattered here and there for useful specific purposes" as in the U.S. utility industry.[32]

A sustained academic critique of regulation as practiced in the United States emerged a decade later. At the University of Chicago, the economist Aaron Director co-taught antitrust with law professor Edward Levi during the 1950s.[33] Director introduced law students, including Robert Bork, to the idea that antitrust doctrine could and should be informed by economic analysis. In 1958, Director established the *Journal of Law & Economics*. In its inaugural issue, his colleague Gary Becker threw down a gauntlet before the standard argument for economic regulation:

> If the industry were a "natural" monopoly, price could be made equal to marginal cost either indirectly by government regulation or

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31. *See* F.A. HAYEK, THE ROAD TO SERFDOM (1944); F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

32. *See* Orville Prescott, *Books of the Times*, N.Y. TIMES, Sept. 20, 1944, at 21.

33. *See* Douglas G. Baird, *The Future of Law and Economics: Looking Forward*, 64 U. CHI. L. REV. 1129, 1129 (1997); Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J.L. & ECON. 163, 183–84 (1983).

> directly by government administration. Therefore, the recommendation is . . . government administration of natural monopolies.
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> The non-sequitor [sic] in this argument is the sentence beginning with "therefore"; . . . Demonstrating that a set of government decisions would improve matters is not the same as demonstrating that actual government decisions would do so.[34]

Thus began a series of articles raising theoretical and empirical challenges to specific regulatory programs.[35] In the journal's second issue, Ronald Coase, then at the University of Virginia, wrote a critique of the Federal Communications Commission.[36] The FCC, the successor to regulatory agencies and bureaus dating back to the 1910s, had the authority to license radio and television stations, among other things. The underlying theory was that scarcity of spectrum made it necessary for the government to choose who could speak through this medium and who could not, a conclusion that even nervous free-speech advocates took for granted. Yet Coase pointed out that the problem was not scarcity—a characteristic of all factors of production—but the lack of property rights in the radio spectrum.

In the early 1960s, George Stigler challenged, empirically, the notion that regulation improved consumer welfare. With Claire Friedland, he used a regression model of electricity rates to argue that these rates were no lower in states with public utility commissions than in those without.[37] In another paper of particular interest for this discussion, he used a time series comparison of the long-term performance of public offerings before and after the Securities Act of 1933 to argue that its registration and disclosure requirements did not improve investor outcomes.[38]

In 1971—the year before Powell's arrival at the Court—Stigler published a more thoroughgoing critique, *The Theory of Economic Regulation*. He argued that "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."[39] This theory of regulation as a benefit sold by regulators to industries sharply contradicted the dominant view that regulation existed to protect consumers against (ubiquitous) monopolies.

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34. *See* Gary S. Becker, *Competition and Democracy*, 1 J.L. & ECON. 105, 105 (1958).
35. *See* Priest, *supra* note 11, at 290–92.
36. *See* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).
37. *See* George J. Stigler & Claire Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J.L. & ECON. 1 (1962).
38. *See* George J. Stigler, *Public Regulation of the Securities Markets*, 37 J. BUS. 117 (1964).
39. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

The combined force of these critiques began to change attitudes about the pervasive use of price and entry regulation. Equally influential, if not more so, was the dismal state of the economy as the 1970s progressed. Inflation, as measured by the annual rate of growth of the Consumer Price Index, had averaged 2.2% during the 1950s and 1960s. It grew to 7.1% during the 1970s and topped 11% in 1974 and 1979. The term "stagflation" came into common use, first in the U.K. and then in the U.S. Suddenly, criticism of price and entry regulation was not limited to right-leaning professors of law and economics. On the left, politicians such as Edward Kennedy, academics such as Stephen Breyer, and public intellectuals such as Ralph Nader argued for a change in regulatory direction.[40]

B. A New Style of Regulation

The widespread belief that regulatory oversight of prices and entry was stifling competition produced a shift in regulatory style in the late 1970s. The shift is commonly termed "deregulation," although the term is misleading. There was no long-term reduction in the number of commands to which businesses were subject nor in the range of economic sectors subject to regulatory oversight. While a few existing regulatory agencies were abolished, the creation of new agencies to solve new problems continued apace.

What changed was the *type* of commands regulatory agencies issued and the way in which they issued them. In transportation and telecommunications, regulators would no longer determine prices, quantities, and entry. Regulators would seek to foster rather than suppress competition. The notion of "ruinous competition" was discredited and abandoned. As I have noted elsewhere, the term "competition" did not appear a single time in the original Securities Exchange Act, but after a set of amendments in 1975, the word was sprinkled liberally throughout the statute.[41]

The new justifications for regulation were externalities, or costs not borne by firms, and information asymmetries. The Environmental Protection Agency was created in the 1970s in recognition of the fact that rational producers might choose to pollute more than the socially optimal amount because they do not bear the full social cost of polluting but reap the benefits.[42] The Department of Labor received new powers to regulate pension plans with the adoption of the Employee Retirement Income Security Act

40. *See* Reuel Schiller, *The Ideological Origins of Deregulation*, REGUL. REV. (Mar. 18, 2019), https://www.theregreview.org/2019/03/18/schiller-ideological-origins-deregulation/ [https://perma.cc/NA32-UFHT].

41. *See* Paul G. Mahoney, *Equity Market Structure Regulation: Time to Start Over*, 10 MICH. BUS. & ENTREP. L. REV. 1, 10–11 (2021).

42. *See* Reorganization Plan No. 3, 84 Stat. 2086 (1970).

of 1974, based on the idea that employees and pensioners could not effectively monitor the behavior of pension plan sponsors.[43] The Commodity Futures Trading Commission was established in 1974 to assume the Secretary of Agriculture's regulatory authority over agricultural futures markets and to regulate the growing market in financial futures to bolster the stability of futures exchanges and clearinghouses beyond what was individually rational for each.[44]

These intellectual changes affected the SEC, which was relieved of its oversight role in corporate restructurings in 1978.[45] By the 1970s, the restructuring of the public utility industry was already complete and PUHCA had become a backwater. It was finally repealed almost as an afterthought in 2005.[46]

These changes in the substance of agency decisions coincided with a change in the process by which agencies issued their commands. Agencies had previously acted principally through case-by-case adjudication, which was useful for setting prices or determining whether a new entrant should receive a certificate of public convenience and necessity. By the 1970s, however, agencies were more frequently acting through general rulemaking.[47]

These changes in regulatory method had implications for judicial deference to agency decision making. As the regulatory system largely ceased to determine industry structure and pricing, by process of elimination, more of its attention became focused on issues of fairness, fiduciary duty, overreaching, and deception. This meant that agencies were more often on substantive territory with which courts were already thoroughly familiar. It would have taken considerable nerve for a court to second guess the SEC on whether a utility holding company should issue equity or debt. It was easy to second guess the agency on when insider trading constitutes fraud.

Courts also began to interpret the vague standards the Administrative Procedure Act applied to notice and comment rulemaking to impose new procedural requirements.[48] They required agencies to identify the

43. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

44. Commodity Futures Trading Commission Act of 1974, 88 Stat. 1389 (codified in 7 U.S.C. § 4a, and recodified as 7 U.S.C. § 2).

45. *See* PRITCHARD & THOMPSON, *supra* note 3, at 66.

46. Energy Policy Act of 2005, Pub. L. No. 109-58, at §§ 1261-1277, 119 Stat. 594 (codified at 42 U.S.C. §§ 16451–63 (2006)).

47. *See* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376–77.

48. *See* 5 U.S.C. § 553 (2018) (procedures for notice and comment rulemaking); *id.* § 706 (scope of judicial review).

reasoning behind their rules[49] and to respond to the public's comments.[50] Here, too, courts were on territory that they knew at least as well as the agencies themselves. And for those procedural requirements not to be mere check-the-box compliance exercises, courts had to ask whether the agencies' reasoning and responses made any sense.[51] Deference looks different when the court has greater transparency into agency procedures.

C. Lawyers and the Retrenchment

The retrenchment was not just a function of economists' changing views about economic regulation. Lawyers' views about the relative importance of statutory text and legislative purpose were changing also. Purposivism reached its high-water mark in securities law in 1964 with the decision in *J.I. Case Co. v. Borak*.[52] The issue was whether a private right of action exists under Section 14(a) of the Exchange Act, which makes it unlawful to solicit a proxy in contravention of SEC rules but does not by its terms confer a private right of action for the violation of any such rules.[53] The Court made short work of the statute's silence, noting its "broad remedial purposes" and stating that "[w]hile this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."[54]

In the 1970s, however, the Court began to pay closer attention to the conventional meaning of statutory text.[55] A little over a decade after the *Borak* decision, the principle that "remedial" legislation must be read "not

49. *See, e.g.*, FEC v. Rose, 806 F.2d 1081, 1088 (D.C. Cir. 1986) ("an agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct").

50. *See, e.g.*, Home Box Off., Inc. v. FCC, 567 F.2d 9, 35–36 (D.C. Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public"), *cert. denied*, 434 U.S. 829 (1077).

51. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962) (setting aside agency action where the agency failed to "articulate any rational connection between the facts found and the choice made").

52. J.I. Case Co. v. Borak, 377 U.S. 426 (1964); PRITCHARD & THOMPSON, *supra* note 3, at 172–73.

53. Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, § 14(a), 48 Stat. 881 (codified at 15 U.S.C. §78n(a)(1)).

54. 377 U.S. at 432.

55. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626-27 (1990) (describing "soft" plain meaning rule); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894 (1982) ("the Court now invokes a literalist reading of statutory terms as a surrogate for actual legislative intent") (footnote omitted).

technically and restrictively, but flexibly to effectuate its remedial purposes"[56] was on the way out.

The Court's rediscovery of statutory text as a constraint on agency discretion cannot be attributed solely, or even principally, to Powell's arrival. The year before Powell joined the Court, it rejected, without dissent, a decision of the Secretary of Transportation that was inconsistent with the "plain and explicit" language of the relevant statute.[57] Nor was Powell the only Justice to depart from the interpretive style of *Borak*. As the decade progressed, Chief Justice Burger,[58] and Justices Stewart,[59] White,[60] Rehnquist,[61] and Stevens[62] would all write opinions rejecting purposive readings that conflicted with legislative text. Rehnquist's opinion in *Touche Ross & Co. v. Redington* was a death knell for the *Borak* position: "generalized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.'"[63]

Powell himself did not arrive to the Court a committed textualist. He dissented from the Chief Justice's opinion in *TVA v. Hill*, which concluded that the plain meaning of the Endangered Species Act supported a district court's injunction against completion of a dam that would destroy the habitat of the snail darter.[64] Powell found the majority's reading of the text "an extreme example of a literalist construction, not required by the language of the Act and adopted without regard to its manifest purpose."[65]

56. *See* SEC v. Cap. Gains Rsch. Bureau, 375 U.S. 180, 195 (1963).

57. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 411 (1971).

58. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 172–73 (1978) ("It may seem curious to some that the survival of a relatively small number of three-inch [snail darters] . . . would require the permanent halting of a virtually completed dam . . . . We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.").

59. *See* Nat'l R.R. Passenger Corp. v. Nat'l Assn. of R.R. Passengers, 414 U.S. 453 (1974) (using the *expressio unius* canon of construction to find no implied private right of action under a provision of Amtrak's organic statute).

60. *See* Santa Fe Indus. v. Green, 430 U.S. 462, 472 (1977) ("[t]he starting point in every case involving construction of a statute is the language itself") (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976) (Powell, J.)).

61. *See* SEC v. Sloan, 436 U.S. 103, 116 (1978) ("Even assuming, however, that a totally satisfactory remedy—at least from the Commission's viewpoint—is not available in every instance in which the Commission would like such a remedy, we would not be inclined to read §12(k) [of the Exchange Act] more broadly than its language and the statutory scheme reasonably permit.").

62. *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623–24 (1978) ("In this case, however, we need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us. . . . [A] desire for uniformity cannot override the statute.").

63. Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (quoting SEC v. Sloan, 436 U.S. 103, 116 (1978)).

64. Tennessee Valley Auth. V. Hill, 437 U.S. 153 (1978); *see also* discussion *supra* note 58.

65. 437 U.S. at 195, 202 (Powell, J., dissenting).

As Pritchard and Thompson observe, in 1974, Powell endorsed the idea that the sale of all the stock of a business was not the sale of a "security" despite the clear language of the Securities Act and Exchange Act defining "any . . . stock" as a security.[66] His rationale was that such a result was contrary to the statutes' investor protection purpose. By the time the question came squarely before the Court in 1985, however, Powell's majority opinion in *Landreth Timber Co. v. Landreth* gave the statutory language its plain meaning.[67]

The textualist tide rose substantially between 1974 and 1985. In the mid-1970s, Robert Bork, a critic of purposive interpretation, became the Solicitor General of the United States. Another critic, Frank Easterbrook, would become Deputy Solicitor General. The Solicitor General's views carry weight with the Court and constrain the arguments an agency makes in litigation.[68]

It is interesting to note that prior to the 1970s, the SEC appeared routinely as amicus in securities cases to which it was not a party. Its views shaped key cases taking an expansive approach, including *Borak* and *Tcherepnin v. Knight*.[69] Following Bork's 1973 appointment as Solicitor General, however, the SEC ceased appearing as amicus as a matter of course in cases involving the securities laws. Notably, it sat out one of the seminal retrenchment cases, *Santa Fe Industries v. Green*.[70]

Meanwhile, academics, including Antonin Scalia, began to question the very notion of a legislative "purpose" discernable apart from the text of a statute.[71] In 1984, Frank Easterbrook argued that the rise of textualism was evidence of judges' increasing understanding that statutes were the result of interest group bargains that bore at best a random relation to the

66. *See* PRITCHARD & THOMPSON, *supra* note 3, at 108. The relevant provisions of the Securities Act and Exchange Act are codified at 15 U.S.C. § 77b(a)(1) and 15 U.S.C. § 78c(a)(10), respectively.

67. Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985).

68. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255 (1994).

69. *See* PRITCHARD & THOMPSON, *supra* note 3, at 277 (list of Supreme Court securities cases indicating government role in each).

70. Santa Fe Indus. v. Green, 430 U.S. 462 (1977).

71. *See, e.g.*, REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 90–91 (1975) ("[t]he disciplines of the legislative process are directed more to ascertaining agreement on the specific action to be taken in a bill than to attaining agreement on its legislative purposes"); Antonin Scalia, *Guadalajara! A Case Study in Regulation by Munificence*, REGULATION, Mar.–Apr. 1978, at 23, 27 ("Increasingly in recent years, however, the genuine occasion for delegation [to an agency] has been not the absence of congressional time but, after the expenditure of congressional time, the absence of congressional agreement."); Sean Donahue, *Limitations on Judicial Review: A Semiotic Interpretation of Statutes*, 7 UCLA-ALASKA L. REV. 204, 207 (1978) ("Concern over the use of legislative intent as an aid to statutory interpretation involves a determination that recourse to legislative intent is unpredictable, uncertain, often unknowable, speculative, and even unconstitutional.") (footnotes omitted).

public interest and should not be stretched farther than their explicit commands.[72]

By 1985, Bork, Scalia, and Easterbrook were all circuit judges, with Scalia soon to join the Supreme Court. Had Justice Powell never sat on the Court, textualism might have come to securities law with a delay. But it would have come nevertheless.

Indeed, it is possible (though highly speculative) that had Powell not sat on the Court, textualists would have had more freedom simply to reject the private right of action under Rule 10b-5. Pritchard and Thompson are surely correct to say that the Court granted certiorari in more securities cases because of Powell's influence—probably many more. Ironically, however, the Court's restrictive interpretations of Rule 10b-5 in *Blue Chip Stamps*, *Ernst & Ernst*, and *Santa Fe* gave the Court's imprimatur, on an almost yearly basis, to the existence of the implied private right of action.[73]

By the mid-1980s, even securities law professors had become skeptics of Rule 10b-5 class actions. John Coffee observed that the lawyer's profit-maximizing litigation strategy was inconsistent with the social objective of deterring fraud.[74] Janet Cooper Alexander used a sample of securities class action settlements to argue that liability was a function of litigation dynamics unconnected to whether the defendant had committed fraud.[75] And Joseph Grundfest, a former SEC Commissioner, argued that it would be normatively desirable for the SEC to "disimply" the private right of action.[76] It is interesting to ponder whether, absent the long string of Court precedent structuring the Rule 10b-5 cause of action in ever more minute detail, Justice Scalia might have persuaded a majority of his colleagues that the right of action was simply inconsistent with the language of Section 10(b). That door shut with the enactment of the Private Securities Litigation Reform Act, which indicated a clear Congressional acceptance of the Rule 10b-5 cause of action.[77]

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72. *See* Frank Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14–15 (1984) (contrasting purposive and textual interpretation and giving an economic rationale for the latter).

73. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Santa Fe Indus. v. Green, 430 U.S. 462, 472 (1977).

74. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

75. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

76. *See* Joseph A Grundfest, *Why Disimply?*, 108 HARV. L. REV. 727 (1995); Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961 (1994).

77. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

III. YOU SAY YOU WANT A COUNTERREVOLUTION: THOUGHTS ON THE SEC'S FUTURE IN THE SUPREME COURT

The Court's retrenchment cases of the 1970s and early 1980s limited securities fraud class actions, rejected the SEC's equality of access to information theory of insider trading liability under Rule 10b-5, and exemplified the Court's general shift toward textualism. The cases did not question foundational principles of the administrative state—among them, that Congress may delegate policy decisions within broad limits to an executive agency[78] and that courts should take a hands-off stance toward an agency's decisions in matters delegated to it.[79]

A. Courts Versus Agencies

Why didn't the retrenchment become a more general administrative law counterrevolution? Any answer is necessarily speculative. I offer my own thoughts for what they are worth.

Central figures in the shift from purpose to text in the interpretation of legal rules, including Robert Bork and Antonin Scalia, expressed deep concern about unelected officials usurping Congress's Constitutional authority. At the time of the retrenchment, however, the federal judiciary was the unelected body they wished to rein in. Conservative scholars, executive branch officials, and judges reacted to what they saw as the judicial overreach and activism of the Warren Court—so much so that overreach and activism in executive agencies appeared to them the lesser of two evils.

Alexander Bickel provided a normative baseline for criticizing activist courts by preaching the "passive virtues" of deciding no more than necessary and resisting the temptation to smuggle policy preferences into Constitutional interpretation.[80] Bickel's views strongly influenced his Yale colleague Robert Bork.[81] Shortly after his appointment to the bench, Bork argued that judicial activism would inevitably erode democratic governance and impose elite values on the rest of society.[82]

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78. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372, 409 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that, in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.") (citations omitted).

79. Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984).

80. *See* ALEXANDER M. BICKEL, POLITICS AND THE WARREN COURT (1965); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

81. *See* Stuart Taylor Jr., *Bork at Yale: Colleagues Recall a Friend But a Philosophical Foe*, N.Y. TIMES, July 27 1987, at 13 col. 1.

82. *See* Robert Bork, *The Struggle over the Role of the Court*, NAT'L REV., Sept. 17, 1982, at 1137.

These views about Constitutional interpretation migrated to statutory interpretation. Justice Scalia's 1995 Tanner Lectures argued that when construing statutes, federal judges should shed their common law mindset and recognize that they are not lawmakers, but mere agents carrying out the legislature's instructions.[83] John Manning has described Scalia's approach as requiring judges to look solely to sources external to themselves to find the meaning of statutes, which Manning calls the "anti-discretion principle."[84] It took the passive virtues to their logical conclusion.

It seems to me that conservative legal scholars and judges from roughly 1970 to 2000 were so focused on the anti-democratic potential of the courts that they failed to consider the anti-democratic potential of a semi-autonomous "fourth branch." One data point supporting my supposition is *Chevron U.S.A. v. National Resources Defense Council*.[85] The Court, in a unanimous 6-0 decision joined by Chief Justice Burger and Justice Powell, instructed courts to defer to the administering agency's interpretation of a regulatory statute unless that statute clearly answers the question at issue.

Justice Stevens' opinion brought democratic legitimacy directly to the fore: "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[86] The opinion noted that while agencies are not themselves elected, they serve under an elected executive.[87]

Stevens was not alone in assigning regulatory agencies to the democratically accountable category and judges to the unaccountable category. Justice Rehnquist also favored a narrow judicial role in reviewing agency action that falls within the traditional prerogatives of the executive branch.[88] Justice Scalia, although appointed after the *Chevron* decision, was an enthusiastic supporter through most of his time on the Court.[89]

B. Who Is the Least Dangerous?

Justice Stevens' democratic legitimacy argument does not directly address the separation of powers concern that the executive's role is to

83. Justice Scalia's Tanner Lectures on Human Values were published as ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

84. *See* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749 (2017).

85. 467 U.S. 837 (1984).

86. *Id.* at 866.

87. *Id.* at 865.

88. *See* Heckler v. Chaney, 470 U.S. 821 (1985) (agency decision to refrain from enforcement action not reviewable).

89. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 352 (1994) (Justice Scalia "has long been perceived as the Court's most enthusiastic partisan of the two-step method associated with the decision.").

enforce policy while Congress's role is to make it. Presidents have become adept at using agencies to further policies that the President supports but that Congress will not enact.

This is perhaps most visible in climate policy. The most recent two Democratic administrations have embraced the policy position that climate change can best be addressed by a rapid decarbonization of the economy, whatever the cost.[90] Voters, however, remain unpersuaded that the benefits of this strategy will outweigh the costs. Congress cannot deviate too much from the views of the median voter and has not taken the aggressive steps that elite opinion deems necessary.

Agencies have tried to take up the slack. In 2015, the Environmental Protection Agency adopted rules regulating carbon dioxide emissions from both new and existing fossil-fuel-based power plants.[91] The Clean Power Plan for existing plants envisioned a transition from coal to gas and ultimately to renewable-energy power plants.

The EPA has not been alone in using creative interpretations of its mandate to further decarbonization. The Federal Reserve Board's 2020 Financial Stability Report opined that "climate change . . . is likely to increase financial shocks and financial system vulnerabilities,"[92] laying the groundwork for the potential use of the Fed's extensive monetary, regulatory, and supervisory powers to further decarbonization efforts.[93]

The SEC has made its own foray into climate policy. In early 2022, it proposed a sweeping set of climate-related disclosure rules for public companies.[94] The proposed rules have generated extensive comment and, at the date of this writing, have not been finalized.

These attempts to make significant policy changes without Congressional action mean that agencies often change course with each change of administration. After adopting the Clean Power Plan in 2015, the EPA

90. Under President Obama, the United States entered into the Paris Agreement and pledged to reduce greenhouse gas emissions by 80% below 2005-levels by 2050. After the Trump Administration withdrew the United States from the Paris Agreement, President Biden re-entered the agreement and pledged to achieve net-zero emissions by 2050. *See* Renee Cho, *The U.S. Is Back in the Paris Agreement. Now What?*, COLUM. CLIMATE SCH. (Feb. 4, 2021), https://news.climate.columbia.edu/2021/02/04/u-s-rejoins-paris-agreement/ [https://perma.cc/ZCZ7-NS74].

91. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64509 (Oct. 23, 2015).

92. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., FINANCIAL STABILITY REPORT 58 (2020), https://www.federalreserve.gov/publications/files/financial-stability-report-20201109.pdf [https://perma.cc/DD67-FERV].

93. *See* Christine Parajon Skinner, *Central Banks and Climate Change*, 74 VAND. L. REV. 1301, 1325–53 (2021).

94. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (April 11, 2022).

repealed it in 2019.[95] It almost surely would have reinstated it during the Biden administration had not the Supreme Court's decision in *West Virginia v. EPA* intervened.[96]

The Federal Communications Commission adopted a set of "net neutrality" rules in 2015, repealed them in 2018, and proposed in 2023 to reinstate them.[97] In 2020, the SEC adopted rules regulating proxy voting advice that deviated from prior informal guidance.[98] In 2022, it rescinded two of the just-adopted rules and amended the remainder.[99]

C. The Decline of the Administrative State?

One might argue that these flip-flops are irrelevant to the way courts should review agency action. If one's theory of administrative law is that Congress delegates policy-making authority within certain bounds to an agency, then the agency is free to change its mind as often as it likes about which policy is most efficacious.[100]

But there is another point of view, expressed by Judge Edith Jones during oral argument (as transcribed by a lawyer in the courtroom) in a case challenging the SEC's about-face with respect to proxy advisory firms:

> The whole point of administrative agencies is that they are supposed to be disinterested and experts, but the trend in today's administrative world—and we've now had three administrations affected by this trend—is that there is one change in the balance on the commission,

95. *See* Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (Sept. 6, 2019).

96. *See* West Virginia v. EPA, 597 U.S. 697 (2022) (reversing the D.C. Circuit's vacatur of EPA's repeal of the Clean Power Plan).

97. *See* OFFICE OF THE CHAIRWOMAN, FEDERAL COMMUNICATIONS COMMISSION, FACT SHEET: FCC CHAIRWOMAN ROSENWORCEL PROPOSES TO RESTORE NET NEUTRALITY RULES (2023), https://docs.fcc.gov/public/attachments/DOC-397235A1.pdf [https://perma.cc/FG3Z-LL9Q].

98. Exemptions From the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082 (Sept. 3, 2020). Prior to adopting the rule, the SEC withdrew no-action letters suggesting that investment advisers could satisfy their duties to clients by relying on the advice of a proxy advisory firm. *See* Securities and Exchange Commission, Statement Regarding Staff Proxy Advisory Letters (Sept. 13, 2018), https://www.sec.gov/news/public-statement/statement-regarding-staff-proxy-letters [https://perma.cc/Y6MK-7MYR].

99. *See* Proxy Voting Advice, 87 Fed. Reg. 43168 (July 19, 2022).

100. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (to the extent deference is based on "presumed legislative intent to confer discretion," then "there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind").

and suddenly the experts have a different view . . . . It undercuts the whole idea of the administrative state.[101]

The question for the remainder of this essay is whether that last sentence is a rhetorical flourish or reflects a nascent judicial rethinking of administrative lawmaking and adjudication—and what the latter might mean for the SEC.

As Jill Fisch's contribution to this symposium observes, the Supreme Court has raised serious concerns about specific aspects of administrative governance in recent years.[102] For example, it used the major questions doctrine to conclude that Congress did not give the EPA the authority to restructure the nation's electric power generation methods by rule.[103]

The major questions doctrine is a rule of statutory construction, albeit one informed by separation of powers concerns. The Court is also, however, reexploring Constitutional limitations on Congress's ability to delegate, expressly or by implication, significant lawmaking and adjudicative power to agencies.

The Dodd-Frank Wall Street Reform and Consumer Protection Act expanded the SEC's authority to bring enforcement actions in-house before its administrative law judges (ALJs), a power the SEC used in cases sounding in fraud against persons not required to register with it.[104] Some defendants raised Constitutional challenges to these administrative proceedings. In 2018, the Court held that the SEC's ALJs had not been appointed in accordance with the Appointments Clause.[105]

The Court recently heard argument in a more thorough challenge to the SEC's in-house adjudication, *SEC v. Jarkesy*.[106] The Fifth Circuit in that case found three independent Constitutional defects in the SEC's in-house adjudication of a securities fraud enforcement action seeking a civil penalty. It concluded that agency adjudication of an action "akin to traditional actions at law" violates the Seventh Amendment right to a jury trial.[107] It further concluded that the discretion the Dodd-Frank Act conferred on the SEC to bring cases in-house or in court was an unconstitutional delegation of legislative power because it did not provide an intelligible principle to guide that discretion.[108] Finally, it concluded that SEC

101. Cydney Posner, *In Fifth Circuit Oral Argument, SEC Faces Challenge to Preserve 2022 Changes to Proxy Advisor Rules*, COOLEY PUBCO (Aug. 10, 2023), https://cooleypubco.com/2023/08/10/sec-oral-argument-proxy-advisor-rules/ [https://perma.cc/6U8Y-FCNJ].

102. *See* Jill E. Fisch, *Overseeing the Administrative State*, 47 SEATTLE U. L. REV 899 (2024).

103. West Virginia v. EPA, 597 U.S. 697 (2022).

104. *See* 15 U.S.C. § 78u-2 (2018).

105. *See* Lucia v. SEC, 585 U.S. 237 (2018) (construing U.S. CONST. art. II, §2, cl. 2).

106. *See* Jarkesy v. SEC, 34 F.4th 446 (2022), *cert. granted*, 143 S. Ct. 2688 (June 30, 2023).

107. *Id.* at 451.

108. *Id.* at 459.

ALJs are protected by two layers of for-cause protection against removal in contravention of Article II as the Court construed it in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[109]

The non-delegation doctrine has been moribund since the 1930s. The Court's most recent foray into the doctrine, *Gundy v. United States*, was inconclusive.[110] Writing for herself and Justices Ginsburg, Breyer, and Sotomayor, Justice Kagan concluded that the Attorney General's authority under the Sex Offender Registration and Notification Act to determine when sex-offender registration is required for pre-Act offenders was not an improper delegation of lawmaking authority, at least not as the opinion interpreted the delegated authority. Justice Gorsuch dissented on behalf of himself, Chief Justice Roberts, and Justice Thomas. The critical fifth vote for affirmance came from Justice Alito, who conceded that the majority's approach was consistent with the Court's longstanding application of the nondelegation doctrine but indicated his willingness to reconsider that doctrine in an appropriate case.

Justice Kavanaugh did not participate in the *Gundy* case. Nevertheless, when the Court denied certiorari in a case raising the same issue, he published a statement noting that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[111] The toothless nondelegation doctrine may soon receive dental implants.

Meanwhile, numerous judges in the courts of appeals and a growing number of Justices have expressed skepticism about *Chevron* and its companion, *Auer v. Robbins*,[112] under which courts defer to an agency's interpretation of its own regulations.[113] In 2019, the Court declined to overrule *Auer* but "reinforced" its limited reach.[114]

The Court recently heard argument in two cases asking it to overrule *Chevron*.[115] Concerns about agency flip-flopping were prominent in the oral arguments. Representing the petitioners in *Loper Bright*, Paul Clement referred to *Chevron* as a "reliance-destroying" doctrine and argued that

109. *Id.* at 463; 561 U.S. 477 (2010).

110. 139 S. Ct. 2116 (2019).

111. Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Justice Kavanaugh respecting the denial of certiorari).

112. 519 U.S. 452 (1997).

113. *See* Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 165–66 (2019); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 104–05 (2018).

114. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

115. Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023); Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621 (1st Cir. 2023), *cert. granted*, 144 S. Ct. 325 (2023).

overruling it "would be giving new stability to the law."[116] Justice Kavanaugh noted that *Chevron* requires deference even "when the agency changes position every four years".[117]

It would be a mistake to attribute these changes in attitude solely to changes in Court personnel. Judges are part of a legal culture and the Overton window within that culture has shifted in recent years where administrative law is concerned. Over the past decade, Philip Hamburger has argued that the administrative state is unlawful in various ways—arguments that would have been unthinkable in 1964 but that resonate with judges today.[118] My colleague Aditya Bamzai has argued that *Chevron* rests on a shaky doctrinal foundation.[119]

Notably, Justice Scalia—who authored the *Auer* opinion—later changed his mind about its soundness. In a 2011 concurring opinion, he confessed that "I have become increasingly doubtful of its validity."[120] By 2013, he argued that the Court should reconsider it.[121] Several prominent administrative law scholars and practitioners believe that by the time of his death, Justice Scalia had also come to doubt *Chevron*'s validity.[122] His evolving views may have been linked to a concern that new agency heads, appointed by new administrations, were using these deferential doctrines to change the law in action without having to change the law on the books, creating the very unpredictability and instability that the Constitution's lawmaking structure was designed to reduce.[123]

D. Consequences for the SEC

A decision to pare back regulatory agencies' autonomy, by requiring Congress to set policy at a greater level of detail and courts to resolve ambiguities in regulatory statutes and the rules adopted under them, would

116. *See* Transcript of Oral Argument at 22, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (No. 22-451).

117. *See id.* at 40.

118. *See* PHILIP HAMBURGER, THE ADMINISTRATIVE THREAT (2017); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); *see also* Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491 (2008).

119. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

120. Talk America, Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

121. Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part).

122. *See* Chevron*: Scalia's Evolution*, FEDERALIST SOC'Y (May 6, 2020), https://fedsoc.org/commentary/videos/chevron-scalia-s-evolution [https://perma.cc/WE42-59CW]. Scalia's separate opinion in *Decker* provided a small hint that he had come to harbor doubts about *Chevron*. *See* 568 U.S. at 619 (Scalia, J. concurring in part and dissenting in part) ("The theory of *Chevron* (take it or leave it) is that . . . .").

123. *See* 568 U.S. at 619 (Scalia, J. concurring in part and dissenting in part) ("If we take agency enactments as written, the Executive has a stable background against which to write its rules . . . .").

have immediate implications for securities law. The SEC's climate change disclosure rule might run afoul of the major questions doctrine. Its rules on private investment advisers[124] may not survive a non-deferential interpretation of the relevant statutory provisions. The agency may find it more difficult to use interpretive releases as a substitute for notice and comment rulemaking.[125]

And this may be good for the SEC in the long run. The core of the agency's mission is ensuring high-quality financial disclosures and combatting fraud and manipulation. These remain as relevant today as they were in the 1930s. The agency's forays outside that core have been, to my mind, unsuccessful. Much as I hesitate to disagree with Professor Joel Seligman, the Louis Loss of his generation, I do not share his view that the SEC's restructuring of the public utility industry, which took up most of its energies for more than a decade, was beneficial to consumers and to the industry itself.[126] It was a largely pointless exercise that, I've argued elsewhere, destroyed value.[127]

Congress often takes advantage of an agency's broad policy discretion by engaging in symbolic lawmaking, giving regulators the authority to address a problem without making difficult policy choices that might generate political pushback. For example, following *West Virginia v. EPA*, the Inflation Reduction Act of 2022 defined several greenhouse gasses as pollutants for purposes of the Clean Air Act but did not tell the EPA how to regulate them.[128] Congress gave the SEC several such poison chalices in the Dodd-Frank Act. It instructed it to adopt disclosure rules regarding conflict minerals, mine safety, and pay inequality, among others.[129]

The SEC reluctantly and tardily obeyed these commands. In recent years, however, the agency has shed its reticence to stray outside its core mission. It has inserted itself into politically-charged debates over climate policy, private equity, and hedge fund activism, among others, that it could easily have sidestepped. Industry participants and their trade associations now bring challenges to its new rules as a matter of course and often succeed.[130]

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124. *See* 17 C.F.R. §§ 275.204-2, 206(4)-7, 10, 211(h)(1)-1, -2, -3.

125. *See* Fisch, *supra* note 102, at 921.

126. *See* SELIGMAN, *supra* note 1, at 241–64.

127. *See* Paul G. Mahoney, *The Public Utility Pyramids*, 41 J. LEGAL STUD. 37 (2012).

128. *See* 42 U.S.C. § 7432 (2018).

129. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, §1502, 24 Stat. 2213 (codified as amended at 15 U.S.C. § 78m note) (conflict mineral disclosures); *Id.* §1503, 124 Stat. 2218 (codified at 15 U.S.C. § 78m-2) (mine safety disclosures); *Id.* § 953(b)(1), 124 Stat. 1903 (codified at 15 U.S.C. § 78*l* note) (pay ratio between CEO and median non-CEO employee).

130. *See, e.g.*, Chamber of Com. v. SEC, 85 F.4th 760 (5th Cir. 2023) (SEC adoption of issuer share repurchase rule was arbitrary and capricious); NYSE v. SEC, 962 F.3d 341 (D.C. Cir. 2020) (holding SEC lacked statutory authority to adopt exchange fee pilot program); Am. Petroleum Inst. v.

The SEC would be better off returning to its roots as an apolitical, technocratic organization whose positions do not shift with the political winds. It may be forced to do so against its will if the Court drastically curtails regulatory agencies' discretion. The SEC has clear and ample statutory authority to oversee financial disclosures and combat fraud. Losing the authority to do much of anything else might paradoxically restore the agency's standing with the courts, the markets, and the public.

CONCLUSION

Pritchard and Thompson have given those of us who study the SEC and the securities laws much food for thought. Their methodological focus is on the internal dynamics of the Court's deliberations, on which they have done detailed and valuable work. The Court did not, however, operate in a vacuum. Intellectual trends in economics and law over the past century can also help us understand the SEC's fortunes in the federal courts and make predictions about its future.

SEC, 953 F. Supp. 2d 5 (D.D.C. 2013) (vacating as contrary to statute SEC rule requiring public disclosure of payments made to foreign governments in connection with the commercial development of oil, natural gas, or minerals); Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (vacating SEC rule expanding proxy ballot access for shareholder-nominated board candidates for inadequate economic analysis); Am. Equity Invest. Life Ins. Co. v. SEC, 613 F.3d 166, 167–68 (D.C. Cir. 2010) (vacating SEC rule regarding fixed index annuities for failure to consider rule's effect on efficiency, competition, and capital formation).