Louisiana Law Review

Volume 84
Number 4 *Summer 2024*

Article 9

6-6-2024

Stay in Your Lane! Law, Politics, and the SEC's Climate Disclosure Proposal

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INTRODUCTION

In principle, the United States Securities and Exchange Commission (SEC) is an independent agency designed to be above the partisan political fray. In practice, it is anything but. By law, no more than three of the commissioners can be of the same political party, but three out of five is a majority no matter how you cut it, which gives the party in power effective control. For much of its history, with a few exceptions, the SEC has managed to maintain at least a veneer of political independence. But over the past few years, the SEC has aggressively pursued a nakedly partisan political agenda that has at times stretched the boundaries of the agency's competence and authority.

Nowhere is this more evident than in the SEC's proposed climate disclosure rules, which bear only the most tenuous connection to the agency's core mission, lie outside its area of expertise, and if enacted will almost certainly be challenged as exceeding the agency's statutory mandate. The pursuit of partisan political ends through the regulatory process threatens the agency's reputation for integrity and independence and may have practical consequences for the agency's effectiveness going forward. The overt partisan push will also likely have important legal consequences affecting the agency's formal structure and powers.

The administrative state is currently under attack in ways not seen since the triumph of the New Deal. Over the past two terms, the Supreme Court has issued several significant rulings chipping away at the power of administrative agencies, and the Court seems poised to further limit agency powers. In particular, the Court has developed the "major questions doctrine" whereby agencies must point to specific legislative authority to enact novel rules that have major political or economic significance. The major questions doctrine will undoubtedly play a role, perhaps determinative, in assessing the validity of the proposed climate disclosure rule.

In addition, the Supreme Court is currently considering several cases that could impact the scope of independent agency authority including one major case involving the SEC. In *SEC v. Jarkesy*, the Supreme Court is considering an important challenge to the SEC's use of administrative proceedings.[1] In 2022, the Fifth Circuit held that the use of administrative proceedings to seek civil penalties for common law claims violates the constitutional right to a jury trial; the Fifth Circuit also held that the SEC's discretionary power to choose the administrative forum violates the

1. *See* Jarkesy v. Sec. & Exch. Comm'n, 34 F.4d 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023) (No. 22-859).

"nondelegation doctrine," which had not been used to strike down a law in almost 90 years.[2] The nondelegation doctrine is closely related to the major questions doctrine, and should the Supreme Court affirm the Fifth Circuit, it could further constrain the SEC's (and other agencies') rulemaking authority, including with respect to the proposed climate disclosure rules. This term, the Supreme Court is also reconsidering Chevron deference, a nearly 40-year-old doctrine under which courts are generally required to defer to an agency's reasonable interpretation of ambiguous statutes within the agency's ambit, which could further erode agency authority.[3]

The SEC's recent overtly partisan political turn and its forays into contested terrain outside its core competence and expertise will likely play into these doctrinal disputes. It may also serve to undermine the agency's power in the long run, and with it the agency's ability to exercise meaningful control in areas that *are* within its proper sphere. Ultimately, the legitimacy of independent agencies rests on their being *independent*; shorn of that, the foundation can easily crumble.

Independent agencies occupy an unusual space in the American constitutional structure, first because they are not actually provided for in the Constitution, and second because they seemingly violate one of the core animating principles underlying the Constitution, namely the separation of powers. Independent agencies violate the separation of powers in two ways: first, by exercising executive, legislative, and judicial functions that are constitutionally allocated to other bodies; and second, by exercising all of those functions in a single body. Independent agencies exercise executive functions but are not part of the executive branch and are formally outside the control of the executive.

The traditional justification that is offered for the existence of independent agencies is the need for expertise in highly complex and technical regulatory areas, free from political influence or interference. In *Humphrey's Executor v. United States*, the Court upheld a congressional statute that fixed the terms of the commissioners of the Federal Trade Commission and insulated them from removal by the President except for malfeasance, stating:

> The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. . . . Its duties are neither political nor executive, but predominantly *quasi* judicial and *quasi* legislative . . . . [I]ts members are called upon to

2. *See Jarkesy*, 34 F.4d at 449.

3. *See* Loper Bright Enters. v. Raimondo, 45 F.4d 359 (D.C. Cir.), *cert. granted*, 143 S. Ct. 2429 (2023) (No. 22-451).

> exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'[4]

The Court went on to say that one of the advantages of the Commission is "the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction."[5]

The authority of *Humphrey's Executor* has lately been called into question: in *Seila v. CFPB*,[6] the majority narrowly construed the holding and two concurring justices called for *Humphrey's Executor* to be overturned altogether, arguing that the heads of independent agencies should be subject to removal by the President. Proponents of this view, generally referred to as the *unitary executive theory*, argue that independent agencies are unconstitutional precisely because they *are* independent, that is, not subject to executive control. So far, this view has only garnered minority support on the Court, but it may be growing in influence.

When it comes to the SEC, however, the issue may be of limited importance. While the agency is nominally independent from the executive—and commissioners can only be removed for cause—the nominating structure for commissioners and the President's power to designate the Chairman means that as a practical matter the Commission will be largely, although perhaps not entirely, under the influence, if not direct control, of the executive branch. SEC commissioners are appointed for five-year terms, with one commissioner appointed every year. In practice, the President will be able to appoint a majority of commissioners from his or her own party within at most two years. Moreover, the President gets to designate the Chairman, and the Chairman controls the Commission calendar, which means that even without a majority to push forward the President's agenda, the President can effectively block any countervailing agenda.[7]

While recognizing that the SEC may in fact be subject to executive control might alleviate some concerns over the agency's place in the U.S. constitutional structure, it only serves to highlight other issues, particularly those relating to legislative overreach. Viewed as an arm of the executive, the agency's power to *legislate* is naturally suspect. This, I take it, is what the major questions doctrine and the nondelegation doctrine are really

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4. Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935) (emphasis added).

5. *Id.* at 625.

6. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 249–52 (2020) (Thomas, J., concurring in part and dissenting in part).

7. *See infra* Part II.A.

getting at: that legislation is rightly the province of the legislature; and that the power to legislate can be exercised by an "independent" agency through its rulemaking authority only to the extent that the power is explicitly granted, narrowly circumscribed, and necessary for the agency to carry out its essentially executive functions.

The SEC's core mission is to protect investors; facilitate capital formation; and maintain fair, orderly, and efficient markets. In furtherance of that mission, the SEC has the authority to require public companies to periodically disclose certain information. But that authority is not unbounded. Traditionally, the SEC has, for the most part, limited disclosure obligations to information that is financially material to investors, that is, material information concerning the financial condition and prospects of a company that a reasonable investor would consider important in making an investment decision. The proposed climate disclosure rule would require public companies to disclose extensive, and immaterial, non-financial information that is not relevant to investors, does not fall within the agency's sphere of authority or area of expertise, and indeed encroaches on the domain of other federal agencies. If adopted in its current form, the rule will undoubtedly be challenged, and it is hard to see how it could survive in the current judicial environment. The result is that the rule will likely never take effect, but the agency's pursuit of nakedly partisan political ends unconnected to its core mission and untethered from statutory authority could cause lasting damage to the agency's reputation and undermine the agency's legitimate powers.

Part I of this Article describes the legal framework and justification for independent agencies; Part II discusses partisanship at the SEC and how it connects to the proposed climate disclosure rule; Part III examines the SEC's authority with respect to disclosures; and Part IV examines the various ways in which the climate disclosure rule may be challenged in court.

I. INDEPENDENT AGENCIES: INDEPENDENCE AND EXPERTISE

Independent agencies occupy an unusual place in the U.S. constitutional structure. They are not provided for anywhere in the Constitution. They violate the separation of powers in two ways: first, by exercising powers—legislative, executive, and judicial—that have been allocated to other branches of government; and second, by placing the administration of all of these powers in the same hands.[8]

8. *See, e.g.*, Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 43 (1986) ("Despite their undoubted integration into the national political

The SEC is a perfect example: it exercises what are effectively legislative powers when it engages in rulemakings; it exercises judicial powers through its administrative hearing and adjudication process; and it exercises quintessentially executive powers through its investigative and prosecutorial functions. And all of these powers are ultimately vested in the same hands, the five-member Commission.[9]

The traditional justification that has been offered for independent agency authority rests on the idea that they are governed by an impartial nonpartisan body of experts acting in aid and furtherance of the aims and policies of the constitutional bodies, pursuant to duly authorized and properly delegated authority. The twin pillars are independence and expertise, within the narrow constraints of what has been properly authorized.

In recent years there has been a steadily mounting critique of the authority of independent agencies on both structural and substantive grounds, and the trend seems to be accelerating. One strand of this critique is that independent agencies are too independent to square with the U.S. constitutional structure. In the main this critique, which is generally referred to as the *unitary executive theory*, posits that the Constitution gives the President authority to control all executive action.[10] On this theory, truly independent agencies whose officers can only be removed for cause are constitutionally suspect, or at the very least the methods by which their officers are appointed and removed are constitutionally suspect. There have been several legal challenges mounted on these grounds, challenges that have so far proved successful when the agency

culture, independent agencies have never quite overcome the constitutional questions that dogged the drive to establish the Interstate Commerce Commission a century ago. The notion of an agency that is neither legislature nor court, yet is independent of the executive branch, is exceedingly difficult to reconcile with a tripartite structure of government"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578–80 (1984).

9. Even decisions by ALJs, who supposedly enjoy a modicum of independence, are reviewable by the Commission, the very body that also needed to authorize the institution of the proceeding subject to review.

10. Michael C. Dorf, *The Misguided Unitary Executive Theory Gains Ground*, JUSTIA (June 19, 2023), https://verdict.justia.com/2023/06/19/the-misguided-unitary-executive-theory-gains-ground [https://perma.cc/J8NH-F33Z] ("The unitary executive theory posits that the Constitution gives the President authority to control all executive action. If fully adopted, it would act as a very substantial limit on the power of Congress to assign executive authority to high-ranking personnel who do not serve at the pleasure of the President.").

officials enjoy two layers of for-cause removal protection.[11] But the unitary executive challenges have so far failed to reach situations where the independent agency is viewed as an "impartial" agency exercising "quasi-legislative" or "quasi-judicial" functions, rather than purely executive ones.[12]

The traditional justification for independent agencies rests on their independence, which can be further broken down into two closely interrelated ideas: non-partisanship—sometimes referred to more broadly as impartiality—and expertise. These principles were set out in the 1935 United States Supreme Court case *Humphrey's Executor v. United States*. The case involved the question of whether a provision that commissioners of the then recently created Federal Trade Commission (FTC) could only be removed for cause was constitutional. The Court held that it was, focusing on the fact that the FTC's "duties are neither political nor executive, but predominantly quasi judicial and quasi legislative."[13] In that case, the Court emphasized the *independent* nature of the agency:

> The [Federal Trade C]ommission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly *quasi* judicial and *quasi* legislative.[14]

The Court repeatedly stressed that independence meant being above the political fray, not only in the sense of being free of partisan influence, but also in the sense of not being subject to executive branch control. The Court noted that the great "advantage" that the FTC possessed "lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction."[15] The Court approvingly quoted from a Senate report that the agency must be "'independent of any department of the government . . . . a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character.'"[16]

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11. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010); *Seila Law*, 591 U.S. at 20–21.
12. But that may be changing. *See* Andrew Grossman & Sean Sandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, 22 FEDERALIST SOC'Y REV. 216, 217, 219 (2021).
13. Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935).
14. *Id.* (emphasis added).
15. *Id.* at 625.
16. *Id.* (alteration in original).

According to the Court, the role of independent agencies was to act as a "legislative or as a judicial aid." "To the extent that it exercises any executive function . . . it does so in the discharge and effectuation of its *quasi* legislative or *quasi* judicial powers, or as an agency of the legislative or judicial departments of the government."[17] In that capacity, independent agencies were designed to carry out legislative policy bounded by the congressional directives: "The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed."[18] The Court concluded that "[s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive."[19]

Impartiality and non-partisanship were, in the Court's view, closely tied to expertise: "Like the Interstate Commerce Commission, [the members of the FTC] are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'"[20] The twin pillars of independence—characterized as nonpartisanship, impartiality, and freedom from executive control—and expertise have been the foundation of the legitimacy of independent agencies ever since. At its core, the justification for independent agencies lies in their independence, broadly construed.[21]

Agency independence was supposed to be achieved through a number of structural features designed to insulate the agency from partisan political meddling, including most notably the requirements that multimember commissions be balanced politically and that commissioners

17. *Id.* at 628 (emphasis added).

18. *Id.*

19. *Id.*

20. *Id.* at 624.

21. *See, e.g.*, Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259 (1988) ("The quality that most distinguishes independent agencies from the executive variety is the notion of independence itself. This characteristic is based largely upon three statutory arrangements: the bipartisan appointment requirement; the fixed term requirement; and the requirement that removal be limited to express causes"); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010) ("At the broadest level, the structural characteristics of independent agencies are aimed at insulating them, to some degree, from politics"); Peter P. Swire, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1766 (1985) ("The Supreme Court there held that the distinctive expertise and impartiality of certain agencies justified the power of Congress to insulate agency officers from removal at will by the President.").

could only be removed for cause.[22] Independence, in turn, "was traditionally justified, particularly during the New Deal era, as promoting expertise."[23] But the idea of agency independence has always been an oddity: there is nothing in the Constitution about "independent" agencies, and the agencies exercise powers that are constitutionally assigned to other branches. While the Court in *Humphrey's Executor* defined the agency's powers as "*quasi*-legislative" and "*quasi*-judicial,"[24] they are in fact much closer to being *legislative* and *judicial* than anything *quasi*. Independent agencies also exercise executive functions, and the Constitution provides that "the executive Power shall be vested in [the] President."[25] Critics of independent agencies argue that this means that *all* executive power is vested in the President, and thus that the President must have control over so-called independent agencies, including the power to remove agency heads. In recent years, there has been considerable litigation surrounding this issue, and there appears to be more on the way.[26] The theory of the unitary executive seems to be gaining momentum and may pose a serious challenge to the future of independent agencies.[27] *Humphrey's Executor* may be on the chopping block: in *Seila Law v. Consumer Financial Protection Bureau*, the Court narrowly construed the holding and two concurring justices called for *Humphrey's Executor* to be overturned altogether, arguing that the heads of independent agencies should be subject to removal by the President.[28] On this view, truly independent

22. *See, e.g.*, Bressman & Thompson, *supra* note 21, at 611 ("For example, the requirement that members of independent agencies represent both political parties is an overt attempt at achieving political balance. It is also a means to promote nonpartisan decision making, which is particularly important for agencies that perform quasi-adjudicatory functions, such as holding hearings to determine possible violations of law."); Verkuil, *supra* note 21, at 259 (Independence "is based largely upon three statutory arrangements: the bipartisan appointment requirement; the fixed term requirement; and the requirement that removal be limited to express causes.").

23. Bressman & Thompson, *supra* note 21, at 612. *See also* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 413–18 (2007).

24. *Humphrey's Ex'r*, 295 U.S. at 628.

25. U.S. CONST. art. II, § 1, cl. 1.

26. *See, e.g.*, Grossman & Sandoloski, *supra* note 12, at 216.

27. *See, e.g.*, Dorf, *supra* note 10.

28. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 249–52 (2020) (Thomas, J., concurring in part and dissenting in part).

agencies are unconstitutional precisely because they *are* independent, that is, not subject to executive control.[29]

In *Seila Law*, the majority began by stressing that the Constitution vests "the entire executive power" in the President alone, which generally includes the power to remove lesser executive officers at will.[30] The Court then pointed out that there were only two recognized exceptions to the President's unrestricted removal power:

First, "*Humphrey's Executor* permitted Congress to give for-cause removal protection to a multimember body of experts who were balanced along partisan lines, appointed to staggered terms, performed quasi-legislative and quasi-judicial functions, and were said not to exercise any executive power."[31] Second, *Morrison* approved for-cause removal protection for an inferior officer—the independent counsel—who had "limited duties and no policymaking or administrative authority."[32]

The Court in *Seila* held that the CFPB's leadership by a single person removable only for cause violates the separation of powers.[33] Importantly, the Court distinguished the single-director configuration of the CFPB from the structure of multimember commissions, stressing that the Director could not be described as a "'body of experts' and cannot be considered 'non-partisan' in the same sense as a group of officials drawn from both sides of the aisle."[34] The Court emphasized that multimember commissions of the type approved in *Humphrey's Executor* were balanced along partisan lines and commissioners served staggered terms, fostering the accumulation of agency knowledge and expertise.[35] In essence, the majority in *Seila* was saying that the reasoning of *Humphrey's Executor* still applies to multimember commissions largely because they *are* structured to be independent.

While the legitimacy of independent agencies is said to rest on their being independent, it has not turned out that way in practice, at least not when it comes to the SEC. This has given rise to a second critical strand that has also gained momentum in recent years, one that comes from the opposite direction of the unitary executive challenge, namely that

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29. In a law review article, then Judge Kavanaugh asked: "[w]hy shouldn't [the President] have the authority to [remove the Chairman of the SEC]?" *See* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1473 (2009) (emphasis omitted).

30. *Seila Law*, 591 U.S. at 213–16.

31. *Id.* at 216.

32. *Id.* at 218.

33. *Id.* at 204.

34. *Id.* at 218.

35. *Id.*

independent agencies are not independent enough—that regardless of the control and removal provisions, they are at bottom merely arms of the executive, acting at the direction of the party in power. On this view, the authority of independent agencies must be narrowly circumscribed so that the executive does not unduly infringe on the powers of the legislature and the judiciary. This, I take it, is what informs the recently adopted major question doctrine and the once moribund but perhaps soon-to-be-resurrected nondelegation doctrine, which will be discussed below. But the result is that there are now two distinct strands of criticism of independent agencies: one that they are too independent, the other that they are not independent enough.

The Court in *Seila* never considered that second issue—it was not germane to the case. But the Court did say a few things that might give pause. While the Court distinguished the structure of the CFPB from the multimember Commission in *Humphrey's Executor* by emphasizing the traditional elements of non-partisanship and expertise, the Court also pointed out that "the CFPB Director is hardly a mere legislative or judicial aid."[36] Instead, the CFPB Director possesses significant administrative and "enforcement authority [which] includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*."[37]

The SEC, of course, possesses significant administrative and enforcement authority; it also possesses significant legislative and judicial authority. The extent, limits, and contours of that authority are currently before the Court in *SEC v. Jarkesy*, and while *Seila* involved very different issues, the logic of that case is likely to inform the outcome in *Jarkesy*. In particular, the SEC has the power "to seek daunting monetary penalties against private parties in federal court," which is described in *Seila* as a "quintessentially executive power."[38] The SEC also has the authority not just to seek but to impose those same daunting monetary penalties through its own in-house administrative process, a double-whammy to the separation of powers: the SEC can exercise a quintessentially executive power and a quintessentially judicial one at the same time. The agency's authority in this regard is being challenged in *Jarkesy* on several grounds, including that it violates the Seventh Amendment right to a jury trial.[39]

36. *Id.*

37. *Id.* at 219.

38. *Id.* at 199.

39. *See* Jarkesy v. Sec. & Exch. Comm'n, 34 F.4d 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023) (No. 22-859) (questioning "[w]hether statutory provisions that empower the Securities and Exchange Commission (SEC) to

While it is always difficult to predict how the Court will rule, the early indications are that the agency's authority to seek civil penalties in administrative proceedings where there is no right to a jury trial is unlikely to survive; the only question seems to be how much further the Court will go in reining in the agency.[40]

II. PARTISAN POLITICS AT THE SEC

A. The Partisan Structure of an "Independent" Agency

Much is made in the case law about some of the structural features designed to ensure agency non-partisanship, most notably the mixed political composition of commission bodies, which in turn is used to justify other structural features that promote independence like non-removal except for cause. But at least when it comes to the SEC, the agency is not independent either structurally or practically. It is an arm of the executive branch, and it pursues the political ends of the party in power. While the SEC is nominally independent, it is in reality firmly under presidential control.

The principal structural feature of non-partisanship at the SEC consists of political party balance. By law no more than three members of the Commission can be of the same political party.[41] Commissioners serve five-year terms with one term ending every year, and appointments are supposed to, whenever possible, reflect political balance.[42] A commissioner's term ends every year, and his or her successor is supposed to be appointed in a manner that maintains partisan balance.[43]

But the simple fact is that with a five-member Commission, you can never have political balance: no more than three commissioners can be of the same political party, but three will always be a majority. There have sometimes been calls to make the agency politically balanced by having a

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initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment.").

40. *See, e.g.*, Zach Schonfeld, *Supreme Court's Conservatives Voice Concerns About SEC's In-House Enforcement*, THE HILL (Nov. 29, 2023, 2:57 PM), https://thehill.com/regulation/court-battles/4333751-supreme-courts-conservatives-voice-concerns-sec-in-house-enforcement/ [https://perma.cc/X8DC-E6WJ]; Vaidehi Mehta, *Supreme Court Looks Poised to Curb SEC Enforcement Powers*, FINDLAW (Dec. 7, 2023), https://www.findlaw.com/legalblogs/federal-courts/supreme-court-looks-poised-to-curb-sec-enforcement-powers/ [https://perma.cc/2Y9S-WCYR].

41. Securities Exchange Act of 1934 §4(a), 15 U.S.C. §78d(a).

42. *Id.*

43. *Id.*

six-member Commission evenly divided along party lines, but so far these proposals have gone nowhere.[44] As currently constituted, political balance is simply not possible.

Given the staggered terms of commissioners, a President will be able to appoint a majority of the Commission within two years, and likely earlier. But more important, the President gets to nominate the Chairman of the Commission, whether a new commissioner or an existing one.[45] This means that as soon as the President is in power, he or she can appoint a commissioner of his or her own party to be Chairman.

And this has real, practical consequences: while each commissioner has an equal vote when it comes to rulemakings and enforcement recommendations, the Chairman controls the calendar, which means the Chairman controls the agenda, which means the Chairman has control over what items will even come up for a vote.[46] As a result, even if the President

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44. There is currently a proposal pending in Congress to actually make the agency politically balanced by having a six-member Commission equally divided between Democrats and Republicans. *See* SEC Stabilization Act of 2023, H.R. 4019, 118th Cong. (2023). The proposal is unlikely to go anywhere.

45. *See* 17 C.F.R. § 200.10 ("The Chairman is designated by the President . . .") This was not always the case: originally the Chairman was chosen by the Commissioners rather than by the President (*see, e.g.*, First Annual Report of the Securities and Exchange Commission (1935) ("The Commissioners held their first meeting on July 2, 1934, all Commissioners being present, and chose Commissioner Kennedy as Chairman."). The original structure was similar to the one upheld in *Humphrey's Executor* where the Chairman was not chosen by the President, but rather the by the Commission. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935) ("[C]ommission shall choose a chairman from its own membership."). It was not until 1950 that the power to designate the SEC Chairman was given to the President. *See* Reorganization Plan No. 10 of 1950, Pub. L. No. 87-592, § 3, 54 Stat. 1265 (1962) ("The functions of the Commission with respect to choosing a Chairman from among the Commissioners are hereby transferred to the President."). Of course, from the start, Presidents exerted pressure on the Commissioners to select the President's choice as Chairman. *See, e.g.*, Kenneth Durr & Adrian Kinnane, *431 Days: Joseph P. Kennedy and the Creation of the SEC (1934-35)*, SEC HISTORICAL SOC'Y (Dec. 1, 2005), https://www.sechistorical.org/museum/galleries/kennedy/ [https://perma.cc/R7FW-7UFG] (describing how Roosevelt appointed Kennedy to the Commission and insisted that Kennedy be appointed Chairman.).

46. *See* Reorganization Plan No. 10 of 1950, Pub. L. No. 87-592, § 1, 54 Stat. 1265 (1962) (transferring the executive and administrative functions of the Commission to the Chairman). *See also* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 818 (2013) ("The President appoints the heads of almost all independent agencies, the chairs of multimember agencies, and the administrators

has to wait some time before having a majority on the Commission, the President will always—and immediately—have at least a veto power over agency action that he or she disapproves of. As a practical matter, the party in power will have some control over the agency from day one, and total control within a short period of time.

B. Partisanship at the SEC

About a decade ago, in the midst of another overly politicized SEC moment, then SEC Chair Mary Jo White gave an impassioned defense of the agency's independence. She stated that "SEC Commissioners, . . . no matter who has chosen them, become[,] upon appointment, independent actors, duty-bound to uphold the Constitution, the laws of the United States and the mission of the [sic] their agency. Politics are to be left at the door."[47] White concluded: "[t]o my mind, the SEC achieves the best results and best fulfills its mission, when it uses its expertise, acts independently, and defends that independence against all comers."[48]

Today there is not even an attempt to put on a veneer of independence: the agency is openly acting in an overtly partisan political fashion to further partisan political aims. In her speech on SEC independence, Chair White approvingly cited a previous SEC Commissioner, A.A. Sommer, who had served in the mid-1970s and who had said: "[h]ad anyone sat through every meeting while I was on the Commission, that person could never have told which of the Commissioners were Republicans and which were Democrats."[49] Not anymore: today one does not need a scorecard to tell the players apart. If someone knows what a commissioner said that person can pretty reliably tell what party the commissioner is from.

For most of its history, the SEC had a well-deserved reputation for political independence and impartiality. But a partisan divide began to emerge in the early 2000s under then Chairman Cox, and it accelerated

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of single-head agencies. The appointment power matters because these agency heads generally control the agenda of the agencies; that is, they have control over agency output and can limit agency actions that the President might oppose. The chairs of multimember agencies have been granted budget, personnel, and agenda control by statute."). On the powers of the Chair, *see also* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1164–78 (2000).

47. Mary Jo White, Chair, SEC, The Importance of Independence (Oct. 3, 2013).

48. *Id.*

49. *Id.*

during the Obama Administration.[50] Since that time, partisanship has continued unabated; indeed, it has become firmly entrenched, with the majority shifting with each change in administration.[51] The most salient example of this trend occurred shortly after Chairman Gensler was installed when the agency set out to overturn a series of only recently adopted rules seemingly for no other reason than that they were enacted under the previous administration.[52]

Today, 3–2 Commission votes along strict party lines have become routine. Straight party-line votes have occurred with respect to rule proposals,[53] rule adoptions,[54] and even on occasion with respect to enforcement matters.[55] The votes are often accompanied by stinging dissenting statements from the minority commissioners, typically accusing the majority of overstepping the agency's authority.[56]

Over the past several years, deep fissures have emerged at the SEC, particularly over politically charged issues including shareholder

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50. *See, e.g.*, Mark Schoeff Jr., *How Partisan Politics Have Poisoned the SEC*, INV. NEWS (Sept. 8, 2015), https://www.investmentnews.com/industry-news/features/how-partisan-politics-have-poisoned-the-sec-62327 [https://perma.cc/ZWN4-DTX2] (noting how politicization accelerated under the Obama administration).

51. *See, e.g.*, Brian V. Breheny, Colleen P. Mahoney, & Lily S. Huang, *Skadden Discusses How Trump's Focus on Deregulation Could Shape SEC Priorities in 2017*, COLUM. L. SCH.: CLS BLUE SKY BLOG (Mar. 2, 2017), https://clsbluesky.law.columbia.edu/2017/03/02/skadden-discusses-how-trumps-focus-on-deregulation-could-shape-sec-priorities-in-2017/ [https://perma.cc/VGQ9-7UAP].

52. *See, e.g.*, Chris Matthews, *SEC's Partisan Divide on Display as Republican Commissioners Object to Gensler Plan to Overturn Trump-era Rules*, MARKETWATCH (June 14, 2021, 4:13 PM), https://www.marketwatch.com/story/secs-partisan-divide-on-display-as-republican-commissioners-object-to-gensler-plan-to-overturn-trump-era-rules-11623701634 [https://perma.cc/CEM9-CB2Y]; Katanga Johnson, *U.S. SEC Votes to Undo Trump-era Curbs on Shareholder Advisers*, REUTERS (July 13, 2022, 5:36 PM), https://www.reuters.com/legal/government/us-sec-set-rescind-trump-era-curbs-shareholder-advisers-2022-07-13/ [https://perma.cc/5K9C-RYPW].

53. *See, e.g.*, Hester M. Peirce & Mark T. Uyeda, Statement Regarding Denial of Petition for Rulemaking (Dec. 15, 2023).

54. *See, e.g.*, Mark T. Uyeda, Statement on Short Position and Short Activity Reporting by Institutional Investment Managers (Oct. 13, 2023); Hester M. Peirce, Statement on Short Sale Disclosure (Oct. 13, 2023).

55. *See, e.g.*, Hester M. Peirce & Mark T. Uyeda, The SEC's Swiss Army Statute: Statement on Charter Communications Inc. (Nov. 14, 2023).

56. *See, e.g.*, Hester M. Peirce, We are Not the Securities and Environment Commission – At Least Not Yet (Mar. 21, 2022).

proposals, disclosures of political donations, universal proxy access, stock buybacks, and most notably ESG issues and the climate disclosure rule in particular. The overt politicization of the SEC has been widely noted in the popular press[57] and has been confirmed by scholarly analysis. One academic study has concluded that partisanship at the SEC has reached an all-time high.[58] Indeed, there is a growing body of academic literature that suggests that independent agencies more generally are not in fact independent,[59] but rather subject to presidential control.[60] Executive branch control over the SEC is particularly pronounced.[61] The consequences of the partisan divide have also been widely discussed, with both critics and defenders of the agency sparring over the scope and extent

57. *See* Mark Schoeff, Jr., *Has the SEC Reached Peak Politicization? The SEC's Growing Political Rift Reflects Washington's Widening Partisanship and Threatens to Diminish the Agency's Stature*, INV. NEWS (Apr. 18, 2022), https://www.investmentnews.com/regulation-and-legislation/in-depth/sec-political-rift-partisanship-220152 [https://perma.cc/6NRF-6Z2E].

58. *See* Joseph Engelberg et al., *The Partisanship of Financial Regulators*, 36 REV. FIN. STUD. 4373, 4375 (2023).

59. *See, e.g.*, Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1309 (2023) ("In this Article, we make use of extensive new data to show that the independent agency model no longer works; most independent agencies are not particularly expert, not particularly influential, and their policies and policy-making processes are subject to (not insulated from) elected branch oversight and manipulation.").

60. *See* Bressman & Thompson, *supra* note 21, at 600 ("In this Article, we identify mechanisms that make independent agencies increasingly responsive to presidential preferences. We argue that these mechanisms undermine the traditional binary division between independent and executive-branch agencies."). *See also* Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2022 (2015) (noting White House/executive branch interference with "expert-agencies").

61. On executive branch pressure on the SEC in particular, *see* Bressman & Thompson, *supra* note 21, at 640–43.

of the SEC's legal authority.[62] Challenges to agency action on the ground of politicized regulatory overreach have mounted.[63]

The SEC's climate disclosure proposal is part of a broad executive branch push in the climate change arena. President Biden has outlined an aggressive policy to address climate change and has repeatedly indicated that he would seek to accomplish these ends by way of executive action through the medium of independent agencies. This is not the first time that has been the case when it comes to climate initiatives. For example, certain climate-related agency initiatives during the Obama Administration were reportedly crafted at the White House.[64]

C. Partisanship, Executive Action, and the Climate Proposal

1. The Climate Disclosure Proposal

On the day he was sworn into office, President Biden named Allison Lee, a Democratic commissioner, acting Chair of the SEC.[65] Acting Chair Lee wasted no time getting the ball rolling on a climate change rule, putting out a call for public comments on March 15, 2021.[66] A year later, the SEC, by then under Chairman Gensler, put out the rule proposal for notice and comment.[67] Since then it has been the subject of more than

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62. *Compare* Jon McGowan, *The SEC May be Overstepping its Authority in ESG/Climate Related Disclosure Standards*, FORBES (Aug. 30, 2023, 11:23 PM), https://www.forbes.com/sites/jonmcgowan/2023/08/30/the-sec-may-be-overstepping-its-authority-in-esg-climate-related-disclosure-standards/?sh=12f5e891a2f5 [https://perma.cc/A337-U2PD], *with* Letter from U.S. Senator Elizabeth Warren to SEC Chairman Gary Gensler, Warren Urges SEC to Act Quickly to Issue Strong Climate Risk Disclosure Rule (Feb. 9, 2022) (SEC has "clear authority to issue climate disclosure rules").

63. *See, e.g.*, Press Release, Nat'l Ass'n of Mfrs., Manufacturers Challenge SEC's Authority to Politicize Corporate Governance (May 24, 2023, 1:41 PM).

64. *See* Richard J. Pierce, Jr., *Nostalgia for Agency Expertise*, REGUL. REV. (July 19, 2022), https://www.theregreview.org/2022/07/19/pierce-nostalgia-agency-expertise/ [https://perma.cc/DEL4-JAHC] (noting a study showing "that agencies' announcements of the major climate change policy decisions and immigration policy decisions during the Obama Administration were actually made in the White House and dictated to the agencies.").

65. Press Release, SEC, Allison Herren Lee Named Acting Chair of the SEC (Jan. 21, 2021).

66. Statement, SEC, Allison Herren Lee, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021).

67. Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022).

8,000 comment letters, numerous articles both scholarly and popular, and dozens of law firm bulletins. It has garnered numerous supporters as well as critics. To say it has been controversial would be an enormous understatement. The agency has several times delayed enacting the rule, most likely because of the degree of opposition and the serious legal arguments that have been raised against it.[68] As of this writing, there are some indications that the rule as proposed may be scaled back, although it is unclear whether that will happen and what it would entail.[69]

As proposed, the rule would require public companies to disclose significant amounts of information not only about their own climate-related footprint and its related risks, but also about climate-related outputs of clients and suppliers of the company, even if those companies are private. The proposed rule is lengthy and contains numerous provisions, but broadly speaking it has three principal components: (1) the disclosure of "climate-related risks and their actual or likely material impacts on the registrant's business, strategy, and outlook;" (2) the disclosure of certain governance and management processes relating to climate related risks; and (3) specific disclosures of certain climate-related metrics, targets, and goals, such as those relating to greenhouse gas emissions, including most controversially, data on those same metrics with regard to a company's downstream and upstream suppliers and users.[70]

2. Partisanship and Executive Action

The SEC's climate disclosure proposal comes directly from the White House. It is part and parcel of a series of measures that form the core of the Biden Administration's overall policy goal to combat climate change. The Administration is also openly and unapologetically using executive action to bypass the ordinary legislative process. President Biden has

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68. *See* Soyoung Ho, *SEC Once Again Delays Action on Final Climate Disclosure Rule*, REUTERS (Dec. 12, 2023), https://tax.thomsonreuters.com/news/sec-once-again-delays-action-on-final-climate-disclosure-rule/#:~:text=Yet%20again.,but%20filed%20in%20late%20August [https://perma.cc/25VF-LKM2].

69. *See* Jarrett Renshaw, Isla Binnie, & Douglas Gillison, *Exclusive: US Securities Regulator Signals it May Curb Climate Rule Ambitions*, REUTERS (Nov. 20, 2023, 11:02 AM), https://www.reuters.com/business/environment/us-securities-regulator-signals-it-may-curb-climate-rule-ambitions-2023-11-20/#:~:text=Nov%2020%20(Reuters)%20%2D%20U.S.,requirements%20that%20it%20had%20proposed [https://perma.cc/X6PQ-QK7Q].

70. *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures*, SEC. EXCH. COMM'N, https://www.sec.gov/files/33-11042-fact-sheet.pdf [https://perma.cc/PHR3-FAF3].

announced a broad set of initiatives to combat climate change and made clear from the start that he intends to pursue these aims through executive action rather than by seeking legislative authority. The Administration made this clear even before the inauguration: his campaign team provided the press a list of ten items that the President would pursue even without Congressional authority. Notably, the list included "[r]equiring public companies to disclose climate risks and the greenhouse gas emissions in their operations and supply chains."[71]

President Biden has repeatedly insisted that he would take executive action with respect to climate issues. He has said: "As president I'll use my executive powers to combat climate crisis in the absence of Congressional action."[72] And further: "Congress is not acting as it should . . . . This is an emergency, an emergency, and I will look at it that way. I said last week, and I'll say it again, loud and clear, as President, I'll use my executive powers to combat climate, the climate crisis, in the absence or [sic] congressional action."[73]

The climate disclosure proposal is not the only area where the SEC has waded into politically charged terrain: there have been partisan battles over such things as universal proxy cards, shareholder proposals, conflict minerals, and disclosure of political donations. But the climate disclosure

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71. Umair Irfan, *How Joe Biden plans to use executive powers to fight climate change*, VOX (Jan. 6, 2021, 10:14 AM), https://www.vox.com/21549521/climate-change-senate-election-joe-biden [https://perma.cc/XZ9X-Y38Z].

72. Diana Glebova, *Biden Acknowledges Climate Agenda Dead in Congress, Vows to Use Executive Action*, NAT'L REV. (July 20, 2022, 3:18 P.M.), https://www.nationalreview.com/news/biden-blasts-republicans-for-failing-to-recognize-climate-emergency-vows-to-use-executive-action/ [https://perma.cc/PBX4-UG8R].

73. Zoë Richards & Shannon Pettypiece, *Biden Announces Executive Action on Climate After Failed Effort in Congress*, NBC NEWS (July 20, 2022, 4:00 A.M.), https://www.nbcnews.com/politics/white-house/biden-announce-executive-action-climate-failed-effort-congress-rcna39029 [https://perma.cc/BW29-HDU9]. *See also FACT SHEET: President Biden's Executive Actions on Climate to Address Extreme Heat and Boost Offshore Wind*, WHITE HOUSE BRIEFING ROOM (July 20, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/20/fact-sheetpresident-bidens-executive-actions-on-climate-to-address-extreme-heat-and-boost-offshore-wind/ [https://perma.cc/754G-85R5] ("Today, President Biden will reiterate that climate change is a clear and present danger to the United States. Since Congress is not acting on this emergency, President Biden will. In the coming weeks, President Biden will announce additional executive actions to combat this emergency.").

proposal is by far the most contentious[74] and the one that most clearly exposes the agency as a political actor pursuing partisan political ends at the direction of the executive.

So, what does an overly, and overtly, politicized SEC say about how courts should resolve some of the immediate issues before them, the ones that go not to structure per se, but rather to the authority with respect to specific regulatory enactments? One way to think about it is the three bears theory: they got it just right. From this standpoint, the overt politicization of the SEC is exactly as it should be and solves the unitary executive problem: the party in power is exercising its prerogative to set policy. The SEC is effectively under the control of the executive even if there are some procedural impediments.

But on the other hand, it might raise the bar for what courts should do in reviewing agency rulemaking authority. Much has been written already about the agency's authority—or lack thereof—with respect to adopting the proposed climate rule in thousands of comment letters to the SEC, in academic articles, and in law firm and industry posts. This Article will address some of these arguments below. But very little has been written about the overt politicization of the SEC and how that could inform arguments about the agency's specific legal authority. I would like to suggest that because overt partisanship in the service of executive policy goals undermines the independence that has traditionally been used to justify agency action, courts should apply heightened scrutiny to agency rulemakings in order to safeguard the legislative branch from executive encroachment.

D. Expertise

The SEC cannot credibly claim to be independent—nonpartisan, impartial—when it comes to the proposed climate rules: the rules are designed to implement executive policy goals at the direction of the White House; the proposal was put out for comment on a party line vote; and if it does get approved, it will almost certainly be on a straight party line vote as well.

When it comes to the second pillar that has traditionally been used to justify independent agencies—expertise—the SEC's climate disclosure

74. The rule proposal garnered more than 8,000 comment letters, and has been the subject of numerous op-eds, law firm client letters, newspaper stories, and law review articles.

rule fares no better.[75] When it comes to climate science, it seems fairly obvious to state that the SEC has no particular expertise; indeed, it is safe to say that it has no expertise at all.[76] As far as this author knows, the SEC does not have a single climate scientist on its staff. The former Director of the SEC's Division of Corporation Finance, the division that oversees corporate disclosures, was characteristically modest when he noted that the SEC has little background on environmental issues: "When you get into a lot of detail about greenhouse gas emissions and what types of disclosures are material to investors, I'm not convinced the SEC is the place where that expertise resides."[77]

To this, defenders of the proposed rule argue that the "expertise" in question is not expertise about climate change or climate science, but rather, expertise about "disclosure:" the federal securities laws are premised on a philosophy of disclosure, and the agency is uniquely qualified in determining what types of disclosure are required.[78]

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75. *See generally* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1406 (2013) (explaining the role of expertise in agency action).

76. *See, e.g.*, Andrew N. Vollmer, *The SEC Lacks Legal Authority to Adopt Climate-Change Disclosure Rules*, MERCATUS CTR. (Apr. 12, 2022), https://www.mercatus.org/research/public-interest-comments/sec-lacks-legal-authority-adopt-climate-change-disclosure-rules [https://perma.cc/79AR-YBNJ] ("The main experience and prowess of the SEC in the corporate disclosure area are specifying the elements and details of a company's business and finances that help investors evaluate the company's likelihood of successful financial performance. . . . The SEC and its staff of accountants, lawyers, and economists do not have scientific expertise or experience in these areas, in 'GHG intensity,' or in the indirect emissions upstream and downstream within a company's value chain that should be included in scope 3 GHG emissions"); Patrick McHenry & Jay Clayton, *The SEC's Climate-Change Overreach*, WALL ST. J. (Mar. 20, 2022, 4:37 PM), https://www.wsj.com/articles/the-secs-climate-change-overreach-global-warming-risks-lawmakers-invertors-market-data-11647801469 [https://perma.cc/955E-RZDU] ("Taking a new, activist approach to climate policy—an area far outside the SEC's authority, jurisdiction[,] and expertise—will deservedly draw legal challenges. . . . If and until Congress acts on climate policy, the message to regulators must be clear: Stay in your lane.").

77. *See* Douglas MacMillan & Maxine Joselow, *SEC Plans to Force Public Companies to Disclose Greenhouse Gas Emissions*, WASH. POST (Mar. 15, 2022, 6:00 AM), https://www.washingtonpost.com/business/2022/03/15/sec-climate-emissions-rule/ [https://perma.cc/D78C-UWDA] (quoting Keith F. Higgins, former director of the SEC Division of Corporation Finance).

78. *See, e.g.*, George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 RUTGERS L. REC. 101, 112 (2022) ("Critics of the SEC's Proposal, including Commissioner Peirce, have also pointed out that the SEC does

Which is a fair point, although it immediately raises the question of disclosure of what, and to whom, and to what end? Traditionally, the answer to those questions has been cabined by reference to the underlying goals of the agency, namely investor protection, facilitating capital formation, and promoting fair and efficient markets.[79] Defenders of the proposed rule rightly emphasize that it is disclosure to investors, even if it indirectly provides disclosure to other stakeholders.[80] They insist that "the Proposal is not an environmental regulation but, rather, an investor-focused one."[81]

The problem with that is that the climate disclosure proposal involves disclosures that are admittedly *immaterial*.[82] Disclosure has always been understood to be disclosure of information that would be important to a reasonable investor in making an investment decision, which mirrors the legal definition of materiality (about which there is more below). As a "disclosure agency," the SEC's expertise lies in knowing what information would be important to investors and mandating the disclosure of that information. But information that is immaterial is, by definition, information that is not important to investors in making an investment decision, so how does the SEC have any expertise about that?

To this, defenders of the rule proposal argue that materiality is not a required element under the SEC's statutory authority—that the SEC can require disclosures that are immaterial and has often done so going back to the original disclosures mandated by Schedule A under the Securities Act.[83] This is also a fair point when it comes to the agency's *authority*,

not have the depth of expertise on climate-related matters that other, specialized regulators have. And while this is true, such expertise is not necessary here since the SEC is not setting GHG emission limits, calculating carbon trading prices, drawing up climate transition plans, or setting climate resilience standards for businesses. The SEC's Proposal is limited to disclosure—and only disclosure—on a technical topic, and the SEC has decades-long experience handling disclosures on technical topics.").

79. *See, e.g.*, Bernard S. Sharfman, *The Ascertainable Standards that Define the Boundaries of the SEC's Rulemaking Authority*, 3 U. CHI. BUS. L. REV. 193 (2023).

80. *See, e.g.*, Georgiev, *supra* note 78.

81. *Id.* at 111. *See also id.* at 111–12 ("Again, if the Proposal had environmental (or consumer protection) goals, this critique would be apt, but this is not the case: both on its face and functionally, the Proposal is about investors and capital markets. Any inquiry into its expected effectiveness should focus only on these goals.").

82. *See* Peirce, *supra* note 56.

83. *See* Georgiev, *supra* note 78, at 114–16; Jill E. Fisch, *The SEC's Authority to Pursue Climate-Related Disclosure*, HARV. L. SCH. F. ON CORP. GOV.

which will be addressed below. But there is a second layer added when assessing the SEC's *expertise* with respect to disclosure: shorn from something that is material to investors in making an investment decision, it is hard to see how the mandated disclosures are within the agency's core area of expertise.

With respect to the mandatory disclosure of certain items relating to climate change that are concededly immaterial—meaning they are unimportant to a reasonable investor making an investment decision—it cannot plausibly be claimed that the SEC has any expertise: to the extent that the SEC has any expertise with respect to disclosure, it is expertise with respect to those disclosures that would be important to an investor in making an investment decision. The SEC has no expertise when it comes to the disclosure of information that is not material to the financial condition of a company or that would otherwise not be important to investors. The lack of expertise in this area does suggest that a reviewing court should be even less deferential when assessing claims concerning the agency's disclosure authority.

III. THE SEC'S DISCLOSURE AUTHORITY

A. The Statutory Basis

The SEC's authority to mandate disclosure is very broadly and generally worded. In addition to certain items that are specifically required to be disclosed in registration statements and in various reports, there are several statutory provisions in both the Securities Act of 1933 and the Securities Exchange Act of 1934 that authorize the Commission to require through rules or regulations the disclosure of such other information as may be "necessary or appropriate in the public interest or for the protection of investors."[84] Although these provisions regarding additional disclosures are broadly worded, they are not entirely open-ended.

In particular, while the "public interest" and "the protection of investors" provisions are written as disjunctive, two other statutory provisions make clear that the public interest component is tied to investor protection: the Commission must consider investor protection when determining whether something is in the public interest and must

(June 20, 2022), https://corpgov.law.harvard.edu/2022/06/20/the-secs-authority-to-pursue-climate-related-disclosure/ [https://perma.cc/PJ9H-VS3C]; Joan Heminway, *Materiality and the SEC's Rulemaking Authority*, BUS. L. PRO. BLOG (Oct. 31, 2023), https://lawprofessors.typepad.com/business_law/2023/10/materiality-and-the-secs-rulemaking-authority.html [https://perma.cc/SB42-235S].

84. *See* 15 U.S.C. §§ 77g, 77j, 77s; *id.* §§ 78c-2, 78l, 78m, 78n, 78o, 80a-2.

additionally consider whether any proposed rule will promote efficiency, competition, and capital formation. Specifically, § 2(b) of the Securities Act and § 23(a)(2) of the Securities Exchange Act provide:

> Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, *in addition to the protection of investors*, whether the action will promote efficiency, competition, and capital formation.[85]

Courts have interpreted the language about promoting "efficiency, competition, and capital formation" as requiring the SEC to conduct a cost-benefit analysis subject to review under the arbitrary and capricious standard of the Administrative Procedures Act (APA) whenever the agency adopts a new rule or regulation.[86] Most recently, the Fifth Circuit considered a new SEC rule that requires companies to disclose certain information when they engage in stock buy-backs. The court sent the rule back to the SEC to conduct a proper cost-benefit analysis.[87] The SEC had to admit that it was unable to meet the requisite standard.[88]

As discussed below, the broad wording of the statutory provisions granting the SEC authority to promulgate rules mandating disclosure cuts both ways. Defenders of the climate rule proposal argue that the broad authority encompasses almost anything that the agency, in its discretion,

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85. *Id.* § 77b(b); *id.* § 80a-2(c).

86. *See* Chamber of Com. v. Sec. & Exch. Comm'n, 412 F.3d 133, 142–44 (D.C. Cir. 2005); Bus. Roundtable v. Sec. & Exch. Comm'n, 647 F.3d 1144, 1150 (D.C. Cir. 2011) (finding that Commission "neglected its statutory obligation to assess the economic consequences of its rule"); Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. ON REG. 545, 566–68 (2017); John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 914 (2015) (describing Chamber of Commerce as "interpret[ing] the requirement that the SEC 'consider' a rule's effects on 'efficiency' to imply a very specific [cost-benefit analysis] mandate"); Robert J. Jackson, Jr., *Comment: Cost-Benefit Analysis and the Courts*, 78 L. & CONTEMP. PROBS. 55, 62 (2015) (noting that "the D.C. Circuit made clear [in Chamber of Commerce] that it intends to read the law" as obligating the SEC to conduct a cost-benefit analysis).

87. *See* Chamber of Com. v. Sec. & Exch. Comm'n, 85 F.4th 760, 780 (5th Cir. 2023).

88. Cydney Posner, *SEC Concedes Unable to Correct Defects in Buyback Rule*, COOLEY PUBCO (Dec. 1, 2023), https://cooleypubco.com/2023/12/01/sec-unable-correct-defects-buyback-rule/#:~:text=In [https://perma.cc/TLJ8-7HAB].

views as being in the public interest or for the benefit of investors; but the broader and more open-ended the grant of authority is made out to be, the more likely it is to run afoul of the nondelegation doctrine. A wide-open delegation without any limiting principles is a step too far; there must be some intelligible and articulable principle that shapes and confines the scope of authority.

B. Materiality and Cost Benefit

The proposed climate disclosure rule has three principal components: (1) the disclosure of "climate-related risks and their actual or likely material impacts on the registrant's business, strategy, and outlook"; (2) the disclosure of certain governance and management processes relating to climate related risks; and (3) specific disclosures of certain climate-related metrics, targets, and goals, such as those relating to greenhouse gas emissions, including most controversially, data on those same metrics with regard to a company's downstream and upstream suppliers and users.[89]

Disclosures with respect to the first item which involve "climate-related risks and their actual or likely material impacts on the registrant's business, strategy, and outlook" are clearly within the agency's traditional wheelhouse.[90] First, the disclosures are limited to material information—defined in the proposal in accordance with the standard legal definition of materiality, namely information that a reasonable investor would consider important in making an investment decision or deciding how to vote or, put differently, whether the disclosed material alters the "total mix of

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89. *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures*, *supra* note 70. The most controversial aspect of the rule proposal is a requirement to disclose what are referred to as Scope 1, 2, and 3 emissions: "The proposed rules also would require a registrant to disclose information about its direct greenhouse gas (GHG) emissions (Scope 1) and indirect emissions from purchased electricity or other forms of energy (Scope 2). In addition, a registrant would be required to disclose GHG emissions from upstream and downstream activities in its value chain (Scope 3) if material or if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions. These proposals for GHG emissions disclosures would provide investors with decision-useful information to assess a registrant's exposure to, and management of, climate-related risks, and in particular transition risks." SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures, *supra* note 67.

90. *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures*, *supra* note 70.

information."[91] Second, the information has to be material to the company's business, strategy, and outlook, meaning it has to be material to the company's current or future financial performance. Not only are such disclosures uncontroversial, but they are also likely already required to be made, albeit in a different format, pursuant to Item 303 of Regulation S-K, which requires the disclosure of "material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."[92]

It is with respect to the third part that problems come up: the required disclosures here are not limited to information that is material.[93] Indeed, the lack of a materiality qualification, combined with the fact that Item 303 of Regulation S-K already requires the disclosure of information that is material to the company's current or future financial performance, amounts to a concession that the proposed rule would require companies

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91. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

92. 17 C.F.R. § 229.303.

93. Much has been written about the lack of a materiality standard in the proposed rule, starting with Commissioner Hester Pierce's dissenting statement. *See also* James R. Copland & Bernard S. Sharfman, *The Proposed SEC Climate Disclosure Rule: A Comment from Bernard Sharfman and James Copland*, HARV. L. SCH. F. ON CORP. GOV. (July 28, 2022), https://corpgov.law.harvard.edu/2022/07/28/the-proposed-sec-climate-disclosure-rule-a-comment-from-bernard-sharfman-and-james-copland/ [https://perma.cc/VJH3-73HZ] ("Scope 1 and 2 emissions disclosures are not limited by a 'materiality standard'"); Harvey L. Pitt, *The Proposed SEC Climate Disclosure Rule: A Comment from Former SEC Chairmen and Commissioners*, HARV. L. SCH. F. ON CORP. GOV. (July 1, 2022), https://corpgov.law.harvard.edu/2022/07/28/the-proposed-sec-climate-disclosure-rule-a-comment-from-bernard-sharfman-and-james-copland/ [https://perma.cc/W8EK-P9WW] ("The Commission has long recognized that materiality is the 'cornerstone' of the federal securities laws. . . . The Commission has long limited disclosure obligations to material information, in order to give investors what they need without inundating them with useless or irrelevant information. . . . The Proposal abandons these prudent pronouncements and the longstanding practice they represent. Instead, the Proposal would require the disclosure of, and in many cases the creation of, mountains of financially immaterial information. It is difficult to imagine how Scopes 1, 2, or 3 emissions in and of themselves could be financially material with respect to the vast majority of companies."). On the importance of materiality, *see* Evan Williams, *Understanding Climate Disclosure and Materiality*, U.S. CHAMBER OF COM. (Oct. 25, 2023), https://www.uschamber.com/finance/corporate-governance/effective-material-corporate-disclosure-is-the-cornerstone-of-u-s-capital-markets [https://perma.cc/V3EU-4Y8S].

to disclose information that is not material; that is, it would require the disclosure of information that is not important to a reasonable investor in making an investment decision.

Supporters of the climate change disclosure rule argue that the SEC has authority to mandate disclosures even with respect to items not deemed material. They point to examples where the disclosure obligation does not have a materiality component and the fact that while the word *material* qualifies various statutory provisions, it is notably absent in others, indicating that in certain circumstances materiality may not be a limiting principle.[94] While this is no doubt true, materiality nonetheless will almost certainly play a role in any court review of the validity of the climate change rules even if it is through the backdoor of a cost-benefit analysis for three reasons.

First, the various disclosure-enabling provisions require that any proposed disclosure must "be necessary or appropriate in the public interest or for the benefit of investors."[95] The legal test of materiality is whether a reasonable investor would consider the information to be important in making an investment decision.[96] If information is not material—that is, if it is unimportant to a reasonable investor in making an investment decision—it is hard to see how it could be "for the benefit of investors." Almost by definition, the required information does not provide anything that investors would consider important.

Second, with respect to the public interest prong, as previously noted, that language is cabined by a requirement that the SEC determine that any new rule must be "for the protection of investors." The "protection of investors" language, in turn, brings us back to materiality: if certain information is concededly immaterial, how could mandatory disclosure of that information provide any protection for investors? Again, by definition, it is information that investors would not consider important in making an investment decision.

Third, the statute requires that the SEC consider, in addition to whether a proposed rule is for the protection of investors, whether "the action will promote efficiency, competition, and capital formation." As previously noted, this provision has been interpreted as requiring the

94. *See, e.g.*, Heminway, *supra* note 83; Comment Letter of Securities Law Professors on the Enhancement and Standardization of Climate-Related Disclosures for Investors to Vanessa A. Countryman, Secretary of the U.S. Sec. & Exch. Comm'n (June 6, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf [https://perma.cc/6BK8-GLJX].

95. *See* 15 U.S.C. §§ 77g, 77j, 77s; *id.* §§ 78c-2, 78l, 78m, 78n, 78o, 80a-2.

96. *See* TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976); Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

agency to conduct a cost-benefit analysis whenever it adopts a new rule or regulation. If the information that is required to be disclosed is immaterial, it provides no benefit or protection to investors. Even if the rule does not fail on those grounds alone, the mandatory disclosure of immaterial information will almost certainly fail a cost-benefit test: with no benefit on one side of the ledger, any cost will necessarily tip the scales. And the costs here are in fact quite substantial.

C. The Cost-Benefit Analysis

When it comes to mandating non-material disclosures, it will be very difficult for the agency to show that the benefits outweigh the costs. The lack of a benefit will be contrasted with the substantial costs that companies will have to incur in providing the information. Indeed, the cost-benefit analysis that has been provided by the agency to date appears to be wholly inadequate: while the significant costs are amply quantified, the agency has been unable to articulate any concrete and quantifiable benefits.

By the agency's own calculations, the proposed plan would "raise the cost to businesses to comply with the disclosure rules from $3.9 billion to $10.2 billion. The leap in expense equates to an ongoing additional cost of $420,000 a year on average for a publicly listed small company and $530,000 a year for a bigger firm."[97] Industry groups have argued that the true cost of compliance will be much higher than the SEC estimates.[98] But even under the SEC estimates, the proposed climate rule "would cost companies two-and-a-half times more than all SEC disclosures they currently make."[99]

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97. Jean Eaglesham & Paul Kiernan, *Fight Brews Over Cost of SEC Climate-Change Rules*, WALL ST. J. (May 17, 2022, 5:30 A.M.), https://www.wsj.com/articles/fight-brews-over-cost-of-sec-climate-change-rules-11652779802 [https://perma.cc/9U8K-Q5TH]. *See* Richard Vanderford, *SEC's Climate-Disclosure Rule Isn't Here, but It May as Well Be, Many Businesses Say*, WALL ST. J. (Apr. 25, 2023, 9:00 A.M.), https://www.wsj.com/articles/secs-climate-disclosure-rule-isnt-here-but-it-may-as-well-be-many-businesses-say-854789bd [https://perma.cc/ND3S-PC69].

98. *See, e.g.*, Maria Ghazal, *The Proposed SEC Climate Disclosure Rule: A Comment from the Business Roundtable*, HARV. L. SCH. F. ON CORP. GOV. (July 12, 2022), https://corpgov.law.harvard.edu/2022/07/12/the-proposed-sec-climate-disclosure-rule-a-comment-from-the-business-roundtable/#:~:text=The [https://perma.cc/6C78-2629].

99. *See* Soyoung Ho, *SEC Delays Climate Change Disclosure Rulemaking*, THOMSON REUTERS (June 15, 2023), https://tax.thomsonreuters.com/news/sec-delays-climate-change-disclosure-rulemaking/ [https://perma.cc/8CVJ-XF4K].

In the rule proposal, the potential benefits are never quantified, and they are mostly described in vague and hypothetical terms. A typical example: "Another benefit of the proposed rules is that it *could* allow firm's shareholders to better monitor management's decisions and mitigate certain agency problems stemming from management's discretionary choices with respect to climate disclosure."[100] In light of how courts have treated SEC cost-benefit analyses in the past, it is highly questionable whether this one will pass muster.[101]

IV. CHALLENGES TO THE SEC'S CLIMATE DISCLOSURE AUTHORITY

In addition to the numerous recent challenges centering on the structure of independent agencies, there have been several recent cases—and some still pending ones—challenging the substantive boundaries of agency authority in ways that will likely impact any eventual challenge to the SEC's proposed climate disclosure rule. Some of these challenges—both structural and substantive—were specifically directed at the SEC,[102] while others centered on the powers of diverse federal agencies in ways that have had, or will have, an impact on the SEC's authority. These cases implicate core constitutional issues as well as several canons of statutory construction, aligned around three closely connected and at times interrelated doctrines: Chevron deference, the major questions doctrine, and the nondelegation doctrine.

A. Chevron Deference

"Chevron deference" is a nearly 40-year-old doctrine that is currently being reconsidered by the Supreme Court. In brief, Chevron deference says that if a statute is silent or ambiguous on a particular point, courts must defer to the agency's reasonable interpretation of the statute. Chevron deference is based on the principle that Congress cannot legislate every detail of a statutory scheme and must necessarily give agencies the power to fill in the gaps. Questions of interpretation should be left to the agencies

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100. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

101. *See, e.g.*, Chamber of Com. v. Sec. & Exch. Comm'n, 85 F.4th 760 (5th Cir. 2023).

102. *See, e.g.*, Kokesh v. Sec. & Exch. Comm'n, 581 U.S. 455 (2017) (discussing disgorgement); Liu v. Sec. & Exch. Comm'n, 591 U.S. 71 (2020) (discussing disgorgement); Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237 (2018) (discussing Administrative Law Judges (ALJs)).

statutorily charged with administering the law, and courts should not second-guess those judgments. As the Court put it in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*:

> The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[103]

Chevron deference has always been closely tied to the notion of agency independence and expertise, including with respect to agency rulemaking, as former SEC Chair Mary Jo White made clear:

> When I urge the courts to defer to the SEC's independence and expertise, I am really only making the point that separation of powers requires each of us to respect and stay in our respective lanes. There is a fair amount of law on this. As stated in cases like Chevron, the courts must defer to an agency's interpretation of a law if the statute is silent or ambiguous on a particular point. And in reviewing agency rulemaking, the courts should defer to the agency's reasoned judgments, particularly as to matters within the agency's expertise.[104]

Although Chevron deference is a longstanding doctrine, some members of the Court, particularly Justices Thomas and Gorsuch, have indicated their deep misgivings about the doctrine in recent years, largely on the ground that it takes away the judiciary's fundamental power to interpret law and improperly gives it to the executive branch. Justice Thomas, for example, has said that Chevron deference "wrests from Courts the ultimate

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103. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (internal quotation marks, alterations, citations, and footnotes omitted).

104. Mary Jo White, *Corporate Securities and Financial Law Lecture: The Importance of Independence*, SEC. & EXCH. COMM'N (Oct. 3, 2013), https://www.sec.gov/news/speech/spch100113mjw [https://perma.cc/SC8H-W36C].

interpretative authority to 'say what the law is,' and hands it over to" the executive branch.[105] Justice Thomas has also said that *Chevron* raises serious separation-of-powers concerns by usurping the judiciary's role in interpreting the law and delegating too much legislative authority to agencies.[106] Similarly, Justice Gorsuch recently stated that the Court "should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts."[107] When he was a circuit judge, Justice Gorsuch called *Chevron* a "behemoth" that "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[108] Other justices have also questioned *Chevron:* before he was elevated to the Supreme Court, Justice Kavanaugh wrote a law review article in which he said that *Chevron* "encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints" and often leads to situations where "every relevant actor may agree that the agency's legal interpretation is not the best, yet that interpretation carries the force of law."[109]

This term, the Court is hearing *Loper Bright Enterprises v. Raimondo*, which squarely presents the issue of whether *Chevron* should be overruled.[110] Again, while it is always difficult to predict what the Court will do, the early betting line is that the doctrine is likely to fall.[111]

105. Michigan v. Env't Prot. Agency, 576 U.S. 743, 761 (2015) (Thomas, J., concurring).

106. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 112–16, 131 (2015) (Thomas, J., concurring).

107. *See* Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting).

108. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

109. Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, 129 HARV. L. REV. 2118, 2150–51 (2016).

110. *See* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429, 2429 (2023). The case was argued on January 17, 2024.

111. *See, e.g.*, Ufonobong Umanah, *Expect Narrowing of Chevron Doctrine, High Court Watchers Say*, BLOOMBERG L. (Oct. 10, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/expect-narrowing-of-chevron-doctrine-high-court-watchers-say [https://perma.cc/7GYM-HM7X]; Josh Gerstein & Alex Guillén, *Supreme Court Move Could Spell Doom for Power of Federal Regulators*, POLITICO (May 1, 2023, 3:14 PM), https://www.politico.com/new

Ironically, the original concern that animated the Court in *Chevron* has now been turned almost on its head. From a separation-of-powers standpoint, *Chevron* was focused on safeguarding congressional decision making from judicial interference and more broadly from judicial meddling with the policy making functions of the legislative, and politically responsive, branch:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy . . . the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.[112]

Today, the separation-of-powers concern appears to be quite different: it centers on protecting the legislative branch from executive overreach.

In the context of the proposed climate disclosure rule, if *Chevron* is overruled, the SEC's views concerning the scope and extent of its disclosure authority under various statutory provisions will not be entitled to any special weight. If *Loper* does not overrule *Chevron* outright, a challenge to the climate disclosure rule could be the final straw. The overt partisanship of the agency and its effective control by the executive branch will make it more likely that courts will be skeptical of the agency's claims of authority. Moreover, to the extent that deference is justified on grounds of agency expertise, the agency's lack of expertise when it comes to climate science will likely heighten the degree of skepticism. Finally, courts are unlikely to defer to agency expertise when the position of the agency switches with every change in administration.[113]

s/2023/05/01/supreme-court-chevron-doctrine-climate-change-00094670 [https://perma.cc/L2QR-DWB3].

112. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

113. *See* Pierce, Jr., *supra* note 64 (discussing Justice Kagan's dissent in *West Virginia v. EPA* in which she argues that the Court should defer to agency expertise: "The initial problem with Justice Kagan's argument is the fact that the EPA that issued the [Clean Power Plan (CPP)] during the Obama Administration is the same EPA that issued the Affordable Clean Energy Plan (ACE) during the Trump Administration. A court cannot defer both to the expert EPA that issued the CPP and to the expert EPA that rejected the CPP and issued the ACE."). On SEC interpretations changing over the years and what that means for reviewing

B. The Major Questions Doctrine

Last term, in *West Virginia v. EPA*, the Court adopted the major questions doctrine.[114] In brief, the major questions doctrine holds that courts should be skeptical, rather than deferential, when assessing an agency's claim to possess rulemaking authority in a novel area that is economically and politically significant. The concerns informing the major questions doctrine are similar to those underlying the current critique of Chevron deference: both are rooted in separation-of-powers concerns, and specifically protecting legislative branch authority, whether from executive overreach or congressional abnegation.

In *West Virginia*, the Court noted the usual deferential approach but held that there are "extraordinary cases" that call for a different tack: "cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[115] The Court stated that "both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[116]

Where the agency is asserting authority to act in an area of "economic and political significance," the Court held, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[117] The major questions label took hold, the Court said, "because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[118]

Although it has been described as a novel approach,[119] the major questions doctrine has in fact been simmering for some time, often in

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courts: *see generally* Am. Fed'n of State, Cnty. & Mun. Emps. v. Am. Int'l Grp., Inc., 462 F.3d 121 (2d Cir. 2006).

114. West Virginia v. Env't Prot. Agency, 597 U.S. 697 (2022).

115. *Id.* at 721 (citations omitted).

116. *Id.* at 723.

117. *Id.*

118. *Id.* at 724.

119. *See, e.g.*, *id.* at 764 (Kagan, J., dissenting) (citations omitted) ("The majority thinks not, contending that in 'certain extraordinary cases'—of which this is one—courts should start off with 'skepticism' that a broad delegation authorizes agency action. The majority labels that view the 'major questions

dissents and sometimes under the rubric of what is referred to as the "clear statement rule."[120] At the heart of these earlier pronouncements is the idea that legislative power cannot be assumed to be given over to an agency and may not be able to be legitimately transferred to the executive in any event. For example, in a 2014 case, the Court stated that "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[121] And in a 2019 case, Justice Gorsuch noted in a dissent, joined by Justices Roberts and Thomas, that "[a]lthough it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[122] While still a judge on the D.C. Circuit, Justice Kavanaugh made much the same point, though framed from the perspective of executive overreach: "[t]he major rules doctrine helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority."[123]

In a concurring opinion in *West Virginia*, Justice Gorsuch, joined by Justice Alito, hammered home the separation-of-powers concerns underlying the major questions doctrine, focusing on how agency power can amount to placing legislative authority in executive hands, thus subverting the constitutional structure. "Permitting Congress to divest its legislative power to the Executive Branch," he said, "would 'dash [this] whole scheme.' Legislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him."[124]

When it comes to figuring out what actually qualifies as a "clear statement" of congressional intent to authorize agency action, there seems

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doctrine,' and claims to find support for it in our caselaw."); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263 (2022) ("While ostensibly applying existing major questions case law, the [Supreme Court] in actuality altered the doctrine of judicial review of agency action in its method and content, in ways that will have momentous consequences.").

120. *See generally* Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465 (2024).

121. Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 304, 324 (2014).

122. Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

123. U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 417 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

124. *West Virginia*, 597 U.S. at 739 (Gorsuch, J., concurring) (citation omitted).

to be a great deal of uncertainty.[125] But in his concurrence in *West Virginia*, Justice Gorsuch provided something of a template. Gorsuch pointed to four factors: (1) "courts must look to the legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme'" but noting that '"[o]blique or elliptical language"' will not do; (2) "courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address," although '"vague language"' in '"a long-extant statute"' will be suspect; (3) courts may examine the agency's past interpretations of the relevant statute; and (4) "skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise."[126]

The last point may be the most telling. Even Justice Kagan, who dissented in *West Virginia,* acknowledged that courts should be skeptical when an agency is "operating far outside its traditional lane, so that it ha[s] no viable claim of expertise or experience."[127]

So how would the major questions doctrine, and its corollary the clear statement rule, apply to the SEC's proposed climate disclosure rule? On one hand, the proposed rule does not seem to have quite the same level of economic and political significance as the EPA rule that was rejected in *West Virginia*. On the other hand, the agency is relying on vague—indeed open-ended—language in long-extant statutory provisions, in an area outside the agency's assigned mission of investor protection and facilitating capital formation, in an area far outside its traditional lane where it has no viable claim of expertise or experience.[128]

In *West Virginia*, the Court stated that the major questions doctrine was to be applied in extraordinary cases. However, as many have pointed out, "the Court's reasoning could apply to any major policymaking effort

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125. *See, e.g.*, Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. F. 693, 717 n.159 (2022); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 483–84 (2021); Squitieri Chad, *Who Determines Majorness?*, 44 HARV. J. L. & PUB. POL'Y 463, 465–72 (2021).

126. *West Virginia*, 597 U.S. at 748 (Gorsuch, J., concurring).

127. *Id.* at 765 (Kagan, J., dissenting).

128. *See* Donald J. Kochan, *The SEC's Climate Disclosure Rules are in Double Constitutional Trouble*, HARV. L. SCH. F. ON CORP. GOV. (June 19, 2023), https://corpgov.law.harvard.edu/2023/06/19/the-secs-climate-change-disclosure-rules-are-in-double-constitutional-trouble/ [https://perma.cc/P4QB-FSXW].

by a federal agency."[129] The Court has already relied on the doctrine in a case challenging President Biden's effort to cancel student debt,[130] and it will almost certainly be raised in any challenge to the proposed climate disclosure rule.

C. Nondelegation Doctrine and the Intelligible Principle Test

The nondelegation doctrine is closely related conceptually to the major questions doctrine and could provide another avenue of attack with respect to the proposed climate rule.[131] In brief, the doctrine holds that Congress may lawfully delegate legislative authority to the executive branch so long as it provides an "intelligible principle" to guide the executive.[132] In other words, the doctrine holds that Congress cannot simply give away its power to legislate to another branch: Congress must provide sufficient contours to a legislative grant to ensure that it is still the body legislating.

The nondelegation doctrine was long thought to be a relic: until recently there had not been a successful challenge on nondelegation grounds in over 90 years. But in 2019, in *Gundy v. United States*, four justices—Gorsuch, Roberts, Thomas, and Alito—expressed an interest in reviving the doctrine.[133] Notably, Justice Kavanaugh was not yet on the

129. Shay Dvoretzky & Emily J. Kennedy, *The Evolving Landscape of Administrative Law*, SKADDEN (Sept. 2023), https://www.skadden.com/insights/publications/2023/09/quarterly-insights/the-evolving-landscape-of-administrative-law [https://perma.cc/2MZS-9R2F].

130. *See* Biden v. Nebraska, 143 S. Ct. 2355 (2023).

131. Dvoretzky & Kennedy, *supra* note 129 ("More fundamentally, the major questions doctrine reflects a Supreme Court that is eager to realign separation of powers in ways that minimize the administrative state. The *West Virginia* majority makes clear that '[a]gencies have only those powers given to them by Congress,' and courts decide which powers Congress has conferred. Those strict boundaries go hand in hand with the Court's skepticism of Congress' ability to delegate any lawmaking authority to another branch (the so-called 'nondelegation doctrine').").

132. *See* J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406–09 (1928) ("In determining what [Congress] may do in seeking assistence [sic] from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

133. *See* Gundy v. United States, 139 S. Ct. 2116, 2130–48 (2019) (Gorsuch, J., dissenting).

Court when *Gundy* was heard and took no part in the consideration or decision of the case. Kavanaugh's statements in other places indicate that he is likely receptive to the nondelegation doctrine, so it might currently enjoy a majority on the Court.

How might the nondelegation doctrine apply to the proposed climate rule? Defenders of the proposed rule argue that the SEC's power to mandate disclosure, found in a variety of statutory provisions, is very broad: the SEC can mandate disclosure if it determines that it is "necessary or appropriate in the public interest or for the protection of investors."[134] Left at that, the grant of authority is not just broad, it is overly broad: the public interest does not provide any intelligible principle to guide the executive.

But as previously noted, the statutory grants of disclosure authority are in fact bounded by two other statutory provisions which do give some form and content to what is meant by the public interest. Whenever the SEC is engaged in rulemaking and is required to determine whether the action is necessary in the public interest, the SEC must "*also* consider, *in addition to the protection of investors*, whether the action will promote efficiency, competition, and capital formation."[135] Absent these limiting provisions, an open-ended grant of authority to the SEC to mandate disclosure if the agency deems it to be in the public interest would undoubtedly fail the nondelegation test: there is no guiding principle at all, let alone an intelligible one.

When these further considerations are added to the public interest prong, however, there is an intelligible principle to guide agency rulemaking, but it provides no comfort to defenders of the proposed climate rule. The intelligible principle is that rulemakings must be for the benefit of investors, *or* in the public interest *and* for the protection of investors *and* conducive of market efficiency. The core focus is on whether a rule will benefit investors or otherwise protect investors, balanced against efficiency concerns. And benefitting or protecting investors means benefitting or protecting them in their capacity as investors. A rule mandating disclosure of information that is immaterial—that is, a rule that mandates disclosure of information that a reasonable investor would not consider important in making an investment decision—cannot possibly meet that standard. The federal securities laws are aptly described as a disclosure regime; but it is disclosure that is animated, and must be cabined, by the core mission of the agency, which is protecting

134. *See* McGowan, *supra* note 62.
135. *See* Sharfman, *supra* note 79, at 11.

investors; facilitating capital formation; and maintaining fair, orderly, and efficient markets.[136] The proposed climate rule does none of those things.

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The unitary executive theory starts from the premise that the Constitution allocates *all* executive power to the President, not just *some* executive power, and thus independent agencies are rightly subject to executive control, including with respect to the removal of agency heads.[137] But the major questions doctrine, the nondelegation doctrine, and even Chevron deference are also important elements in conceptualizing independent agencies as an arm of the executive which, at least in the case of the SEC, they surely are. Those doctrines serve as limiting principles designed to safeguard the legislature's proper role in the constitutional structure. The unitary executive theory posits that *all* executive power should be in the hands of the executive; the limiting principles posit that *only* executive power should be in the hands of the executive. The major questions doctrine and the nondelegation doctrine further hold that Congress cannot give away its power to legislate to the executive branch. It is the President's role to apply the law, but it is Congress' role to make the law: the President executes, the Congress legislates. In the middle, there remain those places where the independent agency is truly independent: where it is acting in a quasi-legislative or quasi-judicial capacity, that is, in aid of properly delegated, clearly articulated, and narrowly circumscribed legislative or judicial authority. But for that power to be legitimate, the agency must be truly independent when acting in those capacities; meaning it must act in a non-partisan, impartial manner, free of executive branch influence and interference. Whenever an independent agency acts in an overtly partisan manner in pursuit of a political agenda, its claims of authority should always be viewed with suspicion.

CONCLUSION

The heightened partisanship that is currently infecting the SEC has numerous consequences. The first is reputational, which eventually translates into effectiveness: when the SEC is viewed as a politically motivated actor rather than an impartial arbiter or honest broker, it will lose respect in the community it is tasked with regulating, and that in turn will make it more difficult for it to do its job. People are more likely to

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136. *See id.* at 10–12.
137. *See supra* notes 10–11.

challenge the agency, which will lead to increased litigation or to simply treating the agency with contempt, which will fuel public cynicism.[138]

But the legal repercussions of naked partisanship are even more consequential than the reputational ones. When the SEC is seen as a partisan political actor pursuing the executive's policy agenda, courts will likely treat challenges to the agency's authority—both structural and substantive—with an acute sensitivity. Specifically, courts are unlikely to defer to the agency's interpretation of statutes and regulations and will likely look at claims of statutory authority with a jaundiced eye. This will be particularly pronounced any time the agency strays from its core mission, that is, when it acts outside, or at best at the edges, of its area of expertise. Simply put, courts are not going to defer to the agency's independence and expertise if the agency is viewed as lacking either independence or expertise.

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138. *See* Schoeff, Jr., *supra* note 57 ("Another danger for the SEC of a political split in the business it conducts is reputational risk, Kimpel said. If the SEC's stature diminishes, it could chip away at the faith in its ability to police financial markets and facilitate capital formation . . . . 'More and more people are going to begin to question the legitimacy of the agency,' said Kimpel"); Bob Pisani, *The SEC Wants to Know a Lot More About What Companies Are Doing About Climate Change*, CNBC (Mar. 21, 2022, 2:33 PM), https://www.cnbc.com/2022/03/21/the-sec-wants-to-know-a-lot-more-about-what-companies-are-doing-about-climate-change.html [https://perma.cc/GF3P-S2B3] ("In a statement to CNBC, U.S. Congressman Andy Barr (R-KY), a senior member of the House Financial Services Committee who led GOP pushback against the SEC climate disclosure rulemaking process back in October of last year, said: 'The statutory mission of the Securities and Exchange Commission (SEC) is to protect investors, maintain fair, orderly[,] and efficient markets, and facilitate capital formation. It is definitively not to reduce carbon emissions or solve climate change.' 'But the SEC, by wading into environmental policy debates, like climate change, in which it has zero expertise . . . will politicize the agency and reduce its credibility by hurting investors, elevating non-pecuniary factors above financial returns,' he said"); Pitt, *supra* note 93 ("We fear that the Proposal's disregard of financial materiality, together with what we view as the almost certain judicial reaction (based on existing case law) to inevitable challenges to an eventual rule, ultimately will do irreparable damage to the SEC's regulatory and enforcement program. The Commission's reputation and ability to pursue its mission would be placed at risk. We strongly urge the Commission to rescind or substantially modify the Proposal."). Morale at the agency may also be suffering. *See Gary Gensler's Bad Performance Review*, WALL ST. J. (Oct. 26, 2022, 6:40 PM), https://www.wsj.com/articles/gary-genslers-bad-performance-review-sec-inspector-general-rulemaking-11666719584 [https://perma.cc/CJ79-LF3C] (noting that staff attrition rose to 6.4% in 2022 from 3.8% in 2020).

When it comes to the proposed climate disclosure rule, if it is ever enacted, a reviewing court is most likely to follow the path of least resistance and rule on cost-benefit analysis grounds, which accords with the general rule that courts should avoid deciding a case on constitutional grounds if it can be decided on narrower statutory grounds. The proposed rule, at least in its current form, is unlikely to survive on that score: the costs are enormous, readily identifiable, and reasonably quantifiable. The benefits are few, amorphous, not easily identifiable, and not readily quantifiable. The effective concession that at least some of the disclosures are immaterial, at least from a financial standpoint, is the nail in the coffin: having conceded that the disclosures are not material—i.e., conceding that a reasonable investor would not consider them important in making an investment decision—it is hard to imagine what possible benefit could accrue from them. How could investors benefit through disclosures that are by definition unimportant to them in making an investment decision?

The proposed climate disclosure rule is unlikely to survive in its current form, so the substantive harm may be minimal. But the foray into the politically charged partisan political arena could cause lasting damage. The SEC's move into the climate change arena was a bad mistake. It threatens the agency's well-deserved reputation as an impartial regulator of the nation's financial markets. It turns the agency into another partisan political actor advancing partisan political interests. And it will undoubtedly threaten the agency's actual autonomy as courts inevitably push back on the agency's overreach.