Securities Regulation and Administrative Law in the Roberts Court

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INTRODUCTION

This Essay compares a judicial revolution that is happening to one that is not. Both the change and the status quo are being managed by the current Supreme Court. That Court has, when it comes to administrative law, shown a capacity to revisit everything. But when it comes to securities regulation, it has resisted change.

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It is not obvious why this might happen. The Roberts Court has been labelled "business-friendly,"[1] and corporate America has complained loudly about the burdens imposed by both administrative law and securities regulation. Much of securities regulation *is* administrative law, specifically the administrative law that governs the capital markets (though some of it—importantly—is class action litigation by shareholders against managers). The Securities and Exchange Commission (SEC) is an agency, and it promulgates plenty of rules.

But there is little doubt that the Supreme Court's approach to administrative law has diverged from its approach to securities regulation. When it comes to administrative law, the Supreme Court under Chief Justice John Roberts has evinced a willingness to change doctrine. While some of its new rights have not been paired with particularly compelling remedies, the Court has:

- Overruled the *Chevron* doctrine, under which courts would defer to reasonable agency interpretations of their own statutes.[2]
- Developed the major questions doctrine and reformulated its doctrinal basis away from a check on the *Chevron* doctrine and toward a support for the separation of powers.[3]
- Created a doctrine precluding government officials from having double for-cause removal protections.[4]
- Recognized a new, and potentially wide-ranging, reliance interest that could be used to constrain changes in policy by agencies.[5]
- Reformulated the standard for reviewing agency interpretations of their own regulations.[6]
- Held that agency-enforcement actions modeled on common law fraud must be adjudicated before Article III courts and not administrative law judges (ALJs).[7]

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1 David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1020 (2009) ("[T]here is little doubt that the Roberts Court is, broadly speaking, a business-friendly Court.").

2 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272–73 (2024).

3 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

4 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).

5 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020).

6 Kisor v. Wilkie, 139 S. Ct. 2400, 2416–18 (2019).

7 SEC v. Jarkesy, 144 S. Ct. 2117, 2139 (2024).

- Expressed, through the sentiments of five justices, four of them in *Gundy v. United States*,[8] an interest in reformulating the nondelegation doctrine, which limits the power of Congress to delegate its rulemaking power to administrative agencies.[9]
- Backed away from an early Roberts Court decision broadening states' access to federal court by giving them "special solicitude" when establishing standing to sue.[10]

However, in securities regulation, the Roberts Court, with two exceptions, has not disturbed existing doctrine at all. The Court:

- Declined to cut back on Rule 10b-5[11] shareholder class actions, which depend on a "fraud-on-the-market" theory that the Court reaffirmed.[12]
- Declined to reformulate the rules for insider trading, despite being invited to do so by a Second Circuit case in which hedge fund managers were the defendants.[13]
- Declined to revise the standard to establish materiality.[14]
- Declined to reformulate Rule 10b-5 to preclude "scheme" liability.[15]

In fact, with the exceptions of *Morrison v. National Australia Bank Ltd.*,[16] which limited the ability of foreign investors to take advantage of U.S. securities laws,[17] and *Stoneridge Investment Advisors, LLC v. Scientific-Atlanta, Inc.*,[18] which foreclosed aiding and abetting liability in private Rule 10b-5 cases,[19] the Roberts Court has done little to reform the securities laws at all, despite claims from corporate America that securities class actions and enforcement proceedings have become an onerous burden on

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8 139 S. Ct. 2116 (2019).

9 *Id.* at 2131 (Gorsuch, J., dissenting); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of certiorari).

10 United States v. Texas, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring) ("Nor has 'special solicitude' played a meaningful role in this Court's decisions in the years since [*Massachusetts v. EPA*]. . . . And it's hard not to think, too, that lower courts should just leave that idea on the shelf in future ones." (quoting Massachusetts v. EPA, 549 U.S. 497, 520 (2007)).

11 17 C.F.R. § 240.10b-5 (2024).

12 Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 283–84 (2014).

13 Salman v. United States, 580 U.S. 39, 50–51 (2016).

14 Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 196–97 (2015).

15 Lorenzo v. SEC, 139 S. Ct. 1094, 1100–01 (2019).

16 561 U.S. 247 (2010).

17 *Id.* at 265.

18 552 U.S. 148 (2008).

19 *Id.* at 158.

business. In fact, the SEC has been constrained by the Court only when it happens to be the generic agency defendant in a separation of powers case that has more implications for every agency in the broader administrative state than it does for the state of securities regulation, as was the case for the common law–linked enforcement-actions case in which the SEC was the government party.[20]

What is the explanation for this divergent approach between general regulation, which the Court has sought to police, and securities regulation, which the Court has left alone? Some scholars have argued that the Supreme Court is simply uninterested in securities regulation,[21] but the Court now hears proportionately more securities cases than it once did.[22] Others dispute the premise that the Court supports corporate America.[23] And, of course, the Roberts Court could change its approach to securities regulation in time. But I think the divergence suggests that the Court wants to police public rights and rights against the state but is less interested in reformulating the standards for private disputes, such as disputes between shareholders and managers.[24]

I. THE TALE OF THE TAPE

I extracted the universe of relevant cases from the Supreme Court Database.[25] The Roberts Court has, as of the 2022 term, decided 20 securities regulation cases and far more administrative

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[20] *See, e.g.*, *Jarkesy*, 144 S. Ct. at 2139.

[21] *See, e.g.*, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 86 (2002) ("[M]ost judges do not find securities law interesting.").

[22] *See infra* text accompanying notes 32–36.

[23] *See, e.g.*, JONATHAN H. ADLER, *Introduction* to BUSINESS AND THE ROBERTS COURT 1, 12 (Jonathan H. Adler ed., 2016) ("[T]he Court's tendencies in business-related cases are not easily reduced to a hashtag slogan."). *But see* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (finding that "the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts"); *id.* at 451 (finding that over the span of 1946 to 2011, Chief Justice John Roberts and Justices Samuel Alito and Clarence Thomas rank in the top five Justices most favorable to business); Lee Epstein, William M. Landes & Richard A. Posner, *When It Comes to Business, the Right and Left Sides of the Court Agree*, 54 WASH. U. J.L. & POL'Y 33, 36 (2017) (finding that, in the Roberts Court era, "the current Democratic *and* Republican appointees support business at record levels" (emphasis in original)).

[24] *But see* Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox,* 135 HARV. L. REV. 220, 226 (2021) (arguing that the Roberts Court has overseen "the expansion of corporate rights and narrowing of liability or access to justice against corporate defendants"). I note that for other private disputes, like those between workers and employers or unions and managers, the Roberts Court may take a different approach.

[25] The database may be found at *The Supreme Court Database,* WASH. UNIV. L., http://supremecourtdatabase.org.

law cases—the Supreme Court Database's overinclusive administrative action variable lists 176 of them.[26]

The conventional wisdom about the Supreme Court is that it is highly interested in administrative law cases and increasingly open to taking securities regulation cases.[27] The conventional wisdom before this was that the Court did not care about securities regulation.[28] And in the descriptive data, there is some basis for both conventional views.

On the one hand, administrative law decisions were more controversial in that they were more likely to result in judicial disagreement—a sign of judicial interest in the area. Twenty-two percent of them have been decided 5–4, while only 40% of its administrative law docket has produced a unanimous opinion.[29] For the securities regulation matters, 60% of the decisions were unanimous, and only 10% were decided on a 5–4 basis.[30] There were proportionately more dissents in administrative law cases than in securities law cases as well.[31]

On the other hand, with a Supreme Court that has been hearing fewer and fewer cases,[32] the number of administrative law

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[26] I downloaded two different sets of cases from the database on February 9, 2024, utilizing the 2023 Release 01 version of the database. *Previous Versions of the Database*, WASH. UNIV. L. [hereinafter *2023 Release 01 Database*], http://supremecourtdatabase.org/data.php?s=2. First, I downloaded all the "adminAction" cases decided by the Roberts Court, which is current through the 2022 term, as of this writing. As the Online Codebook to the database explains, "This variable pertains to administrative agency activity occurring prior to the onset of litigation. . . . The general rule for an entry in this variable is whether administrative action occurred in the context of the case. Note too that this variable identifies the specific federal agency." Harold Spaeth, Lee Epstein, Ted Ruger, Sarah C. Benesh, Jeffrey Segal & Andrew D. Martin, *Supreme Court Database Code Book*, WASH. UNIV. L., https://perma.cc/9GFU-F94B. This includes cases like *Citizens United v. FEC*, 558 U.S. 310, 319 (2010), which involves an agency, but is about the First Amendment's constraints on campaign finance regulation; *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 212 (2014), which is a substantive patent law case; and *Rita v. United States*, 551 U.S. 338, 359 (2007), a case that spells out how judges can depart from the sentencing guidelines in criminal cases. To find the securities regulation cases, I looked for a particular issue variable in the database: issue 80120 addresses "federal or state regulation of securities." Spaeth et al., *supra*.

[27] *See* A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 107 (2011).

[28] Bainbridge & Gulati, *supra* note 21, at 103.

[29] *See 2023 Release 01 Database*, *supra* note 26. The database records majority and minority votes via its majVotes and minVotes variables.

[30] *See id*.

[31] *See id*.

[32] As Professor Stephen Vladeck has observed, "Throughout the 1990s and 2000s, though, the court still averaged 80–90 merits decisions each term. The drop into the 60s, and now the 50s, is a phenomenon entirely of the last decade." Steve Vladeck, *The Supreme Court Is Handing Down Its Fewest Decisions in Decades. Here's What that Means.*, MSNBC (June 4, 2022), https://perma.cc/SUL8-QPYK.

cases being heard is down, while the number of securities regulation cases has held steady. Securities regulation is taking up more and more of the Court's docket, but administrative law cases (defined broadly, as the Supreme Court database does[33]) less and less—a surprising and counterintuitive finding.[34] While the Court decided an average of fourteen administrative law cases per term in the 2000–2010 terms, it heard fewer than seven per term in the 2020–2022 terms.[35] For securities regulation cases, the Court has continued to hear an average of one case per term; it has not taken more than three in any term (and it took three only once, in 2009).[36]

One way to assess the interests of corporate America in these cases is to identify the cases in which the Chamber of Commerce filed an amicus brief. It did so in 47 of the 176 administrative law cases heard by the Roberts Court as of the 2022 term.[37] In securities law cases, it filed in nineteen of the twenty cases the Court has heard.[38] The Chamber is seemingly preoccupied with securities regulation—and weighs in on those cases proportionately more than it does cases of administrative law.

If those descriptions of the work of the Court amount to counting and categorization, is there some way to identify the "important" securities regulation and administrative law cases? The question is particularly relevant for administrative law, which, if defined broadly enough, features more decisions than could tractably be analyzed in a symposium essay.

I consulted Quimbee for the Roberts Court cases most likely to appear in administrative law casebooks. It is an imperfect measure—it misses some of the recent developments of administrative law, given that the most recent editions of many casebooks miss some of the even more recent decisions by the Court.[39]

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33 Spaeth et al., *supra* note 26.

34 John C. Coates, IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 34 (2015) ("While the share of securities-law cases has increased, that is because it has kept the number of securities-law cases constant, while shrinking its overall docket.").

35 *See 2023 Release 01 Database*, *supra* note 26. The database records the year in which the relevant cases were decided, making the construction of a simple time series straightforward.

36 *See id*.

37 These numbers are based on a manual search of the dockets on SCOTUSblog, which records all amicus briefs filed in a case. *See, e.g.*, *Securities and Exchange Commission v. Jarkesy*, SCOTUSBLOG, https://perma.cc/TCK4-YS7H.

38 *See id*.

39 The list of administrative law casebooks parsed by Quimbee may be found at *Administrative Law Casebooks*, QUIMBEE, https://perma.cc/6KVE-JQRG.

Nonetheless, the casebook appearances are instructive. To be addressed in this Essay are the following cases that appear in more than four of the eighteen administrative law casebooks that Quimbee reviewed[40]:

TABLE 1

Case Name	Casebook Appearances
FCC v. Fox Television Station, Inc.	10
Free Enterprise Fund v. Public Company Accounting Oversight Board	13
City of Arlington v. FCC	8
Kisor v. Wilkie	11
Gundy v. United States	10
Lucia v. SEC	7
Utility Air Regulatory Group v. EPA	4

The Chamber of Commerce filed amicus briefs in three of these eight cases,[41] successfully in *Utility Air Regulatory Group v. EPA*[42] (*UARG*) and *Lucia v. SEC*,[43] and unsuccessfully in *Kisor v. Wilkie*.[44]

[40] Some widely excerpted Roberts Court administrative law cases will not get analyzed in this Essay: *King v. Burwell*, 576 U.S. 473 (2015), cited in seven casebooks (statutory interpretation); *Michigan v. EPA*, 576 U.S. 743 (2015), cited in four (cost-benefit analysis); and *Stern v. Marshall*, 564 U.S. 462 (2011), cited in five (bankruptcy court jurisdiction over state law counterclaims).

[41] *See Utility Air Regulatory Group v. Environmental Protection Agency*, SCOTUSBLOG, https://perma.cc/KH3Z-MCZY; *Kisor v. Wilkie*, SCOTUSBLOG, https://perma.cc/8XBX-V6ML; *Lucia v. Securities and Exchange Commission*, SCOTUSBLOG, https://perma.cc/TCA4-YWUG.

[42] 573 U.S. 302 (2014).

[43] 138 S. Ct. 2044 (2018).

[44] 139 S. Ct. 2400 (2019).

The securities regulation cases worthy of inclusion in at least four of eleven securities regulation casebooks include[45]:

TABLE 2

Case Name	Casebook Appearances
Tellabs, Inc. v. Makor Issues & Rights, Ltd.	8
Morrison v. National Australia Bank, Ltd.	7
Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund	8
Janus Capital Group, Inc. v. First Derivative Trader	7
Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.	5
Lorenzo v. SEC	5
Halliburton Co. v. Erica P. John Fund, Inc.	7

The Chamber of Commerce filed briefs in all seven of these securities regulation cases,[46] and in four of them could be said to have filed on the winning side, but, as we will see, the "wins" in securities regulation cases were modest at best. All of this will be considered in evaluating the Roberts Court's securities regulation jurisprudence.[47]

II. ADMINISTRATIVE LAW

The Roberts Court has made a great deal of doctrinal innovations to its separation of powers jurisprudence—in particular, viewing presidential control of the administrative state and

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45 *See Securities Regulation Casebooks*, QUIMBEE, https://perma.cc/67DS-YQY9.

46 *See Tellabs, Inc., et al., Petitioners v. Makor Issues & Rights, Ltd., et al.*, SUP. CT. OF THE U.S., https://perma.cc/KDS7-YHRQ; *Morrison v. National Australia Bank*, SCOTUSBLOG, https://perma.cc/MQP3-Q7PE; *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, SCOTUSBLOG, https://perma.cc/28UN-HJ3L; *Janus Capital Group, Inc. v. First Derivative Traders*, SCOTUSBLOG, https://perma.cc/KG7K-BZ57; *Stoneridge v. Scientific-Atlanta*, SCOTUSBLOG, https://perma.cc/GU7A-GGR5; *Lorenzo v. Securities and Exchange Commission*, SCOTUSBLOG, https://perma.cc/CR42-4ZDV; *Halliburton Co. v. Erica P. John Fund, Inc.*, SCOTUSBLOG, https://perma.cc/U6WK-C65X.

47 The only case that made at least four securities law casebooks that will not be addressed is *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 74 (2006) (preempting state securities fraud lawsuits by investors who held, rather than purchasing or selling, stock).

requirements designed to induce more specific authorizations from Congress as two important ways to constrain regulation. It views more control as a necessity. Chief Justice Roberts has complained that "[t]he administrative state 'wields vast power and touches almost every aspect of daily life.' The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."[48] Other Justices have made similar statements.[49]

One throughline for its administrative law jurisprudence may be found in the separation of powers moves by the Court, which have resulted in doctrines that lack much of a bright line. The illegality of double for-cause removal protections is discernible enough, though the removal power was somewhat unpredictably applied to single-headed independent agencies in *Collins v. Yellen*[50] and *Seila Law LLC v. Consumer Financial Protection Bureau*.[51] But when a question is "major" is hard to discern, as would be the test for a revived nondelegation doctrine, the reliance interest in administrative law, and when laws are best interpreted as conferring upon the agency decision-making discretion.

Some have posited that the Roberts Court is committed to originalism, but I do not see much originalism in its administrative law record. Rather, the doctrine is based on the separation of powers and is often paired with prudential rhetoric suggesting that the administrative state has become too large and difficult to supervise, rather than with analysis of what the Framers had to say about administrative governance in the 1780s.

Finally, a pair of "to be sure" paragraphs. While one can always find people bemoaning or celebrating major changes in the

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48 City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (citations omitted) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010)).

49 For example, in dissenting from a decision to deny certiorari, Justice Neil Gorsuch noted that the "administrative state 'touches almost every aspect of daily life'" and that administrative overreach, namely by the *Chevron* doctrine, creates a system where "[r]ather than say what the law is, we tell those who come before us to go ask a bureaucrat." Buffington v. McDonough, 143 S. Ct. 14, 18–21 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (quoting *Free Enter. Fund*, 561 U.S. at 499). Additionally, the *Wall Street Journal* considered Justice Brett Kavanaugh's pre–Supreme Court judicial record and concluded that he had sought to "put a tighter leash on the regulatory state." Jacob Gershman, *Brett Kavanaugh Has Shown Deep Skepticism of Regulatory State*, WALL ST. J. (July 9, 2018), https://www.wsj.com/articles/nominee-has-shown-deep-skepticism-of-regulatory-state-1531186402.

50 141 S. Ct. 1761 (2021).

51 140 S. Ct. 2183 (2020).

Supreme Court,[52] it is certainly possible to overstate how serious those changes have been. Professor Gillian Metzger has called the Roberts Court's hostility to regulation "anti-administrativism."[53] Professors Adam Cox and Emma Kaufman have said that "the Roberts Court has begun to unravel the New Deal settlement in which administrative agencies, insulated from partisan politics, regulate large swaths of American life."[54] But, as I have elsewhere argued, whenever it has used separation of powers doctrines to take on the growth of the administrative state, the Roberts Court has rarely provided remedies worthy of the name.[55]

For every scholar who emphasizes that the Court has used originalism and a strong emphasis on the separation of powers to constrain the administrative state,[56] others characterize the Court, and the Chief Justice in particular, as interested in minimalism—deciding cases narrowly and avoiding sweeping remedies.[57] There are those who find the basis for the Court's administrative jurisprudence to be muddy as well. Commentators Thomas Koenig and Benjamin Pontz have argued that the Court cannot decide whether it should be taking a formalist approach to overseeing the administrative state, which emphasizes the importance of the separation of powers, or a functionalist one, which constrains agencies that overreach.[58]

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52 *See, e.g.*, John O. McGinnis & Xiaorui Yang, *The Counter-Reformation of American Administrative Law*, 58 WAKE FOREST L. REV. 387, 389 (2023) ("[A]dministrative law has emerged as the most important area of legal transformation in the Roberts Court.").

53 Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3.

54 Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1771 (2023).

55 David Zaring, *Towards Separation of Power Realism*, 37 YALE J. ON REGUL. 708, 728 (2020) ("In almost every separation of powers case in the past two decades, when the Supreme Court or D.C. Circuit have recognized a right, they have not afforded the plaintiff a remedy, or at least not much of one."). Metzger has agreed with me on this: "[t]he occasional majority opinions invalidating administrative arrangements on constitutional grounds were notably narrow, cabining their analysis with carve-outs and remedial minimalism." Metzger, *supra* note 53, at 4.

56 *See, e.g.*, Metzger, *supra* note 53, at 48; Cox & Kaufman, *supra* note 54, at 1771 ("The two commandments of administrative law in the Roberts Court are to give the President control over the executive branch and to isolate power in the proper branch of government.").

57 *See, e.g.*, Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 138 (2020) (describing some Roberts Court administrative law cases favorably as examples of judicial minimalism).

58 Thomas A. Koenig & Benjamin R. Pontz, Note, *The Roberts Court's Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL'Y 221, 223 (2023) ("At the heart of the long-running formalism-functionalism debate is a pair of questions about the exercise of power: (1) What kind? (2) How much? Formalism emphasizes the former, and functionalism emphasizes the latter.").

Accordingly, the case for administrative law innovation must be made, rather than assumed, and the rest of this Part of the Essay makes it.

A. Standards and Timing of Review

The Roberts Court has certainly changed its position on the case that used to be deemed the most important one in administrative law—*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[59] In *Loper Bright Enterprises v. Raimondo*,[60] the Court decided that "*Chevron* is overruled."[61]

Chevron deference provided that when a court reviews an agency's construction of the statute the agency administers, a court must first determine whether Congress "has directly spoken to the precise question at issue."[62] If it has, the court must "give effect to the unambiguously expressed intent of Congress."[63] But if the statute is silent or ambiguous regarding the specific point, the court decides whether the agency interpretation is "based on a permissible construction of the statute."[64]

The Court replaced that test with one focused on the delegation by Congress to the agency. "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority," the Court observed.[65] They could meet their "judicial function" in the decision by assessing the "constitutional delegations" of authority, establishing the limits of the delegated authority, and "ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries."[66]

It is hard to know whether *Loper Bright* will represent a sea change in judicial review or something else. The *Chevron* decision it overruled was, by 2024, a husk of its former self. The Court had cited *Chevron* in 245 cases since 1984,[67] but it had not relied on it since 2016.[68] In the thirty-nine cases decided since *UARG* (a 2014

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59 467 U.S. 837 (1984).

60 144 S. Ct. 2244 (2024).

61 *Id.* at 2273.

62 *Chevron*, 467 U.S. at 842.

63 *Id.* at 843.

64 *Id.*

65 *Loper Bright Enters.*, 144 S. Ct. at 2273.

66 *Id.* at 2263 (quoting Michigan v. EPA, 576 U.S. 743, 750 (2015)).

67 This includes every Supreme Court case that cited *Chevron* up to and including *Loper Bright*, as provided by Westlaw's citing reference service.

68 *See* Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 266 (2016).

case) that cited *Chevron*, all but one have either dismissed it as inapposite or complained about it in a concurrence or dissent.[69]

Table 3 takes the Supreme Court Database's list of administrative law cases decided by the Roberts Court, reviews those cases for citations to *Chevron*, and lists the cases, mostly in four year increments, that discussed *Chevron* in any form of depth, pulling the number of cases that fell into the "Examining" (4/4 depth of treatment) and "Discussing" (3/4 depth of treatment) categories. The table shows that the Court has since 2020 all but stopped analyzing the applicability of *Chevron* to administrative law cases.

TABLE 3

Years	**Cases "Examining" or "Discussing" *Chevron* (4/4 or 3/4 Depth of Treatment)**
2020–2023	0
2016–2019	8
2012–2015	10
2008–2011	8
2006–2007	6

Nor has the Court stopped there when it comes to shaping judicial review of administrative action. In *Kisor*, the Court attempted to reformulate the approach that courts should take to reasonable agency interpretations of their own regulations.[70] This so-called *Auer* deference paralleled *Chevron* deference to agency interpretations of their governing statutes but was sometimes characterized as "super-deference."[71] In *Kisor*, the Court upheld *Auer* but "reinforce[d] its limits."[72] Among those limits: deference would be appropriate only if the regulatory interpretation by the agencies was authoritative, "implicate[d] its substantive expertise," and reflected its "fair and considered" judgment.[73]

Finally, in 2024, the Court made it easier for new entrants in regulated industries to bring claims against long-standing agency rules. In *Corner Post, Inc., v. Board of Governors of the Federal*

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69 *See* Metzger, *supra* note 53, at 4 ("[T]he Court was adept in its avoidance tactics, for example, repeatedly determining that statutes were unambiguous and thereby sidestepping the need to take on the debate over *Chevron*'s constitutionality.").

70 *Kisor*, 139 S. Ct. at 2408.

71 *E.g.*, Ethan J. Leib, *Also, No*, 53 TULSA L. REV. 267, 273 (2018) ("*Auer* deference is a form of super-deference, stronger than *Chevron* itself.").

72 *See Kisor*, 139 S. Ct. at 2408.

73 *Id.* at 2416–17.

Reserve,[74] the Court had to decide when the catchall six-year statute of limitations that applies to suits against the United States[75] began: when the agency finalized its administrative action or when that action injured a litigant. The Court concluded that a "claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action."[76] The decision opened up a class of claims to new entrants into an industry who allege that they are injured by a rule that has been around for longer than six years—even decades. Combined with the new standards of review announced in *Loper Bright* and *Kisor*, *Corner Post* could subject a large number of settled agency rules to new challenges, though how sweeping the reexamination of the administrative state will be depends on the willingness of new entrants to bring claims challenging old regulations.

Again, one must calibrate the amount of innovation—with standards of review, it is particularly important to do so. While some public law scholars view the Court's potential reformation of the standards courts apply to agency interpretations of the law as epochal,[77] I have long had doubts that they make much of a difference in case outcomes.[78]

It could be that judges review agency policymaking in a standard way, regardless of whether the legal standard is *Skidmore* deference,[79] *Chevron* deference, "extraordinary deference,"[80] or even, possibly, no deference but with at least a little natural judicial humility when it comes to technical regulations.

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74 144 S. Ct. 2440 (2024).

75 28 U.S.C. § 2401.

76 *Id.* at 2447.

77 *See, e.g.*, Mark Nevitt, *Analysis: Nevitt on* Loper Bright Enterprises, EMORY L. (July 30, 2024), https://perma.cc/4TZR-HPWB ("The court's recent decision in *Loper Bright Enterprises* has enormous implications for environmental law and prospective climate action."); Deborah A. Sivas, *Stanford's Deborah Sivas on SCOTUS'* Loper *Decision Overturning* Chevron *and the Impact on Environmental Law*, STAN. L. SCH. (June 28, 2024), https://perma.cc/3GUW-JGJU ("[T]oday's ruling is likely to have far reaching impacts for the EPA, the FDA, and similar regulatory agencies.").

78 David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010).

79 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

80 "Extraordinary deference" is not a standard the Supreme Court has often applied to administrative action, but some observers think it is a standard applied to certain kinds of financial regulation. *See* MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 169 (2d ed. 2018) (characterizing the standard of review for bank chartering decisions as one of "extraordinary deference").

B. Major Questions Doctrine

The major questions doctrine is best understood, and is most defensible, as a doctrine that originated as a necessary corollary to *Chevron* deference.[81] The Trump administration, for example, considered indexing capital gains for inflation without congressional consent—a trillion-dollar tax cut that would have been enacted not by Congress but by the Treasury Department via a rule, or even less.[82] Of course, that trillion-dollar tax cut could have been reversed by the same bureaucratic operation in the Biden administration—a trillion-dollar tax increase with no congressional imprimatur. Deference to such huge programmatic regulatory changes on the basis of a plausible reading of ambiguous statutory text would be both highly disruptive and yet well within the four corners of the *Chevron* two-part test; hence, there is a common sense need to look more closely at an agency action with large economic or political consequences. The Court first dipped its toe into the doctrine in *MCI Telecommunications Corp. v. AT&T*,[83] a pre-Roberts decision where the judicial analysis was linked closely to the *Chevron* doctrine.[84]

However, now that the Court has overruled *Chevron* deference, it has rooted the major questions doctrine in "both separation of powers principles and a practical understanding of legislative intent."[85] Whatever its origins, the major questions doctrine is a real constraint on the adoption of new responsibilities by old agencies; the Court has used it to comprehensively limit regulatory policymaking, particularly novel kinds of policymaking.[86] It has been used in recent years to reverse a rental eviction moratorium issued by the Centers for Disease Control and Prevention,[87] a wide-ranging anti–climate change initiative issued by the

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81 *See, e.g.*, David Zaring, *The Government's Economic Response to the Covid Crisis*, 40 REV. BANKING & FIN. L. 315, 330 (2020). The corollary was necessary because it is easy to conclude that congressional directions contain some ambiguity. But the Court has said that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

82 For a discussion, see Daniel Hemel & David Kamin, *The False Promise of Presidential Indexation*, 36 YALE J. ON REGUL. 693, 695 (2019).

83 512 U.S. 218 (1994).

84 *Id.* at 229.

85 West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

86 *See id.* (invoking the major questions doctrine to invalidate the EPA's Clean Power Plan).

87 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (per curiam).

EPA,[88] and a Department of Education effort to cancel $400 billion in student debt.[89]

The test itself is capacious. The Court in 2022 said the doctrine applies "in certain extraordinary cases" where "something more than a merely plausible textual basis for the agency action is necessary" to permit a new agency action to go forward.[90] In such cases, the "agency instead must point to 'clear congressional authorization' for the power it claims."[91]

But it is by no means clear what, in fact, an "extraordinary case" warranting application of the major question doctrine might be. The Court has looked to "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance'" of the regulatory initiative.[92] This is no bright-line test, predictable for agencies and regulated industries, though perhaps future precedent will flesh out what counts as major in much the same way that the courts have spelled out what due process requires of the administrative state under *Mathews v. Eldridge*'s[93] equally capacious balancing test.[94]

Nonetheless, the test counts as a novel antinovelty canon of legislative construction, and it has been given its new doctrinal footing by the Roberts Court. Moreover, the doctrine is particularly relevant for federal agencies that rely on old statutes to make new policy—a particular worry for the independent agencies created in the New Deal 1930s.

C. Nondelegation

The nondelegation doctrine prohibits Congress from delegating its legislative powers to other entities—including the President, administrative agencies, and, perhaps most disfavored, private organizations. The doctrine is one of the classic constraints on the administrative state and is often taught in the first week of an administrative law class, but it is rarely deployed

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88 *West Virginia*, 142 S. Ct. at 2595.

89 Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023) ("[T]his leads us to conclude that '[t]he basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.'" (quoting *West Virginia*, 142 S. Ct. at 2613)).

90 *West Virginia*, 142 S. Ct. at 2609.

91 *Id.* (quoting *UARG*, 573 U.S. at 324).

92 *Id.* at 2608 (alteration in original) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

93 424 U.S. 319 (1975).

94 *Id.* at 339–49.

successfully. Although it is an "axiom in constitutional law,"[95] it is a doctrine that has, as Professor Cass Sunstein observed, had "one good year, and 211 bad ones (and counting)."[96]

Courts wrestled uncomfortably with the prospect of Congress delegating its lawmaking authority to administrative agencies for a bounded set of decades. This was not a Founding Era problem—delegation questions emerged only with the rise of the federal administrative state, beginning with the creation of the Interstate Commerce Commission in 1890.[97] In 1928, in *J.W. Hampton v. United States*,[98] the Court ruled that Congress must give its delegates an "intelligible principle" on which to base their legislation-like regulatory actions and that, if it did so, it could appropriately transfer some of its legislative responsibilities to someone else.[99] The doctrine has not been used to strike down legislation since 1935, when the Court invalidated Title I of the National Industrial Recovery Act[100] in a pair of cases where Congress gave vast regulatory powers over commerce to the President and private sector managers and unions.[101]

Yet, since 2019, with Justice Neil Gorsuch filing a dissenting opinion in *Gundy* expressing his interest in revitalizing the nondelegation doctrine,[102] it has become less clear whether the doctrine would remain moribund.[103] Two Justices joined his

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95 Marshall Field & Co. v. Clark, 143 U.S. 649, 697 (1892) (Lamar, J., dissenting).

96 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

97 *But see* Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1260 (2006) ("From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extra-judicial coercive powers, created systems of administrative adjudication, and provided for judicial review of administrative action."); Jerry Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1670–72 (2007) (discussing Republican-era examples of delegation); Jerry Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1668–69 (2008) (discussing the preeminent role administrative agencies played in policymaking during the Jacksonian era).

98 276 U.S. 394 (1928).

99 *Id.* at 409 ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

100 Pub. L. No. 73-67, 48 Stat 195 (1933), *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

101 *Schechter Poultry*, 295 U.S. at 537–38; Panama Refin. Co. v. Ryan, 293 U.S. 388, 433 (1935).

102 *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) ("[We have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities.").

103 *Id.* at 2130 (plurality opinion) ("[I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." (quotation marks omitted) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

opinion,[104] and a fourth and fifth have indicated their receptiveness to the possibility of its reinvigoration.[105] In 2022, Justice Gorsuch filed a concurring opinion that reiterated his position on the nondelegation doctrine when the Court blocked the Biden administration's vaccination mandate.[106] In his opinion, he tied together the nondelegation and major questions doctrines, stating that the two "serve[ ] a similar function" as they "[b]oth serve to prevent 'government by bureaucracy supplanting government by the people.'"[107]

Many observers have noted that the two doctrines may not be quite so harmonious—the rise of the major questions doctrine makes the need to police delegations for intelligible principles less necessary.[108] But the revitalization of nondelegation, if it ever happens, would reinvigorate a major vector for judicial oversight over the administrative state.

D. Administrative Adjudications

The separation of powers jurisprudence by the Roberts Court has manifested itself most prominently in an effort to make administrative adjudications more subject to presidential oversight. As a matter of constitutional necessity, the Roberts Court has sought to protect the President from congressional encroachments on executive regulatory turf.

Apparently, the hope is to impose political control over adjudicators who have generally been deemed to be largely impartial.[109] The Roberts Court, however, has evinced a strong skepticism of independent agency adjudications on separation of powers grounds. Moreover, in *SEC v. Jarkesy*,[110] the Court required

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104 *Id.* at 2131 (Gorsuch, J., dissenting).

105 *See id.* at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").

106 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 668–70 (2022) (Gorsuch, J., concurring).

107 *Id.* at 669 (quoting Antonin Scalia, *A Note on the Benzene Case*, REGUL., July/Aug., 1980, at 25, 27).

108 *See, e.g.*, Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 457 (2008) ("[T]he major questions cases . . . serve to enforce the principles underlying the nondelegation doctrine without resort to constitutional invalidation.").

109 David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1217 (2016) [hereinafter Zaring, *Enforcement Discretion*].

110 144 S. Ct. 2117 (2024).

enforcement actions that are analogous to common law claims—including any administrative proceedings seeking monetary penalties—to be brought in federal court.[111]

Administrative adjudication has been a part of regulatory enforcement since the creation of the New Deal administrative settlement of the 1930s. But since 2010, the Roberts Court has tried to ensure more presidential oversight of the independent agencies. In that year, it established a principle that two layers of for-cause removal protections interfered with the President's ability to control administrative policy.[112] The SEC's subordinate accounting regulator, the Public Company Accounting Oversight Board (PCAOB), was run by a board that enjoyed for-cause removal protection, as did the commissioners on the SEC itself.[113] The Roberts Court rewrote the PCAOB's governing statute to make its board removable at will by the SEC to avoid this degree of policy remoteness from the President.[114] It later returned to removal questions to make the directors of single-headed independent agencies removable at will in *Collins*[115] and *Seila Law*.[116]

Administrative adjudications became the front line of this fight in a number of recent cases. The issue is that ALJs receive career appointments[117] and may be removed from their position only for good cause, as "established and determined by the Merit Systems Protection Board."[118] ALJs can be removed by SEC commissioners, who themselves can be removed only for "inefficiency, neglect of duty or malfeasance in office."[119] Because the Court in *Myers v. United States*[120] found that the President's removal power was required to ensure that the laws were faithfully

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111 *See id.* at 2129.

112 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 502–03 (2010).

113 *See id.*

114 *Id.* at 508–09.

115 *Collins*, 141 S. Ct. at 1783.

116 *Seila L.*, 140 S. Ct. at 2202.

117 5 C.F.R. § 930.204(a) (2024).

118 5 U.S.C. § 7521(a) (providing ALJs with for-cause removal protection); *see also* Memorandum from the Solic. Gen., U.S. Dep't of Just., to Agency Gen. Counsels (July 2018) (arguing that this protection remains intact after *Lucia*) (available at https://perma.cc/Y2TW-BUD9).

119 MFS Sec. Corp. v. SEC, 380 F.3d 611, 619 (2d Cir. 2004) (quotation marks omitted) (quoting SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988)). The Supreme Court seemed to endorse the existence of for-cause removal protections for SEC commissioners in *Free Enterprise Fund*, but it is worth noting that the statute says nothing about it. *See Free Enter. Fund*, 561 U.S. at 546 (Breyer, J., dissenting) ("It is certainly not obvious that the SEC Commissioners enjoy 'for cause' protection. Unlike [other] statutes, . . . the statute that established the Commission says nothing about removal.").

120 272 U.S. 52 (1926).

executed, that power is part of the separation of powers required by Article II.[121]

The action in these cases has largely been with the SEC, although it has arguably been a stand-in for the many agencies that resort to administrative proceedings. There are approximately sixteen hundred ALJs employed by the federal government; one can count those who work for the SEC on the fingers of one hand.[122]

The Roberts Court in *Lucia v. SEC* agreed that the ALJs' role in formal adjudication did not pass constitutional muster because the ALJs were "Officers of the United States" who had not been appointed consistent with the Appointments Clause,[123] but through a competitive process administered by the Office of Personnel Management.[124] However, the Court observed, "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed official,'" which looks like the sort of remand to the agency that might be offered in a nonconstitutional case.[125] Once the SEC issued an order ratifying the appointment of ALJs, the Court concluded that "[t]o cure the constitutional error, another ALJ (or the Commission itself) must hold [a] new hearing" over the defendant, now that the appointment process—with the SEC commissioners operating as a head of a department—passed constitutional muster.[126]

These sorts of very modest remedies are, it turns out, a feature of the Court's separation of powers administrative law revolution. This revolution, apart from the doctrinally important major questions doctrine and the general change in mood represented by the willingness to entertain new approaches to the supervision of agencies, focuses on the novel rights found, not the remedies offered. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board,*[127] for example, the successful plaintiffs won nothing but the warm feeling of knowing that they had cured a constitutional infirmity.[128] Similarly, in *Lucia*, the defendant won only the right

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121 *Id.* at 161–64.

122 Zaring, *Enforcement Discretion*, *supra* note 109, at 1194 n.196. Currently, only Carolyn Fox Foelak and Jason Patil appear to be hearing cases.

123 U.S. CONST. art. II, § 2, cl. 2.

124 *Lucia*, 138 S. Ct. at 2051.

125 *Id.* at 2055 (quoting Ryder v. United States, 515 U.S. 177, 183, 188 (1995)).

126 *Id.*

127 561 U.S. 477 (2010).

128 *See* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 518 (2014) (noting that the remedy in *Free Enterprise Fund* and other separation of powers cases "largely, if not completely,

to a redo of the proceedings against him—that case was ultimately settled for an industry bar and a $25,000 penalty.[129] Although the plaintiff established that the agency process that found that he had committed securities fraud was unconstitutional, that was not enough to win him dismissal of the charges against him.[130] In *Axon Enterprise, Inc. v. FTC*,[131] the Court only allowed a plaintiff with a complaint about the removability of ALJs to bring the constitutional claim immediately in federal court, rather than having to exhaust their administrative remedies before doing so.[132]

In *Jarkesy*, the Court took a different kind of run at administrative adjudications, subjecting them to scrutiny under the Seventh Amendment's right to a jury trial. The Court analogized administrative proceedings seeking monetary damages to a common law, rather than equitable, remedy. Its precedents provided, it said, that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law."[133] Because the Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,"[134] defendants in administrative proceedings seeking monetary penalties had a right to a jury. That meant that the enforcement action against George Jarkesy and his firm had to be brought in federal court (though defendants can, I have argued with Professor Chris Walker, waive that right if they would prefer administrative proceedings[135]). In doing so, the Court narrowed the "public rights" exception on which agencies had relied in the past.[136] Although the securities fraud claims brought against Jarkesy emerged from a statutory scheme created by Congress, securities fraud was sufficiently like common law fraud to be covered by the Seventh Amendment. Congress's power to create new causes of action did

failed to fulfill the remedial values discussed above (i.e., compensation, incentive to litigate, and deterrence)").

129 *See* Raymond J. Lucia Co., Exchange Act Release No. 89078, 2020 WL 3264213, at *4–5 (June 16, 2020).

130 *Lucia*, 138 S. Ct. at 2055.

131 143 S. Ct. 890 (2023).

132 *Id.* at 900. It also did so on arguably narrow grounds, including that the removability claim "fall[s] outside the Commissions' sphere of expertise." *Id.* at 906.

133 *Jarkesy*, 144 S. Ct. at 2129 (alteration in original) (quotation marks omitted) (quoting Tull v. United States, 418 U.S. 412, 422 (1987)).

134 U.S. CONST. amend. VII.

135 Christopher J. Walker & David Zaring, *The Right to Remove in Agency Adjudication*, 85 OHIO STATE L.J. 1, 23 (2024).

136 *See Jarkesy*, 144 S. Ct. at 2132–34.

not mean that it had the unfettered power to delegate cases under the new causes away from the jury. Securities fraud was thus unlike other public rights schemes that Congress could delegate to agencies, such as certain matters relating to customs and immigration laws, Native American tribes, or revenue collection.[137]

Jarkesy will matter for enforcement actions seeking to impose monetary penalties on defendants, who now likely have a right to a jury empaneled by a federal judge. Some agencies, like the Federal Energy Regulatory Commission and Commodity Futures Trading Commission, also impose monetary penalties through ALJs and will have to rethink their approach.[138] Other agencies, such as the Occupational Safety and Health Review Commission, are only statutorily authorized to pursue enforcement through in-house proceedings—if those are not "public rights" disputes, Congress may need to step in.[139]

But it is early to declare that the sky is falling. Adjudications not involving monetary claims, like asylum claims, should not be affected. *Jarkesy* itself suggested that some different kinds of monetary claims—not penalties, but disgorgement of illegally taken money, for example—did not sound in common law.[140] And it may be that the common practices of registering to practice before the SEC waives the Seventh Amendment right.[141]

E. Administrative Reliance

The Supreme Court has also started to explore a doctrine that, if taken seriously, could radically reduce the ability of agencies to develop new regulations because reliance on the old regulations might be an independent basis for concluding that the new rule is arbitrary and capricious.

Like many of the Supreme Court's innovations in administrative law, reliance is no bright-line rule. Perhaps there are reasons for such a rule—people generally do not like change, and a

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137 *See id.*

138 *See, e.g.*, *U.S. Supreme Court's Jarkesy Decision Imperils FERC's Use of In-House Hearings to Impose Civil Penalties*, SIDLEY AUSTIN LLP (July 2, 2024), https://perma.cc/YJ6Z-DCBY.

139 SEC v. Jarkesy*: A Groundbreaking Supreme Court Decision with Significant Implications for Securities Enforcement*, GREENBURG TRAURIG, LLP (June 28, 2024), https://perma.cc/F82N-SEYV.

140 *Jarkesy*, 144 S. Ct. at 2129 ("What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to 'restore the status quo.'" (quoting *Tull*, 418 U.S. at 422)).

141 *See generally* Alexander I. Platt, *Registration as Consent: Patching* Jarkesy*'s Hole in SEC Enforcement*, 100 NOTRE DAME L. REV. REFLECTION (forthcoming 2025) (available on SSRN).

reliance interest in previously adopted policies will make it harder for regulators to change old policies. The Court has not yet decided many cases on reliance grounds, although, as Professor Haiyun Damon-Feng has observed, lower courts are increasingly doing so.[142]

Administrative reliance was born in *FCC v. Fox Television Stations*.[143] In that case, the Court reviewed a change in policy by the Federal Communications Commission (FCC) over sanctions for indecent content on broadcast networks. It reversed a lower court decision vacating the policy but noted that "when its prior policy has engendered serious reliance interests that must be taken into account," an agency is obligated to "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[144] The Court remanded the case, and when it came back to the Supreme Court, the Court threw out sanctions that had been imposed on the basis of the new policy because "the regulatory history . . . makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice" of what sort of conduct might be deemed indecent by the FCC.[145]

That was a rather small acorn out of which to build an oak tree of a reliance interest, but build on it the Court did in 2016's *Encino Motorcars v. Navarro*.[146] In that case, the Department of Labor changed its policy on who qualified as a worker entitled to receive overtime pay if they worked more than forty hours per week.[147] The Court concluded that a change in policy had to be carefully justified given "the serious reliance interests at stake,"[148] and that "here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position."[149] It is worth noting that the dispute here was a private sector dispute—a contest

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142 Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1792 (2024) ("[L]ower courts have seized upon the opportunity that *Regents* presents to use their review power as a judicial veto to administrative policy change.").

143 556 U.S. 502 (2009).

144 *Id.* at 515.

145 FCC v. Fox Television Stations, Inc., 567 U.S. 239, 254 (2012).

146 579 U.S. 211 (2016).

147 *Id.* at 214–18. The new rule made service advisors eligible for overtime, as opposed to salesmen, who were exempt from the Fair Labor Standards Act's coverage. *See id.* Hector Navarro was a service advisor who then petitioned for overtime pay. *See id.* at 218–19.

148 *Id.* at 224.

149 *Encino Motorcars*, 579 U.S. at 222.

between managers and workers that might not be so different from a dispute between investors and managers.

The Court expounded further on the reliance interest in administrative law in one of its most consequential cases of the last decade—the effort by the Trump administration to revoke the Obama administration's Deferred Action on Childhood Arrivals (DACA) program, which moved illegal immigrants who were brought to the United States under the age of 18 to the back of the queue for deportation proceedings if they registered with the Department of Homeland Security (DHS).[150] The revocation was thwarted; the Court concluded that the agency "*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns," and the agency had not done so.[151] In *Department of Homeland Security v. Regents of the University of California*,[152] the reliance interest was an important reason that the effort to revoke DACA failed, although the Court also criticized the reasoning by DHS on other grounds.[153]

F. Availability of Review

As for the availability of judicial review, the Roberts Court again appears to have innovated—in this case from one of its early precedents. In *Massachusetts v. EPA*,[154] the Supreme Court determined that Massachusetts had standing to challenge the Environmental Protection Agency's (EPA) failure to regulate greenhouse gases.[155] Central to the holding was the idea that states should receive "special solicitude" when trying to prove standing.[156] But the Roberts Court has stopped giving state plaintiffs that kind of solicitude.

In *United States v. Texas*,[157] the Court distinguished the issue of state standing in the case from *Massachusetts v. EPA* on the grounds that "[t]he issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking, not a challenge to an exercise of the Executive's enforcement discretion," but did not take up the opportunity to wholly

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150 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020).
151 *Id.* (emphasis in original).
152 140 S. Ct. 1891 (2020).
153 *Id.* at 2856.
154 549 U.S. 497 (2007).
155 *Id.* at 520.
156 *Id.*
157 143 S. Ct. 1964 (2023).

reconsider special solicitude.[158] Similarly, in *California v. Texas*,[159] the Supreme Court held that the twenty state plaintiffs lacked standing to challenge the Patient Protection and Affordable Care Act[160] (ACA).[161] As one commentator observed, "neither the majority, the dissent, the lower courts, nor the parties themselves seemed to believe that the doctrine of special solicitude was controlling, or even relevant, precedent—adding to already existing evidence that the doctrine may, functionally, no longer be good law."[162] Finally, there is also evidence that federal courts are retreating "from relaxed standing analyses, even when the litigants before them are states,"[163] potentially indicating future narrow readings of *Massachusetts* by lower courts.

Some have argued that "special solicitude is far from dead, but its weight appears to be diminishing."[164] But others think that the special solicitude doctrine is dead. Professors Will Baude and Samuel Bray have argued that "if anything[,] the Court drew from the identity of the plaintiffs as States the need for *special skepticism* of standing."[165] The availability of judicial review thus represents another reform, and one that is less plaintiff friendly than others in the Roberts Court's remaking of administrative law.

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It is not entirely clear whether the Roberts Court administrative law doctrine counts as a revolution—at least not yet. While many of the separation of powers cases have not really affected the administrative state, other than to make it less bureaucratic and more political, the major questions doctrine has already been influential, undoing a variety of regulatory efforts of real import. But this caution cannot obscure the fact that there has been plenty of change in administrative law doctrine during the Roberts Court era.

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158 *Id.* at 1975 n.6.

159 141 S. Ct. 2104 (2021).

160 Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

161 *California*, 141 S. Ct. at 2112.

162 Leading Case, *Article III—Standing—Special Solicitude Doctrine—Affordable Care Act*—California v. Texas, 135 HARV. L. REV. 343, 343 (2021).

163 Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1309 (2019).

164 *Id.*

165 William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 176 (2023) (emphasis in original).

III. SECURITIES REGULATION

While doing so much doctrinally in the area of administrative law, the Roberts Court has taken a very different approach to securities regulation, where it has repeatedly turned away appeals for it to narrow the ability of investors or the government to enforce those laws.

It is not obvious that it would take such a tack. Securities litigation is expensive: in class actions alone, as Professor Leah Neupert observed, "[e]normous settlement figures have been common since the early 1990s and are attributable to" doctrines that the Court has squarely had an opportunity to pare back.[166] It is also expensive to simply be a publicly traded company—so much so that the number of publicly traded companies in the United States has shrunk significantly between 1996 and 2012, with only a slight rebound since.[167] Moreover, Congress, with some regularity, deregulates the capital markets, most recently in the bipartisan Jumpstart Our Business Startups (JOBS) Act of 2012,[168] so deregulation is not without precedent. As we have seen, the Chamber of Commerce has repeatedly petitioned the Court to lighten the regulatory burden on the capital markets.[169] Nonetheless, the Court has resisted deregulation other than in the areas in which the SEC is a generic agency defendant.

A. Insider Trading

Consider insider trading law, which has been criticized by many for featuring an overly complex test for tippee liability.[170] Insider trading law in the United States in general has been complicated—perhaps for good reasons—by requiring more than merely trading on material nonpublic information. Instead, liability attaches only if the trade was informed by information acquired through a breach of a duty.[171] In the classical context, where a corporate officer trades on the basis of material nonpublic

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166 Leah Neupert, *A Court's Guide on How to Gut Precedent by Relying on It:* Halliburton II*'s Puzzling Effect on Securities-Fraud Class Actions*, 76 LA. L. REV. 225, 226–27 (2015).

167 Gabriele Lattanzio, William L. Megginson & Ali Sanati, *Dissecting the Listing Gap: Mergers, Private Equity, or Regulation?*, 65 J. FIN. MKTS., Sept. 2023, at 1, 5.

168 Pub. L. No. 112-106, 126 Stat. 306 (codified as amended in scattered sections of 15 U.S.C.).

169 *See supra* text accompanying note 37.

170 *See, e.g.*, Matthew Williams, Note, *Mind the Gap(s): Solutions for Defining Tipper-Tippee Liability and the Personal Benefit Test Post-*Salman v. United States, 23 FORDHAM J. CORP. & FIN. L. 597, 607–20 (2018).

171 Dirks v. SEC, 463 U.S. 646, 655–64 (1983).

information with her shareholders, that breach is relatively easy to explain and understand.[172] The officer has a fiduciary obligation to put her shareholder's interests ahead of her own, but by trading with them on the basis of information that she knows and that they do not, she is putting her interests over theirs.

Things become more complicated when outsiders are involved. Under the traditional tippee liability test that the Supreme Court announced in *Dirks v. SEC*,[173] the duty requirement meant that insider-tippers had to be breaching a duty to someone, and that that breach could be established if the insider-tipper "will benefit, directly or indirectly, from his disclosure."[174] This personal-benefit requirement encompasses "whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings."[175] In addition, a personal benefit can be established "when an insider makes a gift of confidential information to a trading relative or friend."[176]

Much of the litigation surrounding tippee liability ever since has turned on this question of what a personal benefit could be. Is friendship enough?[177] Is respect from close family members sufficient?[178] Or must the personal benefit be established through pecuniary means?[179]

The author of the *Dirks* opinion, Justice Lewis Powell, had not initially required the personal-benefit test, but rather adopted it at the request of Justice Sandra Day O'Connor.[180] Ever since,

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172 Kevin S. Haeberle & M. Todd Henderson, *A New Market-Based Approach to Securities Law*, 85 U. CHI. L. REV. 1313, 1325–26 (2018) (explaining the "classical theory" of insider trading).

173 463 U.S. 646 (1983).

174 *Id.* at 662.

175 *Id.* at 663.

176 *Id.* at 664.

177 *Id.*

178 The *Dirks* Court said "there must be a breach of the insider's fiduciary duty before the tippee inherits the duty to disclose or abstain. In contrast, the rule adopted by the SEC in this case would have no limiting principle." *Dirks*, 463 U.S. at 664.

179 In *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *abrogated by* Salman v. United States, 580 U.S. 39 (2016), the Second Circuit took such a view. It held that the personal benefit cannot be inferred without "proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452. That proof "requires evidence of 'a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the [latter].'" *Id.* (alteration in original) (quoting United States v. Jiau, 734 F.3d 147, 153 (2d Cir. 2013)).

180 *See* A.C. Pritchard, Dirks *and the Genesis of Personal Benefit*, 68 SMU L. REV. 857, 866 (2015).

the test has been criticized as complicated.[181] Moreover, corporate America has worried that the SEC and Department of Justice have aggressively pursued insider trading investigations because, of all the white-collar crimes available, insider trading cases were relatively easy to prove. After the 2008 financial crisis, many noted that only one mid-level executive of a large bank went to jail in the United States for crisis-related misconduct.[182] During that period, Preet Bharara, then the United States Attorney for the Southern District of New York, filed scores of insider trading cases and won almost all of them.[183] Some worried that the government was underenforcing broad areas of financial fraud and obsessing over more easily proven insider trading cases that had nothing to do with the financial crisis.

In 2016, the Roberts Court had the opportunity to cut back on insider trading prosecutions by making the test more rigorous or clarifying what exactly the personal benefit test meant. In *Salman v. United States*,[184] it declined to do either. Bassam Salman had received tips from an investment banker relative about impending merger announcements and shared them with other family members without receiving any compensation for the tips. Other insider trading cases involving Wall Street investors had been rejected because of the nonpecuniary nature of the tip.[185] But the Court did not decide to limit the reach of insider trading to cases where material nonpublic information was exchanged for pecuniary compensation. Instead, the Court "adhere[d] to *Dirks*,"[186] in part because it "created a simple and clear 'guiding principle' for

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[181] *See, e.g.*, Williams, *supra* note 170, at 607–20; Joan MacLeod Heminway, *Willful Blindness, Plausible Deniability and Tippee Liability: SACS, Steven Cohen, and the Court's Opinion in* Dirks, 15 TRANSACTIONS: TENN. J. BUS. L. 47, 56 (2013) (describing *Dirks* as a "decision made in a different era—an era that preceded the information superhighway of today—applying insider trading law to an unusual set of facts.").

[182] Jesse Eisenger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES (Apr. 30, 2014), https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html.

[183] As of 2014, "Wall Street's top prosecutor Preet Bharara is 79 for 79 on insider trading cases during his tenure as U.S. attorney for the Southern District of New York." Maureen Farrell, *Preet Bharara: Now 79 for 79 on Insider-Trading Cases*, WALL ST. J. (Feb. 6, 2014), https://www.wsj.com/articles/BL-MBB-16064. He remained in the job until President Donald Trump fired him. As the *New Yorker* put it, "[W]hile the hedge-fund and insider-trading crackdowns continued energetically, the anticipated flood of financial-crisis cases never materialized." Sheelah Kolhatkar, *What Will Be Preet Bharara's Legacy?*, NEW YORKER (Aug. 24, 2017), https://www.newyorker.com/business/currency/what-will-be-preet-bhararas-legacy.

[184] 580 U.S. 39 (2016).

[185] *See supra* note 179 and accompanying text.

[186] *Id.* at 48.

determining tippee liability,"[187] and declined to take the opportunity to reform insider trading law at all. The Court, moreover, had the opportunity to do so if it chose—the Second Circuit had held that the personal benefit received by the tipper had to be "pecuniary or [of a] similarly valuable nature."[188] But the Court concluded that "this requirement is inconsistent with *Dirks*."[189] Consistency with precedent was more important to the Court than reform of the insider trading laws.

B Fraud on the Market

In 1988's *Basic, Inc. v. Levinson*,[190] the Supreme Court turned the Rule 10b-5 class action into a mechanism that could discipline managers of public companies for making materially misleading disclosures. Rule 10b-5 litigation only works through class actions; any individual investor would likely lack the losses required to make punishing managerial dishonesty worth hiring a lawyer and bringing a lawsuit, so the aggregation of claims is necessary. Rule 10b-5 has a reliance element, however.[191] It could be difficult for any individual shareholder, let alone the entire class of shareholders, to establish that they made their purchasing decisions on the basis of some particular managerial misrepresentation.

Basic solved this problem by adopting a "fraud-on-the-market" approach, which meant that shareholders did not have to establish that they relied on a particular managerial misstatement, but rather that they assumed that the market price of the stock took account of all public information about that stock—including any managerial misrepresentations.[192] As the *Basic* Court put it, "[T]he market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations."[193] Requiring each plaintiff to establish reliance on one particular statement by the firm would be impossible; accordingly, "where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed."[194]

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187 *Id.* at 51 (quoting *Dirks*, 463 U.S. at 664).
188 *Newman*, 773 F.3d at 452.
189 *Salman*, 580 U.S. at 50.
190 485 U.S. 224 (1988).
191 *Id.* at 243.
192 *Id.* at 241–42.
193 *Id.* at 246.
194 *Id.* at 247.

Reversing the fraud-on-the-market presumption would have made class actions by shareholders against managers much more difficult. Corporate America welcomed the possibility, and in 2014 the Chamber of Commerce, National Association of Manufacturers, and Business Roundtable filed a brief urging the Court to modify or overrule the *Basic* presumption, as "proof of actual reliance is an 'essential element' of a private securities fraud claim."[195]

But the Roberts Court refused to do so. Instead, in *Halliburton Co. v. Erica P. John Fund, Inc.*,[196] it reaffirmed the fraud-on-the-market theory and limited it in a reasonably insignificant way, allowing companies sued by their shareholders to present evidence at a class certification hearing that the omission or inaccurate disclosure had not affected the price of the stock—a call for event studies presented by expert witnesses, but hardly a major reform of the 10b-5 class action.[197] As Chief Justice Roberts wrote, "Before overturning a long-settled precedent, [ ] we require 'special justification,' not just an argument that the precedent was wrongly decided. Halliburton has failed to make that showing."[198]

Once again, doctrinal stability had been prized over innovation in the securities laws.

C. Materiality

Another way that the Roberts Court could reduce the number of securities fraud cases in federal court would be to establish a higher threshold for materiality. Under current law, plaintiffs who allege that the defendants committed securities fraud must establish that a misrepresentation—either by false disclosure or omission—was one that would matter to investors.

The standard for materiality is low—it must be that the information misrepresented by the public company would have affected the "total mix" of information that an investor would have relied upon before making a purchase or sale decision.[199] This has meant, for example, that some opinions advanced by publicly

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[195] Brief for Chamber of Commerce of the United States of America, National Association of Manufacturers, Pharmaceutical Research and Manufacturers of America, and Business Roundtable as Amici Curiae Supporting Petitioners at 3, Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) (No. 13-317) (quoting Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc., 445 U.S. 148, 159 (2008)). The pharmaceutical industry group joined the brief as well.

[196] 573 U.S. 258 (2014).

[197] *Id.* at 279.

[198] *Id.* at 266 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)).

[199] TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (quotation marks omitted).

traded companies can be the basis of a securities fraud lawsuit. In *Virginia Bankshares v. Sandberg*,[200] the pre-Roberts Court held that a board's opinion that the price being offered in a proposed merger was "high" and "fair"[201] could be material for stockholders deciding whether to vote in favor of the merger.[202] In *Sandberg*, the Court noted that the board's recommendation to approve the merger was made with knowledge that there was evidence that the price was neither particularly high nor particularly fair.[203] The result was that materiality could reach statements about facts and "I think/believe" statements by the company and its managers or underwriters.

The Roberts Court could have made opinions immaterial as a bright-line rule and left shareholders to sue only on the basis of misrepresentations or omissions of facts. But in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*,[204] the Court declined to change the confusing law set forth in *Sandberg*. Instead, the Court concluded that a statement of opinion would not constitute an "untrue statement of material fact" even if the stated opinion ultimately proved to be incorrect.[205] However, as per *Sandberg*, if the opinion expressed was not sincerely held, it could still be grounds for a lawsuit.[206] In addition, "if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself," then liability could also attach.[207] To be sure, *Omnicare* does not make it easy for shareholders to bring opinion claims because, like all fraud claims, it requires specific allegations of intent in the pleadings—that is, before discovery.[208] Inferring intent before being able to investigate it is not easy—but once again, the *Omnicare* opinion affirmed *Sandberg*'s holding that opinions could form the basis for a fraud claim rather than recalibrating it.

Rather than creating a bright-line rule on whether opinions could be material, the Roberts Court reaffirmed its precedents on materiality as well.

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200 501 U.S. 1083 (1991).
201 *Id.* at 1088 (quotation marks omitted).
202 *Id.* at 1090.
203 *Id.* at 1094.
204 575 U.S. 175 (2015).
205 *Id.* at 186 (quotation marks omitted).
206 *Id.* at 185.
207 *Id.* at 189.
208 *Id.* at 194.

D. Scheme Liability

The Roberts Court has, after exploring efforts to curb liability for 10b-5 lawsuits to only the makers of statements, and not their accomplices, decided to return to something like the status quo. In 2011's *Janus Capital Group v. First Derivative Traders*,[209] the Court read part of Rule 10b-5 sufficiently narrowly to exempt investment advisors to a mutual fund from liability for false statements made by the fund they advised.[210]

That opinion suggested that the Court might entertain some reforms to Rule 10b-5 doctrine. It noted that Congress had never explicitly authorized private rights of action under the rule[211] (there is plenty of precedent for the idea that Congress must do so before a private right of action may be heard in the courts[212]) and pledged to read the right of action narrowly in part because of "the narrow scope that we must give the implied private right of action."[213] Rule 10b-5(b) makes it unlawful for any person "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."[214] To the Court, this meant that the investment advisors of a fund "did not 'make' any of the statements in the Janus Investment Fund prospectuses; Janus Investment Fund did."[215] The holding meant that only the speaker could be held liable for false statements under Rule 10b-5(b); the speaker's aiders and abettors in perpetrating a fraud could not be.

But eight years later, the Court rethought its hostility to this sort of "scheme" liability. In *Lorenzo v. SEC*,[216] the Court held that a person who did not "make" a false statement under Rule 10b-5(b) might be liable under Rule 10b-5(a) or (c) if the person disseminated a false statement with an intent to defraud.[217] In that case, Francis Lorenzo, an investment banker, was instructed by his superior to send prospective investors emails with materially misleading omissions.[218] Because his supervisor had written the statements he sent to investors, Lorenzo could not be liable under

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209 564 U.S. 135 (2011).
210 *Id.* at 138.
211 *Id.* at 146.
212 *E.g.*, Alexander v. Sandoval, 532 U.S. 275, 286 (2001).
213 *Janus*, 564 U.S. at 144.
214 17 C.F.R. § 240.10b-5.
215 *Janus*, 564 U.S. at 146–47.
216 139 S. Ct. 1094 (2019).
217 *Id.* at 1104.
218 *Id.* at 1099.

Janus's interpretation of Rule 10b-5(b)—he did not "make" the statements in the emails. But Rule 10b-5 also makes it unlawful to (a) "employ any device, scheme, or artifice to defraud" or (c) "engage in any act, practice, or course of business" that "operates . . . as a fraud or deceit" in connection with the purchase or sale of securities.[219] Under this language, disseminating a statement made by someone else could still constitute securities fraud. As the Court put it:

> [D]issemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b–5, as well as the relevant statutory provisions. In our view, that is so even if the disseminator did not "make" the statements and consequently falls outside subsection (b) of the Rule.[220]

Lorenzo reversed holdings by a number of lower courts after *Janus* that schemes to defraud people would not lead to liability for everyone involved in the scheme, but rather only for those who made the false statements.[221] Moreover, it is entirely consistent with the "as you were" approach of the Roberts Court to securities regulation. In *Janus*, the Court appeared ready to substantially cut back on Rule 10b-5 liability, but in *Lorenzo*, it essentially brought participants in a scheme to defraud—even if they did not "make" the fraudulent statements to investors—back under Rule 10b-5's regime.

E. Other Matters

Nor are these doctrinal areas outliers. The most cited (by five times more than the second-most cited case) of the twenty cases the Roberts Court has heard in securities regulation, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[222] slightly relaxed the pleading standards necessary to file a Rule 10b-5 complaint (or, at least, slightly relaxed the standard compared to the one proffered by

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219 17 C.F.R. § 240.10b-5(a), (c).

220 *Lorenzo*, 139 S. Ct. at 1100–01.

221 Before *Lorenzo*, the Second, Eighth, and Ninth Circuits had all held that a misstatement alone was not enough to support a fraudulent scheme claim, whereas the D.C. and Eleventh Circuits had held that a misstatement standing alone was sufficient. *Compare* Lentell v. Merrill Lynch & Co., 396 F.3d 161, 177 (2d Cir. 2005), Pub. Pension Fund Grp. v. KV Pharm. Co., 679 F.3d 972, 987 (8th Cir. 2012), *and* WPP Lux. Gamma Three Sarl v. Spot Runner, Inc., 655 F.3d 1039, 1057 (9th Cir. 2011), *with* SEC v. Familant, 910 F. Supp. 2d 83, 95 (D.D.C. 2012), U.S. SEC v. Big Apple Consulting USA, Inc., 783 F.3d 786, 797 (11th Cir. 2015), *and* SEC v. Monterosso, 756 F.3d 1326, 1334 (11th Cir. 2014).

222 551 U.S. 308 (2007).

the dissent).[223] The second-most cited Supreme Court case in that canon, *Amgen, Inc. v. Connecticut Retirement Plans*,[224] held that proof of materiality is not a prerequisite to certification of a securities fraud class action.[225] There the Court held that "[a]s to materiality . . . the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry."[226] *Amgen* was the other side of the coin from the *Halliburton* reliance-interest case. A strong reliance standard might make it difficult to certify a class, who may have made their investment decision in reliance on a variety of different bits of information; but when it comes to whether a particular corporate communication was material, nothing about the makeup of the class was relevant to the question. Once again, the Court declined to make class actions harder to bring.

The fourth-most cited case, *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*,[227] was deregulatory, albeit, unlike many securities regulation cases taken by the Court, not a matter of administrative law. It held that private parties could not bring Rule 10b-5 class actions against aiders and abettors of fraud.[228] The decision limited the number of potential defendants who could be pursued by aggrieved investors and distinguished securities regulation from criminal law, where aiders and abettors can be held criminally liable.[229] The Court also threw some cold water over an effort to characterize these aiders and abettors as part of a "scheme,"[230] but, as we have seen, the Court would later clarify in *Lorenzo* that Rule 10b-5(a) and (c) meant that private plaintiffs could pursue these scheme theories.

CONCLUSION

What explains the differences between the Roberts Court's reformist approach to administrative law and precedent-following approach to securities regulation? In my view, it is a different

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[223] The majority held that "[a] complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged," *id.* at 324, whereas the dissent insisted on a probable cause standard, *id.* at 336 (Stevens, J., dissenting).

[224] 568 U.S. 455 (2013).

[225] *Id.* at 469.

[226] *Id.* at 460.

[227] 552 U.S. 148 (2008).

[228] *Id.* at 162.

[229] While the SEC has been given the power to bring enforcement actions against aiders and abettors, private plaintiffs have not. *Id.*

[230] *Id.* at 159–61.

approach to public law than private law—at least when it comes to corporate disputes between investors and managers. When investors and managers conflict, the Court is apparently unsure whether the law should be tweaked. But when it concerns rights against the state, the Roberts Court has been substantially more inclined to involve itself.

Other observers of the Roberts Court's record in securities regulation have taken somewhat similar views about the doctrinal agenda. While Professor Adam Pritchard has not seen a theme in its opinions—he has argued that they "yield[ ] few, if any, common threads tying them together as a body of work"[231]—others have noted that the Court has taken a cautious approach to securities regulation. Professor John Coates has observed that "the Roberts Court's securities-law jurisprudence does not mark a significant departure from prior Supreme Courts."[232] And Professor Eric Chaffee, along the lines of the claims made here, has concluded that the Roberts Court is "serving in the role of a museum curator maintaining historical relics from bygone eras, doing minor restoration work as needed, limiting access to these relics through statutory interpretation, and occasionally offering an exhibition involving issues at the periphery of securities law."[233]

Why not try reform in securities regulation along with reform in administrative law? It is that question that animates this Essay. One difference may be the way that the Roberts Court has thought about litigation in the two different contexts. Rule 10b-5 class action litigation is a suit brought by investors against managers. To be sure, there is a class action bar of plaintiffs' lawyers who might not ordinarily seem like the trusted delegates of securities law enforcement to a relatively probusiness court. But the Roberts Court apparently feels that the "private" disputes between the owners of a corporation and those who run it is not a field where reform is necessary.[234] Instead, the private interests of the stakeholders in securities litigation can be pursued according to the old doctrinal verities.

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231 Pritchard, *supra* note 27, at 143.

232 Coates, *supra* note 34, at 34.

233 Eric C. Chaffee, *The Supreme Court as Museum Curator: Securities Regulation and the Roberts Court*, 67 CASE W. RSRV. L. REV. 847, 850 (2017).

234 It is worth noting here that "public" and "private" are not being used in the way an administrative lawyer might think about the terms. In administrative law, public rights are rights created by Congress—and the rights of shareholders to bring disclosure claims against the firms in which they have invested were set forth in the Securities Act of 1933 and the Exchange Act of 1934, as well as the judicial precedent interpreting those statutes. Private rights, on the other hand, are those created by common law.

The public-private distinction is not a clean one, to be sure. Most of the securities regulation cases heard by the Court were Rule 10b-5 class actions, and those simply look different than cases by stakeholders against government agencies. The former seek damages, the latter equitable relief. However, most insider trading cases are not private disputes—they are brought by the government, as was the case in *Salman*.

Administrative law reform has been a more "public law" matter. The Court has made some motions toward asserting a less deferential judicial review of agency policymaking, moved to empower presidential oversight of agency officials, insisted on clear-statement rules by Congress authorizing important administrative action, and created a reliance interest that should make it harder for agencies to change policy. While it is possible to overstate the comprehensive nature of these changes, it is fair to say that they sound a common theme. The Court wants to cut back on the independence of administrators and afford new kinds of rights to regulated entities aggrieved by their bureaucratic treatment. The question is less one of private ordering, and more one of public ordering.

The implication is that the Roberts Court is a public law court first and foremost. It worries about the power of the state more than it worries about inefficiencies in the legal architecture governing private disputes. This could change over time—indeed, it has changed over time, as the early Roberts Court was more cautious about administrative law innovation than is its current roster. But public law is a priority when compared to more private law disputes. At his confirmation, Chief Justice Roberts said that the job of the Supreme Court was relatively passive—it should call "balls and strikes" rather than change the rules of the game.[235] But it appears to take that passive role more seriously when the government is not involved in the dispute.

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[235] *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Congress 55–56 (2005) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").