

REGULATORY DISSENT AND JUDICIAL REVIEW

Luke N. Roniger*

*The Administrative Procedure Act provides the statutory procedure by which federal agencies must consider and adopt regulations and lays out the standard of judicial review that should be applied to properly adopted agency rules. SEC rules have faced increased hostility—or at least increased scrutiny—from the United States Court of Appeals for the District of Columbia (D.C. Circuit), which often issues the final judicial decision for agency regulations. Indeed, cases like *Business Roundtable v. SEC* (Business Roundtable II), 647 F.3d 1144, 1148 (D.C. Cir. 2011)—in which the D.C. Circuit struck down an SEC rule—constitute a significant shift in the standard of judicial review for agency regulations.*

As the D.C. Circuit appears willing to review not just the process by which regulations are adopted, but also the actual content of such regulations, the bases for the court's decisions—i.e., the factors the court considers in reviewing regulations—are increasingly important. Specifically, a reviewing court's ability to endorse the dissenting opinions of minority members of a regulatory commission poses particular problems to that commission's quasi-legislative activity in promulgating rules. In the wake of Business Roundtable II, where a court's review of agency procedures is increasingly morphing into substantive review, judicial endorsement of minority views effectively displaces the policy choices of the majority members of regulatory agencies. In other words, when a court's rejection of an agency rule is a

* J.D. Candidate 2015, Columbia Law School; M.P.P. Candidate 2015, Duke University; B.A. 2008, University of San Diego. Many thanks to Professor Robert Jackson for his invaluable guidance and to Riley, Mary Sue, and Jack Roniger for their feedback and constant support. Additional thanks to Tanvi Mirani, Daniel Rockower, and the editors and staffers of the *Columbia Business Law Review* for their extremely helpful guidance and comments.

product of judicial reliance on the dissenting opinions of the minority commissioners, the court essentially provides a rubber stamp for what was the minority (and losing) position on the commission. This Note explores how this result conflicts with basic principles of separation of powers, injures the institutional legitimacy of both the SEC and the courts, and threatens the efficacy of a primary financial regulator at a time when the U.S. economy is most in need of effective financial regulation.

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I. INTRODUCTION

One of the core responsibilities of federal agencies is to enact regulations within the statutory bounds provided by Congress. The Administrative Procedure Act¹ (“APA”) provides the process by which agencies must consider and adopt regulations and lays out the standard of judicial review for agency rules. A court must overturn agency regulations if it finds that the agency’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”² Courts demonstrate varying levels of judicial deference to agency decision-making, ranging from lenient³ to relatively stringent.⁴ Whether a regulation survives review often turns (unsurprisingly) on the standard of review. The most demanding standard (until recently)—so-called “hard look” review—is rooted in the Supreme Court’s decision in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.* There, the Court announced:

¹ 5 U.S.C. § 500 (2012).

² *Id.* § 706.

³ See *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 865–66 (1983). So-called “*Chevron* deference” is based on the idea that politically accountable agencies are better suited than politically unaccountable judges to make policy-shifting interpretations. *Id.* at 865–66 (“Judges . . . are not part of either political branch of the Government. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

⁴ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

[A]n agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁵

Notably, *State Farm* focuses on the agency's process in making a decision. One author has stated that the court uses this "process-based emphasis" because courts "may have greater competence in overseeing the process by which an agency formulates its decision than in evaluating the *policies underlying that decision*."⁶

However, recent cases from the United States Court of Appeals for the District of Columbia (D.C. Circuit) have revealed yet another, more rigorous standard for reviewing agency rules.⁷ Most notably, *Business Roundtable v. SEC (Business Roundtable II)* held that "the SEC is required to apprise itself—and hence the public and the Congress—of

⁵ *Id.* at 43.

⁶ Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Policymaking*, 36 SEATTLE U. L. REV. 695, 711 (2013) (emphasis added).

⁷ See, e.g., *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (overturning the agency's recently adopted proxy access rule because the Commission relied on insufficient data and thus acted arbitrarily and capriciously in underestimating the costs of the new rule); *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (finding that the SEC violated the APA by failing to adequately consider alternative option to the proposed rules, partially basing its ruling on the fact that "two dissenting Commissioners raised, as an alternative to [the proposed rule] . . . a familiar tool in the Commission's tool kit[,] . . . making it hard to see how that particular policy alternative was either 'uncommon or unknown.'"). For a more in-depth discussion of the D.C. Circuit's decisions in these cases, see generally James D. Cox and Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811 (2012).

the economic consequences of a proposed regulation.”⁸ In so holding, “[t]he D.C. Circuit appears to have extended hard look analysis . . . by adding a specific requirement concerning cost-benefit analysis.”⁹ A recent article explains that the court’s “demands for extensive empirical basis and cost-benefit analysis in SEC rulemaking” demonstrated “unprecedented heightened judicial scrutiny towards the SEC.”¹⁰ Indeed, since *Business Roundtable II*, commentators have noted that “hard look review appears to have morphed from process-based review into substantive review”¹¹

Because cost-benefit analysis is not a requirement for SEC regulations,¹² the court appears to have created a new requirement for SEC rulemaking—a process already governed by significant statutory and common law requirements.¹³ Even more remarkable—and this Note argues, more worrisome—is the fact that the court, in rejecting the SEC’s proposed regulation, partially relied on the opinions of the dissenting commissioners.¹⁴ In fact, the court appeared to endorse those opinions,¹⁵ effectively allowing the minority opinion to prevail.

When a court relies on the dissenting opinions of minority commissioners, it provides a rubber stamp for what was the losing position. A reviewing court’s ability to endorse the dissenting opinions of minority members of a regulatory commission poses particular problems with respect to that commission’s quasi-legislative activity in promulgating rules. In the wake of *Business Roundtable II*, as judicial review of

⁸ *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (citing *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133 (D.C. Cir. 2005)).

⁹ Fisch, *supra* note 6, at 712.

¹⁰ Leen Al-Alami, *Business Roundtable v. SEC: Rising Judicial Mistrust and the Onset of a New Era in Judicial Review of Securities Regulation*, 15 U. PA. J. BUS. L. 541, 564 (2013).

¹¹ Fisch, *supra* note 6, at 711.

¹² *Id.* at 721 n.123.

¹³ *See infra* Part II.

¹⁴ *See infra* Part III.

¹⁵ *See infra* Part III.B.2.

agency procedures has morphed from procedural to substantive review; judicial endorsement of minority views is at odds with the basic separation of powers doctrine. *Substantive* review of agency rules does not resemble a judicial decision but a legislative one.

The Securities Exchange Act of 1934 (“1934 Act”) calls for the SEC to be headed by a majority-minority group of five commissioners, where only three commissioners (including the chairperson) may come from the President’s political party.¹⁶ One important purpose of this bipartisan structure is to encourage robust policy debates, as this structure lets the agency “benefit from a collegial decisionmaking process[,] . . . diverse viewpoints[,] . . . differing philosophies, experiences, and expertise.”¹⁷ However, while the friction of bipartisan back-and-forth can lead to a more thoughtful, well-rounded regulatory scheme, a judicial process that supplants the majority viewpoint with that of the minority goes too far. Judicial reliance on the opinions of dissenting commissioners changes the context of bipartisan debate. It provides an incentive structure whereby the minority block can—and may intend to—lay the foundation for a court’s rejection of the majority’s policy preferences. This dynamic makes it more valuable for the dissenting commissioners to avoid compromise and simply lay out their policy rationale in a dissent, thus giving a court the opportunity to adopt the minority position. Therefore, judicial reliance on such dissent—and commissioner knowledge of that possibility—deprives the Commission of the benefits of bipartisan deliberation.

This Note argues that a court should not rely solely a commissioner’s dissenting opinion in rejecting administrative regulations. Doing so harms both the SEC and the courts and impedes the effectiveness of financial regulation at a time when regulatory success is essential. While commissioner dissent is not inherently bad—and in fact it might even be the product of the very sort of healthy,

¹⁶ 15 U.S.C. § 78d(a) (2012).

¹⁷ See Fisch, *supra* note 6, at 720 n.176 (citation omitted) (quoting another source).

bipartisan discourse the 1934 Act sought to encourage—a court should not use it to effectively circumvent the Commission’s majority. In essence, courts should avoid crossing the line between reviewing an agency’s decision and participating in that decision.

The remainder of this Note proceeds as follows. Part II describes the basic structure and purpose of the SEC, as well as the statutory grounds for the promulgation of agency rules. Part III explores the various standards of judicial review for administrative regulations and explains more deeply emerging trend of more demanding judicial review of SEC rules. Part IV reviews the scholarship of dissenting opinions and examines why dissenting opinions within executive agencies do not exist within the same institutional structure as those in the judicial branch. Part V explores possible policy solutions.

II. SEC AND RULEMAKING OVERVIEW

A. SEC Structure, Purpose, and Procedures

The 1934 Act established the Securities and Exchange Commission (“SEC” or “Commission”) to protect investors and, in doing so, to promote efficiency, competition, and capital formation within the U.S. financial system.¹⁸ The 1934 Act provided that the agency’s main body would consist of five commissioners, only three of which may come from the President’s political party.¹⁹ The commissioners, led by the SEC Chair, are empowered to promulgate federal regulations²⁰ and in so doing must provide public notice and seek public comment—i.e., “written data, views, or arguments”—for or against those regulations.²¹ After consideration of public input, the Commission can adopt the proposed regulation, whereby it “becomes part of the official rules that govern the securities industry.”²² Upon issuing new regulations, individual commissioners have the opportunity to offer their public support for or disagreement with the given regulation.

As the rise of the administrative state has led agencies to play a prominent role within the federal government,²³ the

¹⁸ 15 U.S.C. § 78c(f) (2012).

¹⁹ 15 U.S.C. § 78d(a) (2012).

²⁰ See Securities Act of 1933, 15 U.S.C. § 77a (2012); Trust Indenture Act of 1939, 15 U.S.C. § 77aaa (2012); Securities Act of 1934, 15 U.S.C. § 78b (2012); Investment Company Act of 1940, 15 U.S.C. § 80a (2012); Investment Advisers Act of 1940, 15 U.S.C. § 80b (2012); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (2012); Jumpstart Our Business Startups Act of 2012, Pub. L. No. 112-106 (codified in scattered sections of 15 U.S.C.).

²¹ Administrative Procedure Act, 5 U.S.C. § 553 (2012).

²² *Rulemaking, How it Works*, SEC. & EXCH. COMM’N (APRIL 6, 2011), <http://www.sec.gov/answers/rulemaking.htm>, archived at <http://perma.cc/74JJ-LS7X>.

²³ Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1464 (“[F]ederal agencies exercise pervasive control over economic and other activities in this country. Whatever their failings and accompanying calls

SEC—like all federal agencies—wears several different institutional hats. The Commission operates as an adjudicatory body by hearing cases for violations of SEC regulations; as an arm of the executive branch, the agency is charged with the implementation and enforcement of its regulations. However, when proposing, debating, and adopting its regulations, the SEC’s function most resembles that of a legislative body.²⁴ Indeed, courts have noted that “notice and comment rulemaking . . . is analogous to the procedure employed by legislatures in making statutes.”²⁵ This fact—that an agency, in *making* policy rather than implementing or enforcing it, acts most like a legislature—should inform our analysis of regulatory dissent.

B. Administrative Law

Our analysis will also be improved by briefly reviewing the framework and environment within which regulatory decisions are made. The structure for regulatory decision-making has been alluded to thus far, but the two sections below highlight the main portions of the principal laws that govern agency rulemaking. Those laws are the APA and the Government in the Sunshine Act (“GITSA” or “Sunshine Act”).

1. Administrative Procedure Act

The APA provides the procedures by which a federal agency proposes and adopts federal regulations.²⁶ As noted above, the APA requires that an agency provide notice and

for reform or more sweeping deregulation, these entities inevitably will continue to do the work of government.”).

²⁴ Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 753 (1996) (arguing that APA rulemaking procedures “fairly suggest[] the parameters of a hearing on legislation, conducted by a legislative committee”).

²⁵ *Hector v. U.S. Dep’t of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996) (explaining that “the notice of proposed rulemaking corresponds to the bill and the reception of written comments to the hearing on the bill”).

²⁶ Administrative Procedure Act, 5 U.S.C. §§ 500–596 (2012).

opportunity for public comment regarding proposed regulations and that, upon adoption of new rules, the agency give a basic explanation of the rationale and purpose behind the new rule.²⁷ Several articles have explored the effect of the APA on the effectiveness and efficiency of agency rulemaking.²⁸

Criticisms of the current rulemaking process have discussed two important factors relevant to this Note: the inefficiency of the process and the disproportionate advantages that exist for the members of the regulated industry. Regarding inefficiency, one author has pointed to the “years of effort” and the “expenditure of millions of dollars” by administrative agencies during the rulemaking process, all of which can be for naught if a reviewing court subsequently strikes down a rule.²⁹ Other scholars have recognized that the nature of notice-and-comment rulemaking “allows industry groups to control the administrative record by submitting extensive comments and studies to which the SEC is then obligated to respond.”³⁰

2. Government in the Sunshine Act

The Government in the Sunshine Act also affects agency rulemaking.³¹ Enacted in 1976, GITSA is aimed at increasing transparency in government. To that end, it requires that meetings of agency commissioners be “open to public observation.”³² The law defines a meeting as a

²⁷ *Id.* § 553(b)–(c).

²⁸ See, e.g., Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 79 (2013) (discussing the effect of APA procedures on the perceived legitimacy, accountability, and defensibility of federal regulations and arguing that increased public participation in rulemaking would lead to better acceptance by the regulated community).

²⁹ Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 61 (1995).

³⁰ Fisch, *supra* note 6, at 722.

³¹ Government in the Sunshine Act, 5 U.S.C. § 552b (2012).

³² *Id.* § 552b(b).

“deliberation[]” of a quorum of individuals for a given agency.³³ For the SEC, this effectively prevents any private meeting of more than two commissioners.³⁴

A recent article explores whether GITSA has stifled the power of informal conversation and thus made it harder for commissioners to collaborate. It notes that “[b]y requiring that discussions take place in public, [GITSA] subjects them to media scrutiny, interest-group attention, and political pressure[,]” making it “more difficult for commissioners to modify their positions and engage in compromise.”³⁵ Another article cautions that, while the Sunshine Act seeks to shed light on agency deliberations, “candor and the flexibility necessary for collaboration or compromise are more likely to flourish in the shade.”³⁶

³³ *Id.* § 552b(a)(2) (“[T]he term ‘meeting’ means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.”).

³⁴ *See* Fisch, *supra* note 6, at 718–19 & n.166 (explaining that the SEC often operates with at least one vacancy, which leaves the GITSA-triggering quorum at only two commissioners; absent any vacancies, the GITSA-triggering quorum is three commissioners).

³⁵ *Id.* at 719.

³⁶ Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 595 (1984). Notably, as the following passage from Jill Fisch explains, there was a failed attempt to remedy the Sunshine Act’s counter-productive effects.

In 1995, the chair of the Administrative Conference of the United States (ACUS) was asked to review the Sunshine Act in light of these concerns. The chair established a special committee, held a series of public meetings, and concluded that there was substantial credible evidence that the Act was having a negative effect on collective decisionmaking by multi-member agencies. The committee concluded that Congress should establish a pilot program to enable agencies to engage in preliminary policymaking and deliberations outside of the public-meeting context. Shortly after the committee made its recommendations, however, Congress terminated the funding of the ACUS, and the committee’s recommendations were abandoned.

Fisch, *supra* note 6, at 721 (citations omitted).

III. JUDICIAL REVIEW OF AGENCY REGULATIONS

As discussed above, a court charged with reviewing an administrative rule may reject that rule if the court determines that the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³⁷ However, different applications of this standard result in a wide range of judicial deference. In fact, there seem to be at least five different variations of the standard for judicial review of agency rules,³⁸ from extreme judicial deference to what is effectively substantive review of agency regulation, and the standard applied often determines the fate of the regulation under review. This Part explores the various deference doctrines courts have applied in reviewing agency—particularly SEC—regulations.

A. Deference Doctrines

Courts apply different standards of review depending on the circumstances in which the challenge to an agency rule arises.³⁹ In its most basic form, judicial review follows the standard laid out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, holding that a court must defer to any reasonable interpretation of a statute by an agency charged with implementing that statute.⁴⁰ The Court in *Chevron* explained that politically accountable agencies are better suited than courts to make the policy judgments

³⁷ 5 U.S.C. § 706 (2012).

³⁸ See *infra* Part III.A–B (exploring and examining the following approaches courts have taken: deference doctrines of (1) *Chevron*, (2) *Skidmore*, and (3) *Seminole Rock*, as well as so-called (4) "hard look review" and (5) the recent standard the D.C. Circuit applied to SEC regulations).

³⁹ Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 560, 570 (2006) (discussing the different so-called "deference doctrines" applied by courts in reviewing agency rules and arguing that certain changes would provide for a "more democratic and constitutionally legitimate administrative state").

⁴⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1983).

inherent in agency interpretations⁴¹ and that deference to an agency's interpretation is proper under the separation of powers doctrine:

[Judges] are not part of either political branch of the Government. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.⁴²

Other standards of review apply to agency interpretations announced through procedures less formal than adjudication or rulemaking⁴³ and can vary even within their own application. One scholar explains that “*Skidmore* deference,” rooted in the Supreme Court’s ruling in *Skidmore v. Swift & Co.*, is based on an “agency’s comparative advantage in terms of its subject-matter expertise.”⁴⁴ In such cases, “the deference due an agency interpretation varies ‘with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.’”⁴⁵ Thus, “the *Skidmore* doctrine makes the extent of the deference due an agency’s interpretation of an ambiguous agency-administered statute depend, to some degree, on the agency’s consistency in interpreting the statute over time.”⁴⁶ Because “[i]nconsistency in

⁴¹ *Id.* at 865–66.

⁴² *Id.*

⁴³ *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001) (deciding that United States Customs Service classification rulings are not entitled to *Chevron* deference because the statute that provides for such rulings did not intend for them to have the force of law).

⁴⁴ *See Pierce*, *supra* note 39, at 569; *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

⁴⁵ *See id.* (quoting *Mead Corp.*, 533 U.S. at 228).

⁴⁶ *Id.* at 571.

an agency's treatment of the same scientific dispute naturally tends to reduce the credibility of the agency's claim of superior subject matter expertise,"⁴⁷ courts are willing to impose a sliding scale depending on the apparent certainty of the agency's opinion.

Yet another variation of judicial review for agency action is so-called "*Seminole Rock* deference," which courts have applied when reviewing an agency's interpretation of that agency's own rule—i.e., rather than its interpretation of a statute.⁴⁸ In such cases, a court must give an agency's interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation."⁴⁹ However, courts have created a significant carve-out for the general *Seminole Rock* standard. Indeed, courts have rejected agency attempts to "parrot" the same open-ended statutory language that delegated administrative authority.⁵⁰ Courts took issue with "parroting" as it became a method for agencies to provide more specific provisions via informal interpretations, effectively escaping procedural rulemaking requirements and making a "mockery of . . . the APA[.]"⁵¹

⁴⁷ *Id.*

⁴⁸ *Id.* at 569.

⁴⁹ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Supreme Court applied *Seminole Rock* in *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Since then, the Supreme Court, many lower courts, and many scholars have begun to refer to *Seminole Rock* deference as "*Auer* deference." See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the [rule at issue] is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" (citation omitted)); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) ("In this suit I have no need to rely on *Auer* deference, because I believe the FCC's interpretation is the fairest reading of the orders in question.").

⁵⁰ See *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (holding that the APA requires an agency to give some definitional content to statutory language when it issues rules).

⁵¹ *Mission Grp. Kan., Inc. v. Riley*, 146 F.3d 775, 782 (10th Cir. 1998). More recently, the Supreme Court explicitly adopted the anti-parroting doctrine to not give deference to an agency's interpretation of a given regulation. See *Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006).

Jill Fisch notes that “although *Chevron* is often described as having ‘revolutionized the jurisprudence of agency deference,’ courts apply *Chevron* deference surprisingly infrequently,” as courts “closely review the factual record and reasons justifying the agency’s policy choices.”⁵² So-called “hard look” review will lead a court to reject regulations where the court determines the agency ignored “an important aspect of the problem,” based its decision outside “the evidence before the agency,” or made a determination “so implausible that it could not be . . . the product of agency expertise.”⁵³

Each of these standards of review has different implications for the rule under consideration. Under *Chevron* or *Seminole Rock*, agencies receive significant deference from a court charged with evaluating their interpretation of a particular statute or rule. However, while this significant deference usually allows an agency interpretation to withstand judicial review, nothing requires that agencies remain consistent in their interpretation.⁵⁴ Indeed, *Chevron* not only allows for, but also promotes the mutability of agency interpretation, as changing political opinions within a given agency will almost inevitably provide the opportunity to shift a particular interpretation.⁵⁵ As Harold Greenberg explains, this “leaves statutory ambiguity perpetually unresolved.”⁵⁶

More importantly, agencies react to the procedures that govern agency action. As discussed above, we saw this with “parroting”—wherein agencies attempted to evade certain

⁵² Fisch, *supra* note 6, at 710.

⁵³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁴ See Harold M. Greenberg, *Why Agency Interpretations of Ambiguous Statutes Should be Subject to Stare Decisis*, 79 TENN. L. REV. 573, 574 (2012) (“An agency may revise an earlier interpretation so long as the new interpretation is ‘permissible’ under the statute. In *Chevron*, the United States Supreme Court justified this paradigm under the imperative of administrative flexibility.”).

⁵⁵ *Id.*

⁵⁶ *Id.*

procedural requirements by employing vague language in promulgating rules, only to offer more precise guidance via agency interpretations. That agencies are aware of the legal context within which they make rules should not come as a surprise. There is no reason to believe this fact does not also hold true for agencies facing judicial review. With regard to the SEC, it is reasonable to assume that the Commission and its members have taken note not only of the increasingly rigorous review by the D.C. Circuit, but also of the court's reliance on the dissenting views of the Commission's minority.

B. Recent Developments Between the D.C. Circuit and the SEC

Recent rejections of agency rules demonstrate the judiciary's increased willingness to conduct a more searching review of agency rules. The D.C. Circuit has shown what some have called⁵⁷ unprecedented heightened review of SEC regulations. Indeed, “[o]ver more than two decades, since 1990, the SEC has had to (unsuccessfully) defend eight securities-related regulations in the D.C. Circuit.”⁵⁸ The most recent cases demonstrate “a turning point in judicial review of the SEC's actions” and “an unusually aggressive examination of the factual record the SEC presented in

⁵⁷ See Alami, *supra* note 10, at 564.

⁵⁸ *Id.*, at 547–48 & n.39 (listing the eight cases: “Bus. Roundtable v. U.S. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (challenging SEC rule on proxy access and shareholder-nominated candidates); Am. Equity Life Ins. Co. v. U.S. SEC, 613 F.3d 166 (D.C. Cir. 2009) (challenging SEC regulation of fixed income annuities); Fin. Planning Ass'n v. U.S. SEC, 482 F.3d 481 (D.C. Cir. 2007) (challenging exemption of broker-dealers from the Investment Advisers Act); Goldstein v. U.S. SEC, 451 F.3d 873 (D.C. Cir. 2006) (challenging SEC rule on hedge fund exemptions); Chamber of Commerce of U.S. v. U.S. SEC, 443 F.3d 890 (D.C. Cir. 2006) (challenging same upon remand); Chamber of Commerce of U.S. v. U.S. SEC, 412 F.3d 133 (D.C. Cir. 2005) (challenging SEC regulation of mutual funds); Teicher v. U.S. SEC, 177 F.3d 1016 (D.C. Cir. 1999) (challenging SEC limitations on persons who commit certain offenses related to investment advising); Bus. Roundtable v. U.S. SEC, 905 F.2d 406 (D.C. Cir. 1990) (challenging rule regarding corporate listings on national security exchanges)”).

support of its rule.”⁵⁹ Some commentators have cautioned that this increased mistrust by the D.C. Circuit could undermine the strides made in securities regulation since the 1934 Act.⁶⁰ The next two Sections provide an overview of the D.C. Circuit’s willingness to use the dissenting opinions of SEC commissioners as a basis for overturning a particular regulation.

1. The Emergence of Judicial Reliance on
Commissioner Dissent: *Chamber of Commerce
of the United States v. SEC* and *Goldstein v.
SEC*

The D.C. Circuit’s hostile treatment of SEC rules came in a series of decisions. The first of these was *Chamber of Commerce of the United States v. SEC*.⁶¹ There, the court invalidated certain SEC mutual fund regulations, holding that the SEC violated the APA by failing to adequately consider alternative options to the proposed rules.⁶² In support of its decision, the court cited the opinions of the “two dissenting Commissioners[,]” who “raised, as an alternative to [the proposed rule] . . . a familiar tool in the Commission’s tool kit[,] . . . making it hard to see how that particular policy alternative was either ‘uncommon or unknown.’”⁶³

In *Goldstein v. SEC*,⁶⁴ the court rejected proposed SEC hedge fund regulations that would have required advisors to count the hedge funds for which they worked as “clients,” subjecting those advisors to certain regulations.⁶⁵ First, despite possible ambiguity of the word “client,” the court avoided applying *Chevron* deference, reasoning that “[t]he lack of statutory definition of a word does not necessarily

⁵⁹ *Id.* at 548.

⁶⁰ *See id.*

⁶¹ 412 F.3d 133 (D.C. Cir. 2005).

⁶² *Id.* at 144.

⁶³ *Id.*

⁶⁴ 451 F.3d 873, 884 (D.C. Cir. 2006).

⁶⁵ *Id.*

render the meaning of the word ambiguous.”⁶⁶ Then, in rejecting the rule, the court dismissed the Commission’s justifications of increased investing in and fraud actions relating to hedge funds. The court sided with the Commission’s minority members, apparently seeing their disagreement as reason enough to doubt the Commission’s finding. The court said of the SEC’s reasons for adopting the new rule that “[a]ll of this may be true, although the dissenting Commissioners doubted it.”⁶⁷ With that, the hedge fund rule was rejected, presumably implying that doubt from the Commission’s dissenting minority is enough to render the majority’s conclusion “arbitrary and capricious.” These cases served as an overture for the court’s demanding review of SEC rules. However, a more recent decision has removed any doubt as to the D.C. Circuit’s willingness to look deeply into the substance of agency rules.

2. *Business Roundtable v. SEC*

*Business Roundtable II*⁶⁸ has been the subject of much scholarly attention. Some argue that the case “amounts to the D.C. Circuit’s ‘strongest admonition of the SEC to date’ and may hint at general rising distrust, or even hostility, by the federal courts towards the SEC.”⁶⁹ One scholar concludes that the decision has imposed an “unprecedentedly high bar for the SEC to meet before it promulgates a new rule.”⁷⁰

At issue in the case was a challenge to Rule 14a-11—the “proxy access” rule—which sought to make it easier for shareholder to nominate directors.⁷¹ In rejecting the rule, the court held that the SEC had “acted arbitrarily and

⁶⁶ *Id.* at 878.

⁶⁷ *Id.* at 882.

⁶⁸ 647 F.3d 1144 (D.C. Cir. 2011).

⁶⁹ Al-Alami, *supra* note 10, at 548 (citing Thomas Stratmann & J.W. Verret, *Does Shareholder Proxy Access Damage Share Value in Small Publicly Traded Companies?*, 64 STAN. L. REV. 1431, 1445 (2012)).

⁷⁰ *Id.*

⁷¹ *Business Roundtable II*, 647 F.3d at 1146.

capriciously for having failed . . . adequately to assess the economic effects of a new rule.”⁷² The court took issue with the substance of the agency’s policy predictions, criticizing the fact that the Commission “inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.”⁷³ The court not only cited, but also sided with the opinions of the dissenting commissioners who voted against the proxy access rule: “The two Commissioners voting against the rule faulted the Commission on both theoretical and empirical grounds.”⁷⁴ The court reasoned that the Commission’s majority “chose wrongly from conflicting studies about the effects of [the proxy access rule]. . . .” According to the court, the minority commissioners had the more reliable reports. As one article describes the decision, the court, in overturning the policy preference of the majority of SEC commissioners, “*simply chose the opposite side of a politically charged debate.*”⁷⁵

Thus, *Business Roundtable II* constitutes not just an increased standard of judicial review but the most recent indication that the D.C. Circuit will in part base its rejection of SEC regulations on the dissenting opinions of the minority commissioners. As discussed in the next Part, agencies are aware of the risk of judicial intervention. In light of cases

⁷² *Id.* at 1148.

⁷³ *Id.* at 1148–49.

⁷⁴ *Id.* at 1148. See also Comm’r Kathleen L. Casey, Speech by SEC Commissioner: Statement at Open Meeting to Adopt Amendments Regarding Facilitating Shareholder Director Nominations (Aug. 25, 2010), available at <http://www.sec.gov/news/speech/2010/spch082510klc.htm>, archived at <http://perma.cc/LG7H-GJLP> (faulting the Commission for failing to act “on the basis of empirical data and sound analysis”).

⁷⁵ Recent Cases, *Administrative Law—Corporate Governance Regulation—D.C. Circuit Finds SEC Proxy Access Rule Arbitrary and Capricious for Inadequate Economic Analysis—Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), 125 HARV. L. REV. 1088, 1094 (2012) (emphasis added).

like *Chamber of Commerce, Goldstein*, and *Business Roundtable II*, commissioners need to worry not only that they follow the correct *procedure for making a decision*, but also that the reviewing court *agrees with that decision*. The negative effects this can have on agency decision-making, as well as the value of dissenting opinions in general, are discussed below.

IV. JUDICIAL RELIANCE ON COMMISSIONER DISSENT

Scholars have noted that stricter standards of judicial review play a role in hindering regulatory activity.⁷⁶ Courts' willingness to employ commissioner dissent in overturning agency regulations further muddies the water of an already-problematic relationship between the courts and federal agencies, as what appears to be heightened scrutiny can now essentially resurrect the views of minority members of the Commission. By allowing themselves to partially base their rejection of SEC regulations on the dissenting opinions of minority commissioners, courts encroach into the policy-making arm of the executive branch and upset the purpose of a bipartisan regulatory commission. Nor is judicial use of commissioner dissent analogous to the resurrection of a *judicial* dissent. Because they do not exist within the same institutional mechanism—namely that of *stare decisis*—commissioners' dissenting opinions do not lead to the same sort of jurisprudential progress or intellectual honing that results from dissents in the judicial branch. This Part first discusses the consequences of heightened review on agency procedures and regulatory efficacy. It then considers the value of dissenting opinions in the context of executive agencies.

⁷⁶ See *infra* Part IV.A.

A. Consequences of Judicial Review of Agency Rules

Long before the most recent changes in standards applied by courts in considering agency rules, it was recognized that the process (or threat) of judicial review has an effect on agency rulemaking. In 1991, Professor Richard Pierce pointed to “increasing evidence that judicial review of agency rulemaking is leading to policy paralysis in many regulatory contexts.”⁷⁷ Professor Pierce points to the reaction of the Federal Energy Regulatory Commission (“FERC”) after several cases in which the D.C. Circuit struck down certain energy regulations.⁷⁸ “Even when a major change in regulatory policy is desperately needed” and can be “implemented in a manner that yields enormous improvements in the performance of a regulated market,” agencies “can be publicly labeled lawless and incompetent for making such a change.”⁷⁹ As a result, courts that reject agency rules as arbitrary and capricious cast politically damaging wounds onto the regulatory agencies that made those rules. All the while, agencies that want to avoid judicial rebuke are left with little guidance, as “[t]here is no discernible limit either to the number of alternatives an agency must consider or the amount of consideration an agency must give any alternative.”⁸⁰ This makes rulemaking an unattractive route for agency action.

Political and reputational costs are not the only factors that lead agencies away from formal rulemaking procedures. Significant financial and personnel resources are expended in trying to protect certain rules from judicial rejection, as an agency must weigh the effort that leads to a new rule against the chances of judicial rejection of that rule.⁸¹ Indeed, “[i]f an agency expects a rulemaking to require five to ten years and

⁷⁷ Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 8 (1991).

⁷⁸ *Id.*

⁷⁹ *Id.* at 18.

⁸⁰ *Id.* at 22.

⁸¹ Pierce, *supra* note 29, at 66–67.

tens of thousands of staff hours to complete, with only a 50 percent probability of judicial affirmance of the resulting rule, it will use rulemaking infrequently.”⁸² The result is that agencies avoid rulemaking in favor of other, less public alternatives for making policy.⁸³

Other articles have similarly pointed to the particular obstacles that the SEC faces as a result of recent decisions like *Business Roundtable II*. One author argues that the D.C. Circuit’s “scrutiny of cost-benefit analysis causes enormous rulemaking delay with respect to the particular rule that a court remands or invalidates.”⁸⁴ And delay alone does not necessarily correspond with more effective regulation, as “the additional cost-benefit analysis conducted to protect a particular rule from invalidation does not improve the substance of the rule—it only bolsters the SEC’s defense of its position.”⁸⁵ Rather than improving rulemaking, the D.C. Circuit’s stringent focus on the substance of the SEC’s analysis “creates uncertainty in the rulemaking process, and makes the SEC more vulnerable to the policy preferences of courts and interest groups.”⁸⁶

Litigants—often the subject of newly adopted regulations—are eager to encourage such judicial activity. When an agency adopts new rules, “it can predict that its decisions will be subject to judicial review at the behest of some combination of the many well-financed parties with interests in the outcome of the policy dispute.”⁸⁷ Indeed,

⁸² *Id.*

⁸³ See Rachel A. Benedict, Note, *Judicial Review of SEC Rules: Reviewing the Costs of Cost-Benefit Analysis*, 97 MINN. L. REV. 278, 290–91 (2012). Before joining the Supreme Court, Justice Breyer voiced similar concerns. He noted that “[a] remand of an important agency rule (several years in the making) for more thorough consideration may well mean several years of additional proceedings, with mounting costs, and the threat of further judicial review leading to abandonment or modification of the initial project irrespective of the merits.” Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 383 (1986).

⁸⁴ Benedict, *supra* note 83, at 290.

⁸⁵ *Id.* at 291.

⁸⁶ *Id.* at 296.

⁸⁷ Pierce, *supra* note 29, at 69.

“some scholars argue that the Chamber of Commerce initiated the *Chamber of Commerce v. SEC* litigation despite its weak connection to the mutual fund industry in order to spur judicial activism with regard to SEC rulemaking.”⁸⁸ One article explains the ease with which potential challengers of agency rules can find fodder for a reviewing court:

They will search for two things: (1) issues that arguably are of sufficient importance to be within the scope of the duty that the agency did not discuss at all; and, (2) issues of such importance that the agency arguably should have discussed them more thoroughly or in greater detail. *That search will always bear fruit.* It is impossible for any agency to identify and to discuss explicitly and comprehensively each of the myriad issues, alternatives, and data disputes relevant to a major rulemaking. After the fact, any competent lawyer with access to sufficient resources can identify issues that an agency arguably discussed inadequately.⁸⁹

Thus, judicial review lurks in the background of all agency decision-making, not only in the minds of commissioners but also in those of interested parties—parties that, due to notice-and-comment rulemaking and GITSA, are very much a part of the rulemaking process. When a court’s ability to consider commissioner dissents is viewed in this context, the potential effects on SEC policymaking should be cause for concern. What follows is a review of the arguments for and against dissenting opinions in the context of the judicial branch, which will shed light on the role of commissioner dissents in the context of judicial review.

⁸⁸ Benedict, *supra* note 83, at 292 (citing Donald C. Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1594 (2006)).

⁸⁹ Pierce, *supra* note 29, at 69 (emphasis added).

B. Dissenting Opinions: Good or Bad?

During the early days of the Supreme Court, opinions were issued seriatim, whereby each member of the Court issued an individual opinion on the merits of the case.⁹⁰ However, this tradition, inherited from the British courts, was cast aside when the first true dissent was issued in 1806 in *Simms v. Slaccum*.⁹¹ The emergence of public disagreement among the Justices sparked a wealth of scholarship regarding the value of dissenting opinions,⁹² and by the end of the century there existed an animated debate as to their merits.⁹³

In general, the debate focused on whether the individuality of particular justices should be known, whether expressing that individuality hinders or helps the Court's jurisprudence, and—more broadly—the effect on the Court as an institution.⁹⁴ “[G]roups of lawyers” on both sides “reasoned about whether it was desirable for the judicial office to integrate a judge’s official role and his or her private self.”⁹⁵ The proponents of dissenting opinions won out, and dissenting opinions are common in both state and federal courts. The arguments put forth nonetheless remain instructive, as they consider the legal and practical concerns of the practice of public (and frequent) dissent. The

⁹⁰ See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432 (1986) (discussing the history of seriatim opinions).

⁹¹ 7 U.S. (3 Cranch) 300, 309 (1806) (Paterson, J., dissenting).

⁹² See, e.g., Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959); Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMPLE L. REV. 307, 308–09 (1998); Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507 (2012).

⁹³ Smith, *supra* note 92, at 508 (describing a “roughly thirty-year debate within the Bar on the propriety of published judicial dissent”).

⁹⁴ *Id.* (“Dissent’s would-be abolishers promoted a vision of courts as composite institutions into which judges’ individuality should be merged, while defenders of dissent reasoned from the notion that courts should speak as collections of individual judges.”).

⁹⁵ *Id.* at 509.

commentators who wrote about *judicial* dissents in the early twentieth century did not consider the role dissents would play within the modern administrative state, and the arguments on each side have thus not been applied to the quasi-legislative process of agency rulemaking. The analysis of those turn-of-the-century scholars, however, remains relevant to the question of whether the modern-day frequency of intra-agency dissent is conducive to effective and efficient rulemaking.

1. The Pro-Dissent Camp: Individuality, Flexibility, and Democracy

As for the virtues of dissent, one commentator defending the practice in the early 1900s wrote that the primary purpose of a dissenting opinion is “the assistance of future judges in passing on identical or similar states of fact.”⁹⁶ It is acceptable, the argument goes, that a dissent has no bearing on the case at hand, as the judge’s differing opinion might help limit or refine subsequent use of the particular jurisprudential doctrine employed by the majority.⁹⁷ More recent defenders of dissent have made similar arguments. In a speech at Hastings College of the Law, Justice William Brennan discussed the benefits that dissents provide for future jurists.⁹⁸ He explained the value of pointing out “flaws . . . in the majority’s legal analysis . . . in the hope that the court will mend the error of its ways in a later case.”⁹⁹ The late Justice agreed with other scholars who saw dissents as limiting mechanisms on overly broad majority opinions.¹⁰⁰

⁹⁶ *Dissenting Opinions*, 19 HARV. L. REV. 309, 309–10 (1906).

⁹⁷ *Id.*

⁹⁸ Brennan, *supra* note 90, at 430–31.

⁹⁹ *Id.* at 430.

¹⁰⁰ *Id.* (“The dissent is also commonly used to emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly—a sort of ‘damage control’ mechanism.”). See also V. H. Roberts, *Dissenting Opinions*, 39 AM. L. REV. 23 (explaining how dissenting opinions have often served as the basis for correcting unwise decisions or, where such decisions have not been overruled, limiting their further extension).

All of these arguments are essentially variations of the same theme: Judicial dissents give future judges a basis for a subsequent change in position.

Other proponents argued that dissents are symptoms of democratic governance. Scholars saw public dissent as “the democratic way to express dissident views.”¹⁰¹ These authors compared American courts to those of totalitarian regimes, where dissent—like democracy—was nonexistent. “In contrast stood the courts of a free people for whom legal uncertainty was a necessary condition of democracy. That judges do not agree . . . is a sign that they are dealing with problems on which society itself is divided.”¹⁰²

Moreover, proponents saw dissents as both necessary—in that they promote legal flexibility—and practical—in that they appropriately represent the human nature of courts and the changing nature of the law. “So long as courts are permitted to reverse their own decisions, the law will never be definitely fixed.”¹⁰³ Proponents of this view recognized that certain pieces of interrelated legal rules “will require alteration to avoid contradictions.”¹⁰⁴ Furthermore, these commentators recognized the unrealistic expectation of “uniform agreement among judges . . . so long as judges are human.”¹⁰⁵ For both of these reasons, “to suppress [dissenting opinions] would probably lead to the disquieting belief that the real uncertainties of litigation are much more numerous and dangerous than [they actually are].”¹⁰⁶ Presumably, this argument is based on the belief that an understanding of all opinions of the Court—even those of minority members—leads to a clearer picture of how the Court would decide a given set of facts.

¹⁰¹ Note, *From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, 124 HARV. L. REV. 1305, 1316 (2011) (quoting William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC. 97 (1948)).

¹⁰² *Id.* at 1315–16.

¹⁰³ *Dissenting Opinions*, *supra* note 96, at 310.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 309.

¹⁰⁶ Emlin McLain, *Dissenting Opinions*, 14 YALE L.J. 191, 192 (1905).

Finally, certain arguments in favor of dissent are best understood as a symptom of the unique role of the Supreme Court and federal appellate courts. Justice Brennan discussed the power of a dissent to “hint that the litigant might more fruitfully seek relief in a different forum—such as the state courts.”¹⁰⁷ Justice Brennan noted the “era of expanding state court protection of individual liberties” and explained that “dissents from federal courts may increasingly offer state courts legal theories that may be relevant to the interpretation of their own state constitutions.”¹⁰⁸ Both of these institutional realities relate aptly to the Supreme Court’s ability to offer guidance to (in the first instance) litigants and (in the second) lower courts; however, neither of these functions is carried out in the same way by an agency in promulgation of a rule. Nor are issues of flexibility as relevant with regard to agencies, who can change interpretations and rules as they see fit—i.e., without the help of a preexisting dissent. These differences should be kept in mind in considering the value of regulatory dissent.

2. The Anti-Dissent Camp: Legal Uncertainty, Increased Litigation, and an Impediment to Institutional Legitimacy

Another school of thought viewed dissenting opinions with much more suspicion. Judge Learned Hand expressed his concern that a dissenting opinion “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”¹⁰⁹ Other, more colorful criticism saw dissents as “entertaining” but as “useless as ‘sassing’ the umpire of a baseball game.”¹¹⁰ Justice Potter Stewart went so far as to label them “subversive literature.”¹¹¹ Still others

¹⁰⁷ Brennan, *supra* note 90, at 430.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 429 (citation omitted) (discussing Judge Hand’s description).

¹¹⁰ Walter Stager, *Dissenting Opinions—Their Purpose and Results*, 19 ILL. L. REV. 604, 607 (1925).

¹¹¹ Brennan, *supra* note 90, at 429 (discussing Justice Stewart’s description).

took issue with the power of dissents to affect the institution and legitimacy of the courts and to increase the prospects of future litigation.¹¹²

Other scholars saw a direct conflict between a judge's *personal* opinion and his *institutional* duty.¹¹³ This group "promoted a vision of courts as composite institutions into which judges' individuality should be merged."¹¹⁴ Suppressing dissents would, to these observers, lead to enhanced "dignity and influence of . . . judicial decisions."¹¹⁵ Then-President of the American Bar Association William Wirt Howe remarked that "[i]t is thought by many that . . . dissenting opinions . . . often tend to weaken the authority of the Court" and that, so far as he was informed, they "cannot be essential to the administration of justice."¹¹⁶ As for this latter criticism, perhaps some of it was rooted in an "abuse[] of the privilege" that resulted from dissents beyond the scope of the immediate case.¹¹⁷ Some observers recognized that their issues with dissenting opinions were "not due to a fundamental weakness, but to the *tendency of minority judges to travel out of the law into a discussion of moral, social, and political questions which they think the decision of the court will precipitate.*"¹¹⁸ These critics cautioned that judges "[should] confine themselves to a dignified exposition of the exact point of difference on the law[.]"¹¹⁹

Opponents of dissents also pointed to the effect of public disagreement among judges on the litigation landscape. Indeed, some criticized the fact that progressive era litigants came to "regularly rel[y] on dissenting opinions to criticize decisions of the Court's majority and, indeed, to challenge

¹¹² See *infra* notes 119–21 and accompanying text.

¹¹³ Smith, *supra* note 92, at 508.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 510 (quoting a passage from a turn-of-the-century *Albany Law Journal, Current Topics*, 10 ALB. L.J. 324, 325 (1874)).

¹¹⁶ William Wirt Howe, *Address of the President*, 21 ANN. REP. A.B.A. 235, 259 (1898).

¹¹⁷ *Dissenting Opinions*, *supra* note 96, at 310.

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Id.*

the very legitimacy of judicial review.”¹²⁰ Commentators have noted that dissenting opinions can “encourage and open up for future litigation questions which the Court’s decision should definitively settle.”¹²¹ Thus, the argument goes, dissents provide potential challengers with the hope that “[t]oday’s dissents might become tomorrow’s law.”¹²²

Of course, those arguing against the practice of public dissent in the context of judicial opinions lost the debate. As Hunter Smith points out, the very basis for these anti-dissent voices turned out to be the underpinning of modern-day judicial legitimacy. “[The] desire for courts to speak as anonymous, composite, and impersonal institutions runs counter to one of the main discourses on judicial legitimacy today.”¹²³ He explains that modern-day dissents provide evidence of “individual responsibility or superior traits of personal character behind judicial decisionmaking.”¹²⁴ Other commentators agree, arguing that “because dissenting opinions conflict with the ideal of the rule of law, dissents must be justified another way: as demonstrative of the deliberative process.”¹²⁵ This is similar to the reasoning of Justice Brennan, who believed that “vigorous debate improves the final product” of a judicial opinion “by forcing the prevailing side to deal with the hardest questions urged by the losing side.”¹²⁶ To the supporters of this view, judicial legitimacy is at its highest when dissenting opinions do not just criticize but actually refine the final opinion, “as if the

¹²⁰ Smith, *supra* note 92, at 539.

¹²¹ Ben W. Palmer, *Supreme Court of the United States: Analysis of Alleged and Real Causes of Dissents*, 34 A.B.A. J. 677, 680 (1948).

¹²² *Id.* at 681.

¹²³ Smith, *supra* note 92, at 508.

¹²⁴ *Id.*

¹²⁵ Note, *From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, *supra* note 101, at 1319 (discussing Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2236–47 (1996)).

¹²⁶ Brennan, *supra* note 90, at 430.

opinions of the Court—both for majority and dissent—were the product of a judicial town meeting.”¹²⁷

C. Judicial Reliance on Commissioner Dissent: Imposing Costs Without Providing Benefits

Courts should not be allowed to use commissioner dissent to reject an agency rule. Commissioner dissents within the context of agency rulemaking do not achieve the same goals as judicial dissents, as institutional limitations do not allow Commission opinions to improve the quality of SEC decisions. Moreover, when a court relies on commissioner dissent to reject an administrative regulation, it delves into what is essentially a policy debate within the given agency. This constitutes inappropriate judicial intrusion into the executive branch. In short, judicial reliance on commissioner dissent imposes significant costs without garnering countervailing benefits to either the courts or executive agencies.

First, unlike judicial dissents, commissioner dissents do not improve the quality of the final decision. The creative friction of bipartisan dialogue that Congress sought to encourage by creating a majority-minority commission is for naught if the Commission only produces post-promulgation criticism from the Commission’s minority members. The purpose of the Commission’s structure has been described as follows:

[T]he principal reason that Congress has established multi-member agencies in the first place is because Congress has made the judgment that, for the matters subject to the agency’s jurisdiction, there is a benefit from a collegial decisionmaking process that brings to bear on the ultimate decisions the diverse viewpoints of agency members who have differing philosophies, experiences, and expertise.¹²⁸

¹²⁷ *Id.*

¹²⁸ Fisch, *supra* note 6, at 720 n.176 (quoting Special Comm., Admin. Conference of the United States, *Report & Recommendation by the Special*

Thus, when post-promulgation dissent does not contribute to the productive dialogue among commission members, the SEC's bipartisan structure is undermined.

Some might argue that dissenting opinions *are* the bipartisan disagreements that lead to more deliberative policymaking. In other words, stifling dissent would defeat the legislative intent of the 1934 Act, which explicitly called for a majority-minority political group of commissioners. What is the purpose of providing for a political minority if commissioners are not allowed to express their differing views? However, as discussed above,¹²⁹ the rise of commissioner dissent is actually antithetical to the sort of bipartisan collaboration envisioned by the statutory structure. Indeed, while “[f]rank deliberations might . . . enable[] the Commission to produce [results] that both generate[] consensus and ha[ve] some rational basis[.]”¹³⁰ certain factors—such as industry dominance of comment submissions for proposed regulations and the Sunshine Act’s requirement for open meetings—make collaboration difficult. Rather than contributing to the “town meeting” envisioned by Justice Brennan, dissents are nothing more than after-the-fact records of conversations that never took place. This is unlike the dynamic for judicial dissents, which are often circulated prior to a court’s ruling, so as to force other judges to address the weakest part of their arguments. Indeed, Justice Brennan pointed to “the critical recognition that vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side.”¹³¹ But agency dissents are not the product of deliberations among commissioners; rather, they are the product of pre-established disagreements. Dissents are essentially the airing of grievances that could have—or should have—been the topic of conversation among the intentionally diverse group of commissioners. Here, in part

Committee to Review the Government in the Sunshine Act, 49 ADMIN. L. REV. 421, 424 (1997).

¹²⁹ See *supra* Part III.

¹³⁰ Fisch, *supra* note 6, at 725.

¹³¹ Brennan, *supra* note 90, at 430.

because of the Sunshine Act, no such debate occurs.¹³² When institutional norms do not encourage a back-and-forth—in fact, when laws like GITSA *discourage* private exchanges among commissioners—commissioner dissent does nothing to polish the final regulatory product.

Relatedly, unlike their judicial peers, agency dissents do not aid “future [bodies] in passing on identical or similar states of fact.”¹³³ In the context of rulemaking, agencies do not act like courts—i.e., they do not apply a static body of law to a new set of facts. Nor do agencies need to justify their action with the same respect for prior decisions that courts do. It also cannot be argued that dissents are worthwhile because they provide future Commission members ground to stand on, as no such ground is needed.¹³⁴

Indeed, the SEC does not hang its intellectual hat on precedent or jurisprudential doctrines the same way courts do, and so a future Commission does not “need” dissent the same way a court does. The SEC does not have the same set of norms that guide judicial decisions. While judicial dissents might temper the applicability of overly broad majority opinions by giving future judges a quasi-doctrinal basis for limiting the reach of a given opinion,¹³⁵ commissioner

¹³² See Fisch, *supra* note 6, at 719 (“[T]he [Sunshine] Act precludes private policy deliberations among agency heads and undermines the collaborative and bipartisan structure of the SEC. By requiring that discussions take place in public, the Act subjects them to media scrutiny, interest-group attention, and political pressure. These pressures make it more difficult for commissioners to modify their positions and engage in compromise.”).

¹³³ See *supra* Part IV.B.1 (quoting *Dissenting Opinions*, *supra* note 97, at 310) (discussing Justice Brennan’s praise of dissents as aiding future courts in deciding similar issues).

¹³⁴ See *supra* Part III.A (discussing the ease with which agencies can change policy directions depending on who is in office).

¹³⁵ Dissents do not state the law and technically carry no formal weight. However, Supreme Court jurisprudence has often relied on dissents when necessary for changing the direction of the Court. See, e.g., Note, *From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, *supra* note 101, at 1314–15 (tracing the Court’s eventual embrace of Justice Holmes’s “dissent in *Lochner* and Justice Brandeis’s dissent in *New State Ice Co. v. Liebmann*”).

dissents exist in an entirely different context. Put another way, disagreement among commissioners, unlike among judges, is not based on what the dissenter perceives as (for example) a misapplication of one of the Court's doctrines of constitutional construction.¹³⁶ Instead, it is based on what the dissenter perceives as bad policy. This may very well contribute to the policy discussion. However, such an opinion, unlike judicial dissents, does not bear any legal justification for limiting the reach of an overly broad rule.

It is true that judicial dissent could also be (and in fact, probably is) the product of pre-existing disagreements between judges. However, because commissioners do not need to respect precedent or (for example) rules of statutory interpretation in the same way that judges do, commissioner dissents do not offer the same sort of intellect-honing benefits that result from judicial dissents. The dissenter cannot leave meaningful signposts tied to particular rules of interpretation, because no such rules exist. A disagreement about policy, untethered to any jurisprudential doctrine like that of the Supreme Court, does nothing to limit what the dissenter perceives as overly broad regulation. The SEC, when promulgating rules, simply is not a court. Thus, the benefit of judicial dissents that guide and hone future interpretations of transcendent jurisprudential canon is inapplicable to SEC dissents.

While commissioner dissent does not garner any benefits by contributing to the final product, providing a limiting principle, or allowing for future flexibility, it does impose costs. In an era of increasingly harsh judicial review of SEC regulation, dissents provide a basis for reviewing courts to strike down agency rules. Financially, such rules are the

¹³⁶ *Plessy v. Ferguson*, 163 U.S. 537, 554–55 (1896) (Harlan, J., dissenting) (“In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . [S]uch legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.”).

product of significant agency resources. *Business Roundtable II* and other recent cases¹³⁷ demonstrate the willingness of courts to evaluate the *substance*—rather than just the *process*—of agency rules. In the post-recession financial system, the need for the efficient use of SEC resources is paramount, and sending the SEC back to the drawing board after it has already spent years in the rulemaking process is wasteful. Thus, as courts appear willing to endorse dissent in rejecting agency rules, commissioners should be cautious of the consequences their dissents might have on agency time and money.

Beyond wasting precious financial resources, judicial reliance on commissioner dissent is inconsistent with the separation of powers doctrine, as it is a veiled attempt at judicial legislation. Judicial reliance on—or reference to—commissioner dissent¹³⁸ allows judges to supplant their own policy choice for that of the Commission. Indeed, when “a court reverses an agency decision to adopt a particular policy, the . . . court necessarily is adopting an alternative policy.”¹³⁹ Thus, by siding with minority commissioners, courts allow themselves to make an end run around

¹³⁷ See *supra* Part III.B.

¹³⁸ See, e.g., *Goldstein v. SEC*, 451 F.3d 873, 877–78 (D.C. Cir. 2005) (invalidating the rule requiring that hedge funds be treated as clients of their investment advisers and reasoning in part that “[t]he dissenting [c]ommissioners disputed the factual predicates for the new rule and its wisdom”); *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (“Here, however, two dissenting Commissioners raised . . . an alternative to prescription, . . . making it hard to see how that particular policy alternative was either ‘uncommon or unknown.’”). Edward Sherwin summarized that the SEC’s “failure to consider disclosure-based alternatives supported by the two dissenting commissioners was one of the two bases on which the D.C. Circuit struck down the regulation” at issue in the Chamber of Commerce case. Edward Sherwin, *The Cost-Benefit Analysis of Financial Regulation: Lessons from the SEC’s Stalled Mutual Fund Reform Effort*, 12 STAN. J.L. BUS. & FIN. 1, 50 (2006).

¹³⁹ Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 312 (1988).

Congressional delegation to federal agencies.¹⁴⁰ That is, by displacing the majority position with that of the minority, a court usurps the power of the very agency to which regulatory authority has been delegated. This is not merely a hypothetical proposition. As discussed above, the court in *Business Roundtable II* simply “chose the opposite side of a politically charged debate.”¹⁴¹ By acting contrary to the policy positions of a politically accountable executive agency, an unelected judiciary hurts the legitimacy of judicial review and undermines the separation of powers doctrine.

Furthermore, the growth of commissioner dissent will increase litigation. After recent D.C. Circuit cases, litigants may increasingly rely on commissioner dissent to challenge a given SEC rule. At a recent conference, practitioners advised each other that “[g]ood candidates for judicial review are those agency rules . . . that evoke well-reasoned and passionate dissents from one or more of the agency’s commissioners or board members.”¹⁴² In a presentation to members of the bar, D.C. Circuit judges even advised would-be challengers to agency rules to look to dissenting commissioner statements as a basis for their challenge.¹⁴³

The consequences of commissioner dissent raise practical concerns as well. The entities governed by administrative

¹⁴⁰ Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Policymaking*, 36 SEATTLE U. L. REV. 695, 698 (2013) (“By substituting its own policy judgment for that of Congress, the D.C. Circuit threatens not just the ability of administrative agencies to formulate regulatory policy, but also the ability of Congress to direct agency policymaking.”).

¹⁴¹ See *supra* note 75 and accompanying text.

¹⁴² See *Challenging Federal Agency Rulemaking*, METRO. CORPORATE COUNSEL, Jan. 2012, at 14, available at <http://www.metrocorpccounsel.com/articles/17129/challenging-federal-agency-rulemakings>, archived at <http://perma.cc/F4NV-QAKU>.

¹⁴³ See Scott Rafferty, *Proceedings of the Sixth Annual Administrative Law and Regulatory Practice Institute on Rulemaking*, 35 ADMIN. & REG. L. NEWS 4, Summer 2010, at 22 (summarizing statements by Chief Judge David Sentelle and Judge Brett Kavanaugh of the D.C. Circuit and stating that “[p]etitioners should not let the court overlook a well-reasoned dissent” because “[d]issenting commissioners have the same expertise, even though they are not entitled to formal deference.”).

agencies must pay close attention to new and existing regulations, and companies must expend significant resources to monitor and comply with changing regulations.¹⁴⁴ As discussed above, judges are much more willing to overturn agency rules than legislation, despite the quasi-legislative nature of administrative regulations. Because industry participants will likely be sophisticated parties, they will presumably be aware of this fact and thus be wary of the potential for a dissent-laden regulation to be eventually struck down. This only adds to the uncertainty of the regulatory landscape that results from the ease with which agencies can alter significant pieces of regulation by adopting inconsistent interpretations.¹⁴⁵ Such regulatory uncertainty will impose increased monitoring and compliance costs on the marketplace as a whole.

Finally, certain aspects that make dissents valuable in the judicial branch are simply inappropriate when applied to agency rulemaking. Justice Brennan's description of the power of federal judges to provide a signal for state-court litigants or to give interpretive guidance to state judges does not apply to SEC regulations. It is true that courts look to—and indeed defer to—agency interpretations under the standards of review discussed above, but dissenting statements by minority commissioners should not be entitled to the same sort of deference as majority-approved SEC regulations.¹⁴⁶ Agencies do not send the same sort of powerful signals—e.g., theories of a case, venue, and so on—that are sent by judges.

Thus, commissioner dissents impose significant costs on the SEC and on the courts. These dissents do not contribute

¹⁴⁴ See Ken Tysiac, *Conflict Minerals Rule Poses Compliance Challenges*, J. ACCT. (April 2013), available at <http://www.journalofaccountancy.com/Issues/2013/Apr/20127083.htm>, archived at <http://perma.cc/EQ6R-TFN3> (discussing the Dodd–Frank provisions requiring U.S. companies to discontinue use of conflict minerals and explaining that “[t]he SEC has estimated initial compliance costs of \$3 billion to \$4 billion . . .”).

¹⁴⁵ See *supra* Part III.A.

¹⁴⁶ See *supra* Part III.

to precedential or jurisprudential progress in the same ways that judicial dissents do. They run the risk of increasing litigation over SEC rules. Moreover, when employed in an attempt to overturn agency regulations, they undermine the fundamental doctrine of separation of powers and compromise the goals for bipartisan deliberations.

V. CAUSES OF DISSENT AND POSSIBLE SOLUTIONS

The heightened level of review imposed by the D.C. Circuit has prompted a significant response from the legal community, and proposed solutions center around the SEC and its ability to react to the requirement for cost-benefit analysis.¹⁴⁷ However, no solutions appear to have been aimed at the courts. To mitigate the problems discussed above, courts should be limited in their ability to endorse the dissenting views of a commission's minority members. Such a rule would limit judges' ability to substitute the policy positions of the SEC's minority for those of the majority; allow for more fruitful pre-promulgation deliberations; bolster the legitimacy of rulemaking and judicial review; and restore separation of powers. Before discussing solutions, it is valuable to explore the causes of judicial and regulatory dissent.

¹⁴⁷ See, e.g., Benedict, *supra* note 83, at 288, 302 (arguing that Congress should clarify the exact sort of cost-benefit analysis the SEC must conduct in promulgating new rules because “[t]he D.C. Circuit’s recent trilogy of opinions invalidating SEC rules . . . did not enunciate a consistent standard for the holdings. As a result, the SEC is left with significant uncertainty as to the extent of cost-benefit analysis required for a rule to survive judicial challenge in the future.”).

A. Causes of Dissent at the Supreme Court

The causes of dissent help inform our analysis of these two proposed solutions. A recent article traced the history and evolution of judicial dissent, with an eye toward the contexts that led to a rise of judicial dissent.¹⁴⁸ The authors recognize “a demonstrable nexus between institutional *practice* . . . and institutional *purpose*, which includes the Court’s political and jurisprudential ends.”¹⁴⁹ Notably, the authors discuss the rapid shift from a Court intent on fostering consensus and on issuing unanimous decisions to one that “came to embrace the individual judicial voice.”¹⁵⁰ Specifically, while the Court’s non-unanimous opinions constituted only sixteen percent of its rulings in 1932, that number had risen to seventy-eight percent in 1952.¹⁵¹ As a result, “[t]he ultimate collapse of the consensus norm ushered in the modern discursive regime.”¹⁵²

Several theories exist to explain this sudden increase in Supreme Court dissents, but three in particular are relevant here. First is the significant change in the Court’s *procedure*. The Judiciary Act of 1925 “represented a fundamental transformation of the role of the Supreme Court.”¹⁵³ The new law allowed the Court to exercise its discretion in deciding to hear an appeal—a drastic departure from its prior role as a mandatory appellate jurisdiction.¹⁵⁴ Thus, “[w]ith the discretion to choose both the number and nature of the cases it wished to decide, the Court could

¹⁴⁸ See Note, *From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, *supra* note 101, at 1305–06.

¹⁴⁹ *Id.* at 1305.

¹⁵⁰ *Id.* at 1312.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1272 (2001).

¹⁵⁴ See Note, *From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, *supra* note 101, at 1314.

choose to hear the hard, more contentious questions that naturally engendered dissent.”¹⁵⁵

Second, the Court became aware of a changing *audience* for its decisions. Prior to the 1930s, consumers of judicial opinions did not extend far beyond the litigants of the case at hand. However, a “dramatic shift” occurred when the Court successfully “establish[ed] a relationship with legal scholarship.”¹⁵⁶ Access to this broader audience “assured Justices that their dissents would not fall on deaf ears.”¹⁵⁷ Members of the Court became aware that “a well-reasoned dissent could spur the research and analysis necessary to change the state of the law.”¹⁵⁸ Thus, the potential to “shape the future”¹⁵⁹ through a powerful dissent increased the incentive for minority Justices to voice their concerns.

Third, dissents grew in popularity and practice due to what commentators have called “canonization.” As the Court’s jurisprudence shifted, it became common to resurrect the prior dissents of several landmark decisions.¹⁶⁰ “Consequently, canonical dissents produced canonical dissenters[,]” as dissents no longer resulted in “reputational costs for individual Justices”¹⁶¹—and in some cases could serve to elevate a once-minority member of the Court to greater prominence.¹⁶² These three factors—procedure, audience, and the prospect of canonization—all exist within the context of regulatory dissent.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1314–15 (citation omitted).

¹⁵⁷ *Id.* at 1315.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1314 (“It was in this period that the legal establishment came to embrace Justice Holmes’s dissent in *Lochner* and Justice Brandeis’s dissent in *New State Ice Co. v. Liebmann* as rejections of the Court’s classically liberal jurisprudence.”) (citations omitted).

¹⁶¹ *Id.*

¹⁶² For example, Justice Holmes, whose dissents were often subsequently employed to overturn a prior case, is now known as the “Great Dissenter.” See Richard A. Primus, *Cannon, Anti-Cannon, and Judicial Dissent*, 48 DUKE L.J. 243, 285 (1998).

B. Causes of Dissent at the SEC

The analysis of the rise in Supreme Court dissents is illustrative with regard to SEC dissents. As for procedure, some scholars argue that changes in rulemaking gave rise to more vocal minority commissioners.¹⁶³ Much like the Judiciary Act of 1925 led to significant changes in Supreme Court procedure, the Sunshine Act—by requiring public observation of SEC meetings—constituted an important procedural shift for the promulgation of SEC rules. Criticism of the Sunshine Act alleges that the law has stifled the power of informal conversation and made it harder for commissioners to collaborate. For example, one critic noted that “[b]y requiring that discussions take place in public, [GITSA] subjects them to media scrutiny, interest-group attention, and political pressure[,]” making it “more difficult for commissioners to modify their positions and engage in compromise.”¹⁶⁴ Notwithstanding the good intentions of the Sunshine Act, some scholars worry that the law’s open-door policy has limited commissioners’ ability to remain flexible in the rulemaking process.¹⁶⁵ Finally, one scholar noted that “perhaps most problematically, the Act encouraged commissioners to air disagreements in the form of public criticism of, or dissent from, agency decisions.”¹⁶⁶ Consequently, meetings have become nothing more than “formal procedures in which commissioners articulate their previously developed positions on the stated agenda items rather than engage in meaningful discussions.”¹⁶⁷

It could also be argued that, like early Supreme Court justices, SEC commissioners became aware of a new audience. The public nature of agency meetings discussed above would also affect the agency’s awareness of its listeners. The judicial audience might be even more important to a dissenting commissioner, for if reviewing

¹⁶³ Fisch, *supra* note 6, at 720.

¹⁶⁴ *Id.* at 719.

¹⁶⁵ See *supra* Part II.B.

¹⁶⁶ Fisch, *supra* note 6, at 720.

¹⁶⁷ *Id.* at 719.

judges are willing to look to commissioner dissent in striking down a given rule,¹⁶⁸ a dissenter would write her opinion with that in mind. Just as members of the Court saw an opportunity to influence the future state of the law by garnering support in the legal academic community, commissioners might see an opportunity to affect policy in the future.

Relatedly, the prospect of “canonization” is equally alive for agency decisions. Scholars of judicial dissents recognized that the phenomenon of “canonization” provided an incentive for judges to voice their disagreements in public, as a judge who was eager to raise his profile could use a dissent to plant reputational seeds that would subsequently bloom when his minority opinion was resurrected in a future decision. In the agency context, Keith Brown and Adam Candeub have pointed out that the “idiosyncrasies” that “drive a commissioner’s voting . . . range from . . . career ambitions in industry, a desire to placate a constituency important to a particular congressional ally or sponsor, personal ideological fervor, or even an individual propensity towards contrariness.”¹⁶⁹ Career-conscious commissioners thus can use dissents to make known their pro-business or anti-regulatory points of view. This dynamic is only compounded by the factors discussed above—i.e., the increased media and political pressure resulting from the APA’s requirement for public deliberations—to increase the incentives for commissioners to publicly voice their disagreements, whether such disagreements improve the policymaking process or not.

¹⁶⁸ See *supra* Part III.B.

¹⁶⁹ Keith S. Brown & Adam Candeub, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 790 (2010).

C. Possible Solutions

Two possible solutions exist. First, eliminating commissioner dissent would remove the ability of courts to rely on minority positions altogether—i.e., courts cannot cite dissents that do not exist in the first place. Such an outright ban on commissioner dissent is an obvious solution, but this is also an overly drastic step. As discussed above, part of the aim of majority–minority commissions is to foster a rich conversation among decision-makers with different ideologies.¹⁷⁰ A person appointed as an SEC commissioner has likely served significant roles as a practitioner, academic, or regulator and brings valuable experience. Stifling that commissioner’s point of view would hurt the ability of commissioners to add value to their respective organizations.

Second, courts could be limited—either partially or entirely—in their ability to rely on commissioner dissent. The latter approach is superior for both practical and policy reasons, as it would yield the benefits of bipartisan debate and thoughtful policymaking while mitigating the negative effects described above. One version of this alternative would be to limit or enlarge the judicial inquiry based on whether there was unanimity among an agency’s commissioners in adopting a given rule. Suggestions for a sliding scale of judicial review are not new. For example, David Fontana explores the extent to which public comment influences the process of agency rulemaking and argues that varying degrees of public participation should affect judicial review of administrative law.¹⁷¹ In general, he proposes the following system: “The more public participation in the promulgation of an agency rule, the more deference that rule should receive when it is challenged in court.”¹⁷² By adapting Fontana’s framework to apply to commissioner dissents,

¹⁷⁰ See *supra* Part I.

¹⁷¹ David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81, 99–100 (2005).

¹⁷² *Id.* at 82.

courts could apply a sliding standard of review depending on the number of commissioner dissents.

However, this alternative has problems as well. Unlike public participation, which has no ceiling, the number of possible commissioner dissents is at most only two. While asking a court to treat a regulation that passed unanimously differently from one that encountered dissent is not unreasonable—unanimity being at least some indication of beneficial policy¹⁷³—asking a court to differentiate between regulations that faced one commissioner dissent and those that faced two is unreasonable. Perhaps the two dissenting commissioners simply collaborated to write one opinion, or perhaps they simply waged the same criticism but wrote separate dissents (a likely result if the standard of review became more stringent according to the number of dissents, as anti-regulator commissioners could heighten judicial scrutiny by “papering the file” with dissenting opinions).

Limiting the *weight* courts can give to commissioner dissent would be another way to limit a court’s ability to consider commissioner dissent. Borrowing principles from the Federal Rules of Evidence, this system might require some additional support for a court to rely on a commissioner’s dissent. As long as there were corroborating evidence, the court could agree with the dissenters. Courts would thus be required to find support in the record—i.e., reasons beyond mere policy disagreements—that indicate *why* the Commission acted improperly in enacting a particular rule. However, this would realistically only require a court to point to one of many conflicting studies and choose the one that portrays the proposed rule in the worst light. Given the nature of SEC rulemaking, the notice-and-comment process will almost inevitably churn up at least one—if not many—criticisms of the given rule. A corroboration requirement, then, would only require courts to do what they already do—review the reports on which a

¹⁷³ Cf. Pierce, *supra* note 39, at 571 (“Inconsistency in an agency’s treatment of the same scientific dispute naturally tends to reduce the credibility of the agency’s claim of superior subject matter expertise.”).

given regulation is based—and permit them to then find anything available to support overturning the rule. This would amount to nothing more than a procedural hoop through which a court could easily jump and would have little effect on judges' ability to rely on commissioner dissent.

Aside from a partial limit on relying on dissents, another option could be to completely ban courts from relying on them. An outright ban on judicial use of commissioner dissent would serve many purposes beneficial to both the courts and the SEC. First, by immunizing commissioner disagreement from possible use in the context of a challenge to a rule, this would insulate policy discussions from judicial encroachment—i.e., it would protect the separation of powers doctrine. Maintaining the fundamental structure of the Constitution should compel courts to leave policy decisions to the relevant executive agencies. When Congress delegates certain legislative activity—as with federal agencies like the SEC—the legislative branch does not intend to give any of its lawmaking power to the judicial branch.

At bottom, the courts have the power to review agency rulemaking to ensure that the agency complied with the APA. While the evolution from *Chevron* “hard look” review shows increasing judicial scrutiny for agency rules, it does not appoint courts as regulators. Wherever the line between judicial and executive branches lies, a judge's enactment of the policy positions of minority commissioners based solely on the commissioners' dissenting opinion falls on the wrong side of the line. Whatever procedural review courts are empowered to conduct under the APA, it should not include such a large usurpation from the majority members of an executive agency.

A bar on judicial reliance on commissioner dissent also would preserve the purpose of the SEC's bipartisan structure. The benefits of bipartisan deliberations are stifled when a dissenting commissioner is enticed by the possible judicial embrace of his point of view. Why compromise with the majority when a judge might simply adopt your position entirely? Without that prospect, SEC commissioners might

be more inclined to engage in the very sort of deliberations contemplated by the enabling statute.

This proposed solution of banning courts from relying on dissents would be most effective if imposed on the judicial branch *by* the judicial branch. For many of the same reasons that courts have managed to impose stricter standards of review on agency rules—namely, by stretching ambiguous statutory language of the APA—a statutory bar on judicial reliance on commissioner dissent would likely be less effective than other options. In particular, a Supreme Court decision or procedural court rule would bind the courts more effectively, as lower courts would be compelled to either obey precedent or—in the case of certain rules—follow the very rules promulgated under the auspices of the Supreme Court.¹⁷⁴

¹⁷⁴ While the topic is beyond the scope of this Note, it might also be helpful to re-evaluate GITSA's requirement for public debate of all proposed regulations. All of the discussion above is merely anecdotal; however, if GITSA's requirements have stifled bipartisan intra-agency discussions even a small amount, then regulations lose the very benefit sought by requiring bipartisan commissions. If a reevaluation of GITSA were done in connection with a ban on judicial use of commissioner dissent, these actions together would respect the separation of powers and remove roadblocks to beneficial, bipartisan discussions at the SEC. *See* 5 U.S.C. § 552b(b) (2012) (requiring public debate); *see also supra* text accompanying note 32.

VI. CONCLUSION

The rise of the administrative state is well documented, as federal agencies increasingly influence the dynamics of the federal government. Exercising “pervasive control over economic and other activities in this country[,]” agencies essentially “do the work of government.”¹⁷⁵ However, increasingly stringent judicial scrutiny of agency rules poses a noticeable obstacle on agencies’ willingness and ability to adopt important regulations. The problems posed by an agency’s ineffectiveness are significant regardless of the field of regulation, but in the wake of the 2007 recession the stakes of financial regulation should be cause for concern.

The SEC is faced with certain factors that make the risk of regulatory defect particularly high. First, the SEC is currently charged with a substantial Congressional mandate to implement post-recession reforms of the financial system. Indeed, “strain on SEC resources is especially problematic since the Dodd-Frank legislation tasked the SEC with promulgating more than ninety mandatory rules.”¹⁷⁶ This makes anything that decreases the SEC’s efficiency—such as judicial usurpation of the policymaking process—more worrisome than usual. Second, SEC rulemaking exists in a “context that may be unique to the financial sector, in which systemic risk is high and regulated parties face strong incentives—and have substantial power—to avoid regulation.”¹⁷⁷ While most regulated entities “cannot easily escape . . . regulations, financial actors can contract around” it.¹⁷⁸ Furthermore, while “parties in other sectors, by

¹⁷⁵ Noah, *supra* note 23, at 1464.

¹⁷⁶ Rachel A. Benedict, Note, *Judicial Review of SEC Rules: Managing the Costs of Cost-Benefit Analysis*, 97 MINN. L. REV. 278, 279 (2012).

¹⁷⁷ Recent Cases, *Administrative Law—Judicial Review of Agency Rulemaking—District of Columbia Circuit Vacates Securities and Exchange Commission’s “Hedge Fund Rule”*—Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006), 120 HARV. L. REV. 1394, 1397 (2007).

¹⁷⁸ *Id.*

avoiding regulation, primarily avoid compliance costs,” financial actors can realize significant profits.¹⁷⁹ For example, within the context of financial regulations, avoiding a given rule not only removes a firm’s compliance costs but allows riskier—and often more profitable—trading strategies.¹⁸⁰ The relationship between increased risk and the potential for increased profits simply does not exist in other regulatory contexts that do not involve the volatility of financial markets. These circumstances, the authors conclude, “call for greater agency flexibility.”¹⁸¹ Such high stakes also require an evaluation of the other institutional forces at play within the SEC’s regulatory sphere.

Since *Business Roundtable II*, the SEC remains increasingly susceptible to judicial rejection of its proposed and enacted regulations. Recent cases have shown that courts are willing to endorse and effectively adopt the policy positions of the Commission’s minority members.¹⁸² Judicial reliance on commissioner dissent imposes real costs to the efficacy and legitimacy of the courts and agencies and subjects industry members to uncertainty. Judicial embrace of the viewpoints of dissenting commissioners, by providing the possibility that such viewpoints will eventually prevail, removes the incentive for minority commissioners to compromise.

This Note argues that courts charged with reviewing agency rules should be prohibited from relying on commissioner dissent to reject the rule in question. Whether this prohibition is the product of a court rule or a Supreme Court decision does not matter. Either way, such a rule will limit a court’s ability to wade into the quasi-legislative waters of an agency policy debate. This will not only avoid significant institutional injuries, but also ensure the continued effectiveness of ever-important post-recession

¹⁷⁹ *Id.* at 1397–98.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1398.

¹⁸² *See supra* Part III.

securities regulation and, in turn, protect the stability of the U.S. economy.