

NOTES

EVENTUAL JUDICIAL REVIEW

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The SEC's recent—and controversial—choice to make more frequent use of internal enforcement actions has raised several questions. Some have asked whether the SEC has attempted to advantage itself by prosecuting in-house; others have asked whether the SEC's internal enforcement scheme is unconstitutional. This Note asks a largely overlooked threshold question: Do—and just as importantly, should—federal district courts have parallel subject matter jurisdiction over constitutional challenges to an SEC internal proceeding while this proceeding is underway?

If exercise of parallel jurisdiction is not expressly prohibited by statute, Thunder Basin Coal Co. v. Reich instructs Article III courts to presume claims are not confined to administrative channels if (1) jurisdictional preclusion would prevent “meaningful judicial review,” (2) the suit is “wholly collateral” to a statute’s review apparatus, and (3) the claims are “outside agency expertise.” In Tilton v. SEC, a split Second Circuit panel considered an attempted parallel constitutional challenge to the SEC’s internal enforcement scheme and concluded jurisdiction was indeed precluded. In doing so, Tilton followed a line of recent cases interpreting Thunder Basin to suggest that “meaningful judicial review” is satisfied if a scheme provides any eventual judicial review.

This Note argues that equating meaningful and eventual judicial review under Thunder Basin unwisely limits the ability of Article III courts to monitor agency constitutionality, deprives parties of truly meaningful review, and undercuts the SEC’s legitimacy. This Note proposes two responses: Legislatively, the SEC—or ideally, Congress—should promulgate binding forum selection guidelines granting Article III courts jurisdiction over constitutional challenges to SEC proceedings; doctrinally, Article III courts should employ standard injunction analysis, exercising jurisdiction over constitutional claims and gauging their likelihood of success on the merits.

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INTRODUCTION

*“[I]t is hard to find a better example of what is sometimes disparagingly called ‘administrative creep’ than this expansion of the S.E.C.’s internal enforcement power.”*¹

Judge Jed Rakoff

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) expanded the discretion of the Securities and Exchange Commission (SEC) to bring enforcement actions “in-house” via internal administrative proceedings in front of administrative law judges (ALJs). There has been, unsurprisingly, a dramatic outpouring of industry backlash to the SEC’s choice to take advantage of this legislative change.² Practitioners have raised a range of constitutional challenges to these proceedings, arguing, among other things, that ALJs are not appointed pursuant to the Appointments Clause or that the procedural limitations of the SEC administrative proceedings do not meet due process requirements.³

1. Jed S. Rakoff, Judge, S. Dist. of N.Y., Keynote Address at the PLI Securities Regulation Institute: Is the S.E.C. Becoming a Law unto Itself? 6 (Nov. 5, 2014), <http://securitiesdiary.files.wordpress.com/2014/11/rakoff-pli-speech.pdf> [<http://perma.cc/F59T-VQJW>].

2. See, e.g., Jean Eaglesham, SEC Wins with In-House Judges, *Wall St. J.* (May 6, 2015), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803> (on file with the *Columbia Law Review*) [hereinafter Eaglesham, In-House Judges]; Gretchen Morgenson, Crying Foul on Plans to Expand the S.E.C.’s In-House Court System, *N.Y. Times* (June 26, 2015), <http://www.nytimes.com/2015/06/28/business/secs-in-house-justice-raises-questions.html> (on file with the *Columbia Law Review*) [hereinafter Morgenson, Crying Foul]. For the pertinent Dodd-Frank provisions, see Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a), 124 Stat. 1376, 1862 (2010).

3. See Alexander I. Platt, SEC Administrative Proceedings: Backlash and Reform, 71 *Bus. Law.* 1, 12–14 (2016) [hereinafter Platt, Backlash] (cataloguing both Due Process and Appointments Clause challenges); see also Sarah A. Good & Laura C. Hurtado, Questionable Proceedings: The Constitutionality of Adjudication by SEC Administrative Law Judges Faces Judicial and Legislative Challenges, *L.A. Law.*, Feb. 2017, at 30, 32–33 (“Critics contend that the administrative arena lacks many of the due process protections of the federal courts, including an independently appointed judiciary, the opportunity for extensive discovery, and juries.”); Vedder Price, SEC Administrative Proceedings Under Constitutional Scrutiny, *Sec. Litig. & Gov’t Enforcement Trends*, Aug. 2015, at 6, 6–9, <http://www.vedderprice.com/-/media/files/vedder-thinking/publications/2015/08/sec-administrative-proceedings-under-constitutiona/files/securities-litigation-and-government-enforcement-t.pdf> [<http://perma.cc/92Q7-EXSQ>] (describing recent Equal Protection and Due Process challenges to SEC ALJ enforcement); Ryan S. Stippich, Constitutional and Strategic Considerations Regarding SEC Enforcement Actions Following Dodd-Frank, in *New Developments in Securities Litigation* *3 (2016 ed.), 2016 WL 2989433 (“These cases . . . involve streamlined proceedings where the target of the government’s enforcement action has no ability to take depositions, has highly limited document discovery, no Seventh

Much of the scholarship to date has focused either on gamesmanship considerations, that is, questioning whether the SEC has created for itself a strategic prosecutorial advantage by bringing cases in front of its in-house judges, or alternatively, on the merits of the various constitutional challenges to the in-house proceedings.⁴ Rather than rehash the many thoughtful treatments of SEC strategy or the constitutionality of SEC administrative proceedings, this Note instead scrutinizes a threshold question at the sequential beginning of this otherwise widely discussed topic: Do—and just as importantly, *should*—federal district courts have subject matter jurisdiction over constitutional challenges to an internal SEC proceeding while the proceeding at issue is still underway?

When a statute governing an administrative scheme established by Congress does not explicitly prohibit Article III courts⁵ from exercising

Amendment right to a jury trial, and . . . the rules of evidence and civil procedure do not apply.”).

4. See, e.g., Linda J. Jellum & Moses M. Tincher, *The Shadow of Free Enterprise: The Unconstitutionality of the Securities and Exchange Commission’s Administrative Law Judges*, 70 SMU L. Rev. 3, 33–60 (2017) (arguing that the appointment and removal processes for SEC ALJs violate the Constitution); Alexander I. Platt, *Unstacking the Deck: Administrative Summary Judgment and Political Control*, 34 Yale J. on Reg. 439, 461–70 (2017) (critiquing the advantages bestowed upon the SEC via procedural elements of ALJ adjudication); Urska Velikonja, *Are the SEC’s Administrative Law Judges Biased? An Empirical Investigation*, 92 Wash. L. Rev. 315, 324–34 (2017) [hereinafter Velikonja, *Are the SEC’s ALJs Biased?*] (discussing various types of challenges that have been levied against the internal SEC proceedings); Randall Bryer, *Comment, The SEC’s Potential Appointments Clause Defect and How It Could Impact the Administrative State*, 19 U. Pa. J. Const. L. 521, 532–37 (2016) (discussing the merits of Appointments Clause challenges to SEC ALJs); Kaela Dahan, *Note, The Constitutionality of SEC Administrative Proceedings: The SEC Should Cure Its ALJ Appointment Scheme*, 38 Cardozo L. Rev. 1211, 1215 (2017) (same).

Even as some of these challenges gain traction, such as in *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016) (“The SEC ALJ held his office unconstitutionally when he presided over Mr. Bandimere’s hearing.”), some commentators have suggested that piecemeal resolution of constitutional claims will not mitigate the mutual antipathy between the SEC and the regulated community regarding administrative proceedings. See, e.g., Mark Hamblett, *Ruling May Tee Up Power of SEC ALJs for High Court Review*, N.Y. L.J. (Dec. 28, 2016), <http://www.nationallawjournal.com/id=1202775676574/Ruling-May-Tee-Up-Power-of-SEC-ALJs-for-High-Court-Review/> (on file with the *Columbia Law Review*) (noting one former SEC attorney considered the Appointments Clause issue “fixable” but that “it would be . . . more meaningful for these cases to address the more significant issue of prejudice and these modest, prophylactic fixes that the commission embraces . . . do not go far enough to protect the rights of defendants”). Others have similarly claimed that anything short of a full-scale reevaluation of the use of in-house proceedings will fail to address the core fairness concerns of critics. See Peter K.M. Chan et al., *Morgan Lewis Discusses Tweaking the “Home Court” Rules for SEC Administrative Proceedings*, CLS Blue Sky Blog (Oct. 14, 2015), <http://clsbluesky.law.columbia.edu/2015/10/14/morgan-lewis-discusses-tweaking-the-home-court-rules-for-sec-administrative-proceedings/> [http://perma.cc/Y2K6-USC4] (“The SEC’s proposed procedural modifications are small steps that are not likely to temper continued challenges to the fairness of the AP process generally.”).

5. “Article III courts” refers to courts having the structural protections guaranteed by Article III of the U.S. Constitution, namely life tenure subject to impeachment and

parallel jurisdiction over constitutional challenges to the administrative proceeding itself, *Thunder Basin Coal Co. v. Reich* instructs Article III courts to presume a claim is *not* confined to administrative channels if: (1) preclusion would prevent “meaningful judicial review”; (2) the suit is “wholly collateral” to a statute’s review apparatus; and (3) the claims brought are “outside the agency’s expertise.”⁶ On June 17, 2016, in *Tilton v. SEC*, a split Second Circuit panel evaluated a claim challenging the constitutionality of SEC ALJs—after the SEC had already begun a separate in-house enforcement action against petitioners—and held that subject matter jurisdiction was indeed precluded.⁷ In doing so, the Second Circuit aligned with the Seventh, D.C., and most recently Eleventh and Fourth Circuits in interpreting *Thunder Basin* and its progeny to suggest both that “meaningful judicial review” is the most important of the three “*Thunder Basin* factors” identified above; and “meaningful judicial review” is satisfied if an administrative scheme provides for any *eventual* judicial review of petitioner’s claim.⁸

Given this circuit alignment, it appears that this jurisdictional issue may soon move beyond (at least jurisprudential) resuscitation.⁹ This Note argues that this development, notwithstanding the legitimate interest in streamlining and empowering SEC enforcement post-Dodd-Frank,¹⁰ is

nonreducible salary. See U.S. Const. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

6. 510 U.S. 200, 212–13 (1994).

7. 824 F.3d 276, 279 (2d Cir. 2016).

8. *Bennett v. SEC*, 844 F.3d 174, 186 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1237 (11th Cir. 2016); *Tilton*, 824 F.3d at 279; *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765, 774 (7th Cir. 2015).

9. Indeed, this momentum was compounded by the Supreme Court’s refusal to grant a writ of certiorari to review *Tilton* on appeal. See *Tilton v. SEC*, 137 S. Ct. 29, 29 (2016) (denying certiorari); see also *Tilton v. Securities and Exchange Commission*, SCOTUSBlog, <http://www.scotusblog.com/case-files/cases/tilton-v-securities-exchange-commission> [http://perma.cc/W27T-9TBF] (last visited Jan. 4, 2018) (providing additional background on the denial of certiorari).

10. Following the election of President Trump, many speculated that Trump would dismantle some or all of Dodd-Frank. See, e.g., Lisa Lambert & Sarah N. Lynch, Trump May Already Have a Plan Ready to Revamp Dodd-Frank, Reuters (Nov. 11, 2016), <http://www.reuters.com/article/us-usa-election-trump-doddfrank-idUSKBN1361X0> [http://perma.cc/NLR6-QJME] (discussing Trump’s public indications of intent to weaken Dodd-Frank). In the summer of 2017, the Trump Administration released a 150-page report that took steps to weaken several key elements of Dodd-Frank, calling for the severe limitation of the so-called “Volcker Rule” and the curtailment of the Consumer Financial Protection Bureau’s (CFPB) enforcement capabilities (including a requirement that the CFPB prosecute its actions in federal court rather than via administrative proceedings). See U.S. Dep’t of the Treasury, A Financial System that Creates Economic Opportunities: Banks and Credit Unions 71–92 (2017), <http://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf> [http://perma.cc/587F-VCWA]. However, as of this writing, the Trump Administration has neither materially

(1) a doctrinally dubious application of the *Thunder Basin* factors, as it excises the “meaningful” from “meaningful judicial review”; (2) concerning insofar as it constrains the ability of Article III courts to develop administrative and constitutional law; and (3) undesirable as a policy matter in that it significantly hinders the ability of parties to challenge purported SEC constitutional violations, undercutting the legitimacy of the SEC at a time when skepticism toward the Commission and its enforcement strategy runs relatively high.¹¹

This Note proposes two responses, one legislative and the other doctrinal. Legislatively, the SEC or (ideally) Congress should promulgate binding and detailed forum selection guidelines for enforcement actions. Doctrinally, Article III courts that have yet to rule on this question should employ standard injunction analysis, exercising jurisdiction over the constitutional claims and gauging the likelihood of success on the merits of those claims.¹²

The first proposal will help mitigate the industry uproar by improving the transparency of SEC reasoning regarding forum selection and will encourage much-needed discussion regarding the types of cases that should properly be brought in each forum, that is, the administrative law court or Article III body. The second proposal will ensure that those prosecuted by the SEC have a meaningful opportunity for judicial review of their constitutional and administrative law claims in the district court while also weeding out frivolous defensive tactics camouflaged as constitutional challenges.¹³ Allowing district courts to exercise jurisdiction over

changed nor threatened to materially change the SEC’s internal enforcement apparatus. See generally *id.* (providing recommendations for reforming the U.S. financial system according to Trump’s announced “Core Principles” but not suggesting changes to the SEC’s internal enforcement mechanisms). Were Dodd-Frank to be eliminated in any meaningful capacity vis-à-vis SEC administrative proceedings, this would of course change the climate surrounding many of the issues addressed herein. However, the questions would remain of how and whether Article III courts exercise subject matter jurisdiction over constitutional challenges to administrative proceedings, inside and outside of the SEC, and whether this provides a desirable check on administrative agencies.

11. The current skepticism arguably applies to the administrative state writ large, but even among critics of the administrative state, the SEC seems of late to attract particularly acute criticism. See, e.g., Ilan Wurman, *Constitutional Administration*, 69 *Stan. L. Rev.* 359, 372 (2017) (“The Securities and Exchange Commission (SEC) is perhaps the worst offender, routinely bringing enforcement actions in front of its own judges, who rarely rule against the SEC.”).

12. For a discussion of two recent district court opinions employing standard injunction analysis, see *infra* section III.B. By “standard injunction analysis,” this Note refers to the framework routinely employed by federal courts determining whether or not injunctive relief is appropriate as an equitable matter, that is, by asking “whether Plaintiff (1) is likely to succeed on the merits of her claim, (2) will suffer irreparable harm absent injunctive relief, and (3) the public interest weighs in favor of granting the injunction.” *Duka v. SEC*, 103 F. Supp. 3d 382, 392 (S.D.N.Y. 2015), abrogated by *Tilton*, 824 F.3d 276.

13. From the outset, it is important to note that the proposals made herein are not without cost. Opening the door to threshold constitutional challenges may force enough

parallel constitutional challenges to SEC administrative proceedings will act as a prophylactic mechanism, cautioning the SEC against engaging in unconstitutional behavior, reassuring the industry that legitimate constitutional violations will be subject to meaningful review, and preventing important questions of administrative and constitutional law from being decided outside Article III courts.

Part I of this Note provides background on the SEC's use of internal enforcement actions and describes the doctrinal framework governing subject matter jurisdiction in cases challenging the constitutionality of ongoing administrative proceedings. Part I directs special attention to the tension between allowing meaningful Article III court review of challenges to administrative proceedings and reluctance to allow such challenges to disrupt congressionally enacted administrative schemes.¹⁴ Part II catalogues the recent line of cases refusing to exercise subject matter jurisdiction and then discusses in detail the reasoning in and implications of the Second Circuit's split *Tilton* decision. Part III outlines potential solutions to the problems identified in Parts I and II.

I. OVERVIEW OF THE LEGISLATIVE AND DOCTRINAL FRAMEWORK

This Part provides an overview of the legislative and doctrinal background governing judicial consideration of exclusive subject matter jurisdiction in constitutional challenges to ongoing administrative proceedings, with a focus on the SEC, SEC ALJs, and SEC in-house proceedings. Section I.A offers a description of SEC in-house enforcement capabilities before and after Dodd-Frank, with a short subsection devoted to correcting some common misconceptions about the SEC ALJs tasked with overseeing SEC administrative proceedings. Section I.B then turns to the doctrinal framework used by Article III courts to determine whether an exercise of subject matter jurisdiction is appropriate.

A. *SEC Administrative Proceedings Before and After Dodd-Frank*

This section briefly discusses the ways in which Dodd-Frank altered the SEC enforcement landscape.¹⁵ The intent here is not to exhaustively

expense upon the SEC in the form of litigation and transactional costs that the SEC will refuse to bring cases internally altogether, thereby disrupting or even dismantling the administrative scheme itself. See *infra* section III.B.3.

14. See *infra* section I.B.2 (discussing how the doctrines of administrative preclusion and exhaustion help courts navigate this tension and how these doctrines relate to *Thunder Basin*). This tension largely animates the line of cases discussed in Part II.

15. For a thorough review of the SEC's institutional development, see generally Paul S. Atkins & Bradley J. Bondi, *Evaluating The Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 *Fordham J. Corp. & Fin. L.* 367 (2008). For a more targeted examination of the SEC's expansion of power via Dodd-Frank, see Giles D. Beal IV, *Judge, Jury, and Executioner: SEC Administrative Law Judges Post-Dodd Frank*, 20 *N.C. Banking Inst.* 413, 413 (2016) ("Dodd-Frank extended SEC ALJs' ability to

chronicle changes to the SEC's regulatory apparatus but rather to highlight several modifications that have stoked industry ire and raised an array of constitutional eyebrows.

The question of whether or not to grant exclusive subject matter jurisdiction to SEC administrative proceedings can appear to be a trivial or anomalous feature of a recent string of circuit cases, unless one appreciates the extent to which Dodd-Frank expanded SEC discretion and emboldened the Commission to prosecute in-house. In order to avoid muddying the waters of this discussion, this section simply provides a targeted snapshot of SEC administrative proceedings before (section I.A.1) and after (section I.A.2) Dodd-Frank—rather than investigating the interim dynamics that catalyzed these changes—before briefly addressing several common misconceptions regarding the nature of the ALJs tasked with overseeing these internal adjudications (section I.A.3). Section I.B then explains how the changes introduced by Dodd-Frank intersect with the doctrinal framework governing the question of exclusive subject matter jurisdiction.

1. *SEC Administrative Proceedings Before Dodd-Frank.* — Even before Dodd-Frank, the SEC was authorized under the Securities and Exchange Act of 1934, and subsequent rules and amendments thereto, to pursue internal administrative proceedings as an alternative to bringing enforcement actions in federal district court.¹⁶ Indeed, internal enforcement at the SEC preceded the SEC Division of Enforcement itself, as administrative adjudication before the 1972 establishment of the Division simply took place in various decentralized SEC divisions.¹⁷

levy civil penalties on non-registered individuals and entities, while simultaneously expanding the range of penalties available to ALJs in administrative hearings.”).

16. See Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 *Fordham L. Rev.* 1143, 1145 n.4 (2016) [hereinafter Grundfest, *Fair or Foul*] (“The SEC has used administrative proceedings as an alternative to federal court litigation since the SEC’s inception.”); Tessa Stillings, *Are the SEC’s Administrative Law Courts Constitutional?: Recent Developments in the SEC’s Increased Use of Administrative Proceedings*, 35 *Rev. Banking & Fin. L.* 96, 97 (2015) (“The Securities Exchange Act of 1934 . . . created the SEC and gave the agency the power to “bring “administrative proceedings” against regulated persons or entities who are alleged violators of the securities laws.” (quoting Robert N. Rapp & Virginia Davidson, Calfee, Halter & Griswold LLP, *Challenges to SEC In-House Courts Intensify as Federal Appellate Courts Are Poised to Determine Constitutional Validity* 3 (2015), <http://www.lexology.com/library/document.ashx?g=f0824096-94b8-4635-accd-e6b7b522580e> [<http://perma.cc/WM36-C5AQ>])). The Supreme Court held early on that the SEC is permitted to develop new regulatory rules via these internal adjudications. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing [an administrative proceeding] for announcing and applying a new standard of conduct.”).

17. Daniel M. Hawke, *SEC Historical Soc’y, Roundtable on Enforcement: A Brief History of the SEC’s Enforcement Program 1934–1981*, at 2 (2002), <http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/>

When the SEC chooses to bring an enforcement action internally—at least since the inception of the SEC Division of Enforcement—the SEC Division of Enforcement acts as a party to the dispute and aims to prove the SEC’s case in front of an ALJ.¹⁸ Thereafter, “[t]he ALJ . . . presides over the matter, including the evidentiary hearing, and issues an initial decision.”¹⁹ If a defendant loses before an ALJ, the defendant then may petition for the SEC to review the case *de novo*.²⁰ A party that loses in front of the SEC itself can petition for review by a federal court of appeals, either in the aggrieved party’s home circuit or the D.C. Circuit.²¹ If the SEC’s findings of fact are “supported by substantial evidence,” the reviewing circuit court must find these facts conclusive.²² Thus, neither the SEC’s ability to proceed in-house nor the basic structural framework of these proceedings originated with Dodd-Frank—so what *was* different about pre-Dodd-Frank proceedings as compared to contemporary SEC administrative enforcement?

For purposes of this Note, the key limitations of pre-Dodd-Frank SEC administrative proceedings were the jurisdictional scope of these actions, the inability to impose certain forms of harsh punitive measures, and perhaps most importantly the relative infrequency with which the SEC made use of the administrative pipeline as a policy matter. Regarding jurisdictional scope, prior to Dodd-Frank the SEC was authorized to “impose civil penalties in Administrative Proceedings”²³ only against *regulated* entities, that is, “registered broker-dealers and investment

collection/papers/2000/2002_0925_enforcementHistory.pdf [http://perma.cc/J7VA-WTXX] (“In August 1972, the U.S. Securities and Exchange Commission established its Division of Enforcement. Prior to this time, responsibility for enforcing the federal securities laws had been decentralized among the Commission’s various operating divisions and regional offices.”).

18. Beal, *supra* note 15, at 416.

19. Thomas Glassman, *Ice Skating Up Hill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. Bus. & Sec. L. 47, 52 (2016).

20. *Id.* at 53. Some have argued that this arrangement is circular. See, e.g., Grundfest, *Fair or Foul*, *supra* note 16, at 1162 (“Critics also complain that the first-level appeal from the ALJ’s decision is not to a federal court, but to the very same Commission that authorized the proceeding in the initial instance.”); Eaglesham, *In-House Judges*, *supra* note 2 (arguing defendants appealing to the SEC will receive a decision from the “same body that decided the case against [the defendants] should go forward in the first place”). That being said, the Supreme Court has long condoned the practice of agency enforcement proceeding in-house. Stephen J. Choi & A.C. Pritchard, *The SEC’s Shift to Administrative Proceedings: An Empirical Assessment*, 34 Yale J. on Reg. 1, 3 (2017).

21. 15 U.S.C. § 78y(a)(1) (2012); 17 C.F.R. § 201.410(e) (2017) (“Pursuant to Section 704 of the Administrative Procedure Act, a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review” (citation omitted)); see also *Hill v. SEC*, 825 F.3d 1236, 1238 (11th Cir. 2016) (noting that a losing party may petition for its home circuit or the D.C. Circuit to review the SEC’s order).

22. 15 U.S.C. § 78y(a)(4).

23. *Duka v. SEC*, 103 F. Supp. 3d 382, 386 (S.D.N.Y. 2015), abrogated by *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016).

advisers.”²⁴ If the SEC wished to “obtain civil penalties from *non-regulated* entities,” such as a hedge fund or investment fund, “the SEC was required to file a civil enforcement action in federal district court.”²⁵

Detailed discussion of the SEC’s enhanced punitive abilities and the post-Dodd-Frank choice to bring a greater percentage of actions internally is reserved for the following section, but here it suffices to note that (1) prior to Dodd-Frank the SEC lacked the ability to impose “collateral bars,” a fairly draconian punitive mechanism;²⁶ and (2) as part of a concerted policy effort to utilize the enforcement capabilities introduced by Dodd-Frank, the percentage of total actions brought in-house by the SEC increased from twenty-one percent in 2010 (the year of Dodd-Frank’s passage) to seventy-six percent by 2015.²⁷

24. Urska Velikonja, *Securities Settlements in the Shadows*, 126 *Yale L.J. Forum* 124, 124 (2016), http://www.yalelawjournal.org/pdf/VelikonjaFinalPDF_hu2rg4ma.pdf [<http://perma.cc/MP7Z-V5L4>] [hereinafter Velikonja, *Securities Settlements*]; see also Beal, *supra* note 15, at 417 (“Before Dodd-Frank, the SEC could only seek monetary penalties . . . in front of ALJs if the individual or entity was registered with the SEC.”); Michael S. Piwowar, *Comm’r, Sec. & Exch. Comm’n, Remarks to the Securities Enforcement Forum 2014* (Oct. 14, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370543156675#_ftnrefl6 [<http://perma.cc/4X94-7B8A>] (“Prior to the Dodd-Frank Act, the Commission only had the authority to seek monetary penalties in administrative proceedings against *regulated entities* and would have needed to file an action before an Article III federal court to obtain a monetary penalty against any other person.”).

25. *Duka*, 103 F. Supp. 3d at 386 (emphasis added); see also 15 U.S.C. § 77h–1(g) (discussing the SEC’s authority to impose monetary penalties in cease-and-desist proceedings); Drew Thornley & Justin Blount, *SEC In-House Tribunals: A Call for Reform*, 62 *Vill. L. Rev.* 261, 275 (2017) (“For unregistered parties violating the Securities Act of 1933, the SEC could pursue monetary penalties only in federal courts because the SEC administrative courts had authority only to issue cease-and-desist orders.”).

26. See Platt, *Backlash*, *supra* note 3, at 7 (“Dodd-Frank gave the SEC authority to impose so-called ‘collateral bars’—i.e., bans on associating across the entire securities industry.”).

27. NYU Pollack Ctr. for Law & Bus. & Cornerstone Research, *SEC Enforcement Activity Against Public Company Defendants: Fiscal Years 2010–2015*, at 6 fig.4 (2016), <http://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-Against-Public-Company-Defendants> [<http://perma.cc/U5R2-K9LH>]. Dodd-Frank was not the first expansion of SEC enforcement power, but its alteration of these key structural limitations vis-à-vis jurisdictional discretion and punitive capabilities differentiates Dodd-Frank from prior adjustments to the SEC’s enforcement capabilities and seems to be the catalyst behind the recent outpouring of public criticism. Grundfest, *Fair or Foul*, *supra* note 16, at 1148 (describing, colorfully, Dodd-Frank’s effect by noting that “[i]t was as though a dam holding back pent up rage about the fairness of the Commission’s administrative proceedings had suddenly burst”). Consider the Penny Stock Reform Act (PSRA) of 1990, a major expansion of SEC enforcement power that many characterize as the modern source of ALJ prominence. 3D Harold S. Bloomenthal & Samuel Wolff, *Securities and Federal Corporate Law* § 20:15 (2d ed. 2017) (“The Commission’s extensive areas of adjudication and remedies in such adjudication were significantly broadened by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 . . .”); Bob Van Voris & Matt Robinson, *For the SEC’s In-House Court, a Question of Justice for All*, *Bloomberg* (Aug. 10, 2015), <http://www.bloomberg.com/news/articles/2015-08-10/for-the-secs-in-house-court-a-question-of-justice-for-all> (on file with the *Columbia Law Review*).

At the risk of blurring history through generalization, several commentators seem to agree that in the early days of the SEC, and certainly in the days before Dodd-Frank, the SEC was both relatively constrained by Congress with respect to its choice of forum and, as a policy choice, less inclined to make frequent use of administrative proceedings. Both of these factors contributed to a regulatory ecosystem in which defendants viewed SEC administrative proceedings as largely noncontroversial.²⁸

2. *SEC Administrative Proceedings After Dodd-Frank.* — Dodd-Frank was signed into law in July 2010 amid the tumultuous aftermath of the 2008 financial crisis.²⁹ Dodd-Frank “gave the SEC more power to impose secondary liability for employees aiding their company’s illegal activity” and “gave the SEC and the Public Company Accounting Oversight Board (PCAOB) more power to regulate foreign private accounting firms,” among other significant enhancements of enforcement power.³⁰ However, arguably the most significant of Dodd-Frank’s conferrals of power in the context of securities regulation came in the form of the SEC’s newfound ability to “pursue monetary penalties against *non-regulated* entities through administrative proceedings, rather than strictly in federal court” under section 929P(a) of the Act.³¹ “Non-regulated” refers to entities that are

The PSRA allowed the SEC to bring suits for *punitive* rather than simply remedial disgorgement penalties, including the ability to bar or revoke securities licenses in some instances. David Zaring, *Enforcement Discretion at the SEC*, 94 *Tex. L. Rev.* 1155, 1164–65 (2016) [hereinafter Zaring, *Enforcement Discretion*]. And yet, while the PSRA increased the strength of the SEC’s hand both with respect to settlement and adjudications themselves, it also “left the federal courts with exclusive jurisdiction over cases where the securities laws were violated but the defendants were not licensed to practice before the Commission.” *Id.* at 1165.

28. See, e.g., Beal, *supra* note 15, at 416 (“Historically, congressional limitations on which proceedings could be brought in front of ALJs along with the SEC’s infrequent use of ALJs resulted in little discontent among defendants participating in administrative law proceedings.”); Ryan Jones, *The Fight over Home Court: An Analysis of the SEC’s Increased Use of Administrative Proceedings*, 68 *SMU L. Rev.* 507, 520–21 (2015) (arguing that the SEC’s increased use of ALJs has contributed to a disgruntled regulated population). Another possible contributing factor to this lack of controversy is the fact that formal administrative adjudication dates back to before even the passage of the Administrative Procedure Act (APA), thereby ingraining the legitimacy of the practice in the collective consciousness of the regulated community.

29. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 *Stat.* 1376, 1376 (2010); *Wall Street Reform: The Dodd-Frank Act*, The White House: President Barack Obama, <http://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform> [<http://perma.cc/3SDX-CV2L>] (last visited December 1, 2017) (“The most far reaching Wall Street reform in history, Dodd-Frank will prevent the excessive risk-taking that led to the financial crisis.”).

30. Jones, *supra* note 28, at 516.

31. *Id.* at 516 & n.79 (emphasis added); see also 15 U.S.C. § 77h-1(g) (2012) (allowing the SEC to enforce a civil penalty after a proceeding before an ALJ against “a person if the Commission finds, on the record . . . that such person . . . is violating or has violated any provision of [the Exchange Act], or any rule or regulation issued under [the Exchange Act]”).

not “directly regulated by the SEC,” in contrast with registered broker-dealers or investment advisers long considered “regulated entities” for purposes of SEC jurisdiction.³²

This increased power has contributed to a corresponding increase in the use of administrative proceedings.³³ Indeed, in 2013, then-Director of Enforcement at the SEC Andrew Ceresney announced publicly, “Our expectation is that we will be bringing more administrative proceedings given the recent statutory changes.”³⁴ The SEC contemporaneously added several new ALJs to accommodate this strategic pivot.³⁵

Responding to these changes, Judge Jed Rakoff of the Southern District of New York, an outspoken critic of the SEC’s increased use of in-house enforcement, observed:

The final, and largest expansion of the S.E.C.’s administrative enforcement power came, however, with the passage [of Dodd-Frank]. Section 929P(a) gives the S.E.C. the power through internal administrative proceedings to impose substantial monetary penalties against any person or entity whatsoever if that person or entity has violated the federal securities laws, even if the violation was unintentional.³⁶

Despite this increased enforcement scope, Congress did not implement clear constraints on the SEC’s discretion over choosing a forum.³⁷ The implication of this change—coupled with the absence of constraints on forum choice—is difficult to overstate for the (in some cases, newly)

32. Choi & Pritchard, *supra* note 20, at 5–7.

33. Platt, *Backlash*, *supra* note 3, at 8–9 (“The director of [SEC] enforcement has acknowledged that the shift toward [ALJs] was a response to the new penalty powers.”); see also Mark Schoeff Jr., *SEC Sets Record in Enforcement Actions Against Investment Advisers*, *Investment News* (Oct. 11, 2016), <http://www.investmentnews.com/article/20161011/FREE/161019981/sec-sets-record-in-enforcement-actions-against-investment-advisers> [<http://perma.cc/3A3F-SBC7>] (“The Securities and Exchange Commission filed a record number of enforcement cases against investment advisers and investment companies [in 2016].”).

34. Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, *N.Y. Times* (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html> (on file with the *Columbia Law Review*) [hereinafter Morgenson, *Home-Court Edge*].

35. Press Release, SEC, *SEC Announces New Hires in the Office of Administrative Law Judges* (June 30, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542202073> [<http://perma.cc/EX64-UY3J>].

36. Rakoff, *supra* note 1, at 5. As a fascinating aside, Rakoff points out that “the sole legislative history of Section 929P(a) in the House Report on Dodd-Frank states that ‘This section streamlines the SEC’s existing enforcement authorities by permitting the SEC to seek civil money penalties in cease-and-desist proceedings under Federal securities laws.’” *Id.* at 6 (quoting H.R. Rep. No. 111-687, at 78 (2010)).

37. *Tilton v. SEC*, 824 F.3d 276, 278 (2d Cir. 2016) (“Where both of those alternatives are available, the choice between them belongs to the SEC without express statutory constraint.”).

regulated parties: After Dodd-Frank, targets of SEC internal enforcement actions no longer have the ability to defend themselves with the advantage of “extensive discovery and a jury trial” in federal court, but instead may be subject to a “potentially substantial penalty” in an SEC administrative proceeding.³⁸ That is to say, the SEC has complete discretion when deciding whether to bring a case in federal district court, where defendants enjoy the procedural protections inherent therein, or instead to bring an action internally, where the SEC’s own Rules of Procedure are, for example, generally more receptive to hearsay and less willing to permit depositions.³⁹

Dodd-Frank also enabled the SEC to prosecute previously untenable causes of action and increased the SEC’s discretion to impose harsher sanctions for proven violations.⁴⁰ With respect to new causes of action, Dodd-Frank both broadened the SEC’s ability to bring aiding and abetting and “control-person liability” claims, and, in the case of aiding and abetting, lowered the culpable state of mind requirement from “actual knowledge” to recklessness.⁴¹ With respect to increased punishments imposed for securities violations, Dodd-Frank authorizes ALJs presiding over administrative proceedings to impose fairly draconian bans—known as “collateral bars”—on securities law violators from associating with the

38. Covington & Burling LLP, *Dodd-Frank Beefs Up SEC and CFTC Enforcement 2* (2010), <http://www.cov.com/files/Publication/cd66cd73-ccd7-4b92-9677-cb497e445be3/Presentation/PublicationAttachment/7fc70050-a76a-4405-89ba-ce57ef76f421/Dodd-Frank%20Act%20-%20Dodd-Frank%20Beefs%20Up%20SEC%20and%20CFTC%20Enforcement.pdf> [<http://perma.cc/2MWQ-HYV6>]; see also Erin Bauwens, *The Dodd-Frank Act and Government Overreach: How Expanded SEC Authority Affects the Investing Public and How to Better Regulate the Financial Industry*, 67 *Syracuse L. Rev.* 741, 752 (2017) (“SEC administrative proceedings offer limited discovery. Whereas federal court must abide by the Federal Rules of Civil Procedure and Federal Rules of Evidence, administrative proceedings do not.” (footnote omitted)). While SEC administrative proceedings are not governed by either the Federal Rules of Civil Procedure or the Federal Rules of Evidence, this is not to say the proceedings allow for no disclosure or discovery whatsoever. Instead, the proceedings are governed by the SEC’s own Rules of Procedure found in 17 C.F.R. § 201. Zaring, *Enforcement Discretion*, *supra* note 27, at 1166–67. For a representative procedural critique of the SEC’s in-house proceedings vis-à-vis federal court actions, see, e.g., Jones, *supra* note 28, at 520–28.

39. Zaring, *Enforcement Discretion*, *supra* note 27, at 1166–67.

40. See Chad Howell, *Back to the Future: Applying the Collateral Bars of Section 925 of the Dodd-Frank Act to Previous Bad Acts*, 7 *J. Bus. & Tech. L.* 285, 288 (2012) (“Essentially, the Commission is now authorized to put an individual completely out of the regulated securities business, even out of areas that had nothing to do with the violation of the securities law for which the individual was charged.”); Platt, *Backlash*, *supra* note 3, at 7 (noting that the “collateral bar” is “extremely severe, and it has been described by some courts as ‘the securities industry equivalent of capital punishment’” (quoting *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007))).

41. Covington & Burling LLP, *supra* note 38, at 1 (observing both that “[t]he Act empowers the SEC to bring more aiding-and-abetting claims, which will now also be much easier to prove” and that “[t]he Act expressly authorizes the SEC to bring cases based on ‘control person’ liability”).

effective entirety of the securities industry.⁴² To be sure, collateral bars are very likely justifiable punishments for certain transgressions, but the fact remains that prior to Dodd-Frank, the forced isolation of actors from the remainder of the securities industry could not be imposed by the SEC's ALJs.⁴³

The SEC's increased scope of regulation, power to impose punishment, and discretion to select a forum for enforcement actions all might have independently jarred the regulated community, but even these sweeping changes do not necessarily explain why this funneling in-house has generated such pronounced backlash. The simplest explanation of the backlash seems to be the concerted policy effort by the SEC to bring a *significantly* larger percentage of cases in-house⁴⁴ coupled with the industry's suspicion, whether or not empirically supported, that cases brought before ALJs are more likely to return a favorable outcome for the SEC. One frequently cited piece observed that the SEC achieved favorable results in ninety percent of internal SEC proceedings between October 2010 and March 2015, compared to in sixty-nine percent of federal court cases during the same timeframe.⁴⁵

42. Howell, *supra* note 40, at 286 (“Under Dodd-Frank, the [SEC] is authorized to bar . . . individuals from associating with ‘a broker, dealer, investment advisor, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization,’ effectively eliminating that individual from working in the field of regulated securities.” (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 925, 124 Stat. 1376, 1850–51 (2010))).

43. See *id.* at 285.

44. See *supra* note 27 and accompanying text (providing data on the SEC's increased use of in-house proceedings); see also *supra* note 34 and accompanying text (noting the SEC's announced policy decision to channel more cases in-house).

45. See Eaglesham, *In-House Judges*, *supra* note 2 (observing that “[t]he commissioners decided in their own agency's favor concerning 53 out of 56 defendants in appeals” from January 2010 to March 2015); see also Rachel E. Barkow, *Foreword, Overseeing Agency Enforcement*, 84 *Geo. Wash. L. Rev.* 1129, 1161 (2016); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 *Yale L.J.* 1875, 1887 (1992) (“Indeed, the one common denominator in the SEC experience with administrative law judges is familiar: the SEC always seems to win before its in-house judges.”); Zaring, *Enforcement Discretion*, *supra* note 27, at 1168 (“Appeals from an ALJ's ‘initial decision’ are made to the SEC itself, which can amend or reverse the decision, although it usually does not.”). But see Grundfest, *Fair or Foul*, *supra* note 16, at 1182–84 (questioning the reliability of some empirical arguments accusing the SEC of wielding a statistically significant in-house advantage and of arguments attempting to counter these accusations); Velikonja, *Are the SEC's ALJs Biased?*, *supra* note 4, at 366 (“[T]he data in this debate is no trump card.”).

What both sides of the empirical debate may fail to fully appreciate is the extent to which the *perception* of unfairness undercuts the legitimacy of the SEC in much the same way as actual unfairness. Even if empirical gamesmanship accusations reflect nothing more than industry paranoia, the appearance of impropriety that emerges from guiding more actions in front of SEC ALJs (coupled with the reluctance of the federal courts to entertain constitutional challenges to this arrangement) seems likely to draw into question the SEC's credibility. Cf. Grundfest, *Fair or Foul*, *supra* note 16, at 1153 (“Typically, when a

The upshot has been clear: In the aftermath of Dodd-Frank, the SEC, invigorated with a significant expansion of enforcement capabilities and unaltered discretion as to when the Commission can bring enforcement actions in (purportedly SEC-favorable) administrative proceedings, began to bring more cases internally as opposed to in federal court.⁴⁶ One observer, after considering many of the foregoing changes, noted the following: “The SEC denies that its current procedures are improper, but as it shifts more enforcement actions in-house, the critics will only grow louder.”⁴⁷

The critics have indeed grown noisy,⁴⁸ with criticism permeating the public psyche beyond the confines of the law review universe.⁴⁹ The regulated community has made essentially the following argument: First, the SEC is directing cases in-house more frequently⁵⁰ and appears to win the

plaintiff selects a forum, the factfinder is not in the plaintiff’s employ, the appeal is not to the plaintiff itself, and the plaintiff does not control the rules governing the proceeding.”).

46. Stillings, *supra* note 16, at 99 (“A year before Dodd-Frank was enacted, the SEC filed 53% of its cases in the [administrative law courts], and by the end of 2014, 81% of the SEC’s cases were filed in-house.”); Jean Eaglesham, SEC Is Steering More Trials to Judges It Appoints, *Wall St. J.* (Oct. 21, 2014), <http://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590> (on file with the *Columbia Law Review*) [hereinafter Eaglesham, *Steering*] (“The Securities and Exchange Commission is increasingly steering cases to hearings in front of the agency’s appointed administrative judges, who found in its favor in every verdict for the 12 months through September, rather than taking them to federal court.”).

47. Jones, *supra* note 28, at 520 (footnote omitted).

48. See, e.g., Kimberley A. Strassel, The SEC Plays Judge and Jury, *Wall St. J.* (Aug. 4, 2016), <http://www.wsj.com/articles/the-sec-plays-judge-and-jury-1470353410> (on file with the *Columbia Law Review*). But see David Zaring, S.E.C.’s In-House Judges Not Too Tough, a Review Shows, *N.Y. Times* (Aug. 31, 2015), <http://www.nytimes.com/2015/09/01/business/dealbook/secs-in-house-judges-not-too-tough-a-review-shows.html> (on file with the *Columbia Law Review*) [hereinafter Zaring, *In-House Judges*] (arguing that, in fact, the SEC’s use of ALJs is neither improper nor tilting the scale wrongfully in favor of the SEC).

49. It is worth clarifying that this Note does not seek to argue that “frustration,” industry-based or otherwise, is *itself* cause for great concern. Rather, this Note takes the position that public frustration and skepticism toward the SEC’s increased use of ALJ proceedings have undermined, and will continue to undermine, the SEC’s heretofore stellar reputation among agencies. See Rakoff, *supra* note 1, at 2 (“I think it is obvious that the [SEC] has been, from its very advent, one of the jewels of the federal regulatory regime . . .”). More pointedly: If parties feel that they do not have an opportunity for meaningful review—in federal court—of claims criticizing the very structure of the SEC ALJ enforcement apparatus, the industry frustration may very well continue to generate unnecessary litigation costs and perhaps even political backlash against the SEC, impeding the SEC’s ability to pursue its goal to “protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.” SEC, *What We Do*, <http://www.sec.gov/about/whatwedo.shtml> [<http://perma.cc/2ZLS-RH MV>] (last updated June 10, 2013).

50. Eaglesham, *In-House Judges*, *supra* note 2 (“[H]undreds of decisions show[] how much of a home-court advantage the SEC enjoys when it sends cases to its own judges rather than federal courts. This is a practice the agency increasingly follows.”). Along similar lines, Kara Brockmeyer, then-head of the SEC’s anti-foreign-corruption

vast majority of these in-house prosecutions.⁵¹ Second, the incentive to settle SEC enforcement actions is therefore paramount, making it, practically speaking, extremely unlikely for defendants to endure several layers of SEC review in order to have the opportunity to appear before a federal court.⁵² Finally, those who do eventually appear before a federal court must overcome the presumption that SEC decisions are “correct unless unreasonable.”⁵³

Several commentators have pushed back, arguing that the SEC is not “too tough” in its in-house prosecutions.⁵⁴ Moreover, the SEC itself has

enforcement unit, publicly stated that “[i]t’s fair to say it’s the new normal’ ‘Just like the rest of the enforcement division, we’re moving towards using administrative proceedings more frequently.’” Eaglesham, *Steering*, supra note 46.

51. See, e.g., Glassman, supra note 19, at 56 (“In . . . 2012, the SEC won seven of seven contested administrative proceedings [and] . . . 67% of its federal trials. In 2013, it won nine of ten administrative proceedings and 75% of its federal trials. In 2014, [it] won six of six of its administrative proceedings and 61% . . . of its federal trials.” (footnotes omitted)). Some have suggested that success of SEC in-house enforcement actions may be partly attributable to bringing more routine actions in-house or procedural differences between the two forums. Coffee, supra note 45, at 1887 (“Procedural informality benefits the prosecution.”).

52. Fair or Foul? The SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation: Hearing on H.R. 3798 Before the Subcomm. on the Capital Mkts. & Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs., 114th Cong. 4 (2015) [hereinafter Grundfest Testimony] (statement of Professor Joseph A. Grundfest), <http://financialservices.house.gov/uploadedfiles/hhr-114-ba16-wstate-jgrundfest-20151202.pdf> [<http://perma.cc/7B3C-MTXK>] (“Congress should recognize that the vast majority of SEC proceedings, whether filed administratively or in federal court, are settled.”); Barkow, supra note 45, at 1163 (“[I]n most cases . . . the regulated party opts to settle and avoid the costs of trying to win within a framework relatively favorable to the agency.”); Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. Cin. L. Rev. 505, 505–06 (2013) (noting that “very few” SEC enforcement proceedings ultimately reach a trial); Tyler L. Spunaugle, *The SEC’s Increased Use of Administrative Proceedings: Increased Efficiency or Unconstitutional Expansion of Agency Power?*, 34 Rev. Banking & Fin. L. 406, 411 (2015) (“Andrew Ceresney, the director of the SEC Division of Enforcement, has publicly recognized the advantage that the SEC has when bringing an enforcement action in an [administrative law court] rather than in district court. Simply by threatening . . . enforcement . . . the SEC has increased bargaining power in settlement talks.” (footnote omitted)); Velikonja, *Securities Settlements*, supra note 24, at 128 (“From FY 2007 to FY 2015, between a third and one half of all defendants in primary enforcement actions settled with the SEC before the enforcement action was filed.”); Sonia A. Steinway, Comment, *SEC “Monetary Penalties Speak Very Loudly,” but What Do They Say? A Critical Analysis of the SEC’s New Enforcement Approach*, 124 Yale L.J. 209, 228 (2014) (“Litigation is particularly risky for a public company: even if it ultimately prevails, the uncertainty of pending litigation can be disastrous.”).

53. Rakoff, supra note 1, at 10; see also Morgenson, *Crying Foul*, supra note 2 (“[I]f someone wants to appeal a decision by an [ALJ], that person must go back to the commission. Failing that, a defendant can go to a circuit court of appeals, but judges there are wary of overturning rulings by those who are considered experts.”).

54. Zaring, *In-House Judges*, supra note 48 (“It is not good news to learn that the S.E.C. is bringing a case against you . . . in-house But defendants who want to take on the agency are not without hope.”).

pointed to several reasonable justifications for bringing cases in-house, including speed and relatively flexible evidentiary rules.⁵⁵ But these arguments, notwithstanding their possible merit, seem to have had little effect on the industry's feeling of futility and criticism from the media,⁵⁶ Representatives,⁵⁷ law professors,⁵⁸ former SEC officials,⁵⁹ law students,⁶⁰ and at least one current federal judge,⁶¹ among others.

Whatever the merits of these critiques, it is clear that the SEC's repeated attestations that the policy of increased in-house enforcement is simply utilized in the name of efficiency⁶² has done little to assuage the general sense that the SEC is attempting to play judge, jury, and

55. Andrew Ceresney, Dir., Div. of Enf't, SEC, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370543515297> [<http://perma.cc/NL6X-4NW9>].

56. See, e.g., Robert Anello, Addressing the SEC's Administrative "Home Court" Advantage in Enforcement Proceedings, *Forbes* (Sept. 7, 2015), <http://www.forbes.com/sites/insider/2015/09/07/addressing-the-secs-administrative-home-court-advantage-in-enforcement-proceedings/#18ea84844888> [<http://perma.cc/CWF7-RLAN>] ("[T]he time already is ripe for the SEC to make substantive changes or, if not, for Congress to step in to mandate changes to the agency's process that level the playing field for individual defendants."); Russell G. Ryan, The SEC as Prosecutor and Judge, *Wall St. J.* (Aug. 4, 2014), <http://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362> (on file with the *Columbia Law Review*) ("The SEC often prefers to avoid judicial oversight and exploit the convenience of punishing alleged lawbreakers by administrative means, but doing so is unconstitutional. And if courts allow the SEC to get away with it, other executive-branch agencies are sure to follow.").

57. See, e.g., Peter J. Henning, Reforming the S.E.C.'s Administrative Process, *N.Y. Times: DealBook* (Oct. 26, 2015), <http://www.nytimes.com/2015/10/27/business/dealbook/reforming-the-secs-administrative-process.html> (on file with the *Columbia Law Review*) (quoting then-New Jersey Representative Scott Garrett as stating "in recent years the [SEC] has transformed into a veritable judge, jury, and executioner with its blatant overuse of their in-house courts").

58. See, e.g., Kent Barnett, Resolving the ALJ Quandary, 66 *Vand. L. Rev.* 797, 809–27 (2013) [hereinafter Barnett, ALJ Quandary] (critiquing the cabining of constitutional challenges to SEC ALJs within administrative channels); Grundfest Testimony, *supra* note 52, at 4.

59. See, e.g., Morgenson, *Crying Foul*, *supra* note 2 (noting that Stanley Sporkin, a "former enforcement director at the SEC who was also a federal judge in Washington," has suggested the SEC consider less aggressive use of its internal administrative proceedings).

60. See, e.g., Jones, *supra* note 28, at 536 (attributing "attacks" on the SEC's use of administrative enforcement to the "Commission's increasingly improper use of its administrative proceedings").

61. See Rakoff, *supra* note 1, at 1.

62. See Mortgage Fraud, Securities Fraud and the Financial Meltdown: Prosecuting Those Responsible: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 106 (2009) (statement of Robert Khuzami, Dir., Div. of Enf't, SEC) (citing "efficiency" as an important SEC objective in the context of in-house proceedings); Morgenson, *Crying Foul*, *supra* note 2 ("The agency says its in-house courts, overseen by administrative law judges, are not only fair but also more efficient.").

prosecutor.⁶³ Indeed, for defendants, the SEC's justification for more aggressive in-house prosecution and the existence, or lack thereof, of a statistically significant in-house advantage are likely much less relevant than this sentiment that the regulated community is on the receiving end of enforcement gamesmanship—a sentiment only exacerbated by the fact that federal judges are being prevented from disciplining the SEC from overstepping administrative or constitutional law boundaries in prosecutions⁶⁴ due to preclusions of jurisdiction coupled with intense pressure to settle cases.⁶⁵

3. *Appointment and Removal of ALJs: Addressing Some Common Misconceptions.* — Dodd-Frank and accompanying policy choices have undeniably altered the jurisdictional scope, punitive abilities, and frequency of SEC administrative proceedings.⁶⁶ These changes have placed ALJs, as the individuals tasked with overseeing the first critical layer of in-house proceedings, at the center of debates regarding the proper role of the SEC and the administrative state writ large. Unfortunately, these debates and critiques often overlook or oversimplify the nature of these ALJs, with some suggesting SEC ALJs are hired, fired, and controlled absolutely by the SEC,⁶⁷ and others, including the SEC itself, dismissing outright the possibility that SEC ALJs face any risk of institutional bias.⁶⁸

It appears the reality is somewhat more complicated. Most importantly, it is misleading to say that ALJs are “hired” by the SEC. While the SEC does appoint ALJs, ALJs must first be hired by the Office of Personnel Management (OPM), then added to a list (based on a variety of OPM-determined factors) from which the SEC can then select and appoint

63. See, e.g., Suja A. Thomas & Mark Cuban, A Jury, Not the S.E.C., *N.Y. Times: DealBook* (Oct. 16, 2015), <http://www.nytimes.com/2015/10/17/business/dealbook/a-jury-not-the-sec.html> (on file with the *Columbia Law Review*) (“After losing several cases before juries, the S.E.C. went to a place where it generally cannot lose: itself.”); cf. Kenneth Oshita, Note, Home Court Advantage? The SEC and Administrative Fairness, 90 *S. Cal. L. Rev.* 879, 881 (2017) (arguing that the constitutional challenges “pierce[] into issues of fairness that constitutional arguments seem able only to approximate.”).

64. Zaring, *Enforcement Discretion*, supra note 27, at 1212 (noting that federal judges “will occasionally discipline the government, not necessarily for violating the law but for going too far in a particular case”).

65. See supra note 52 and accompanying text.

66. See supra section I.A.2.

67. See, e.g., Morgenson, *Crying Foul*, supra note 2 (“Given that [ALJs] are employees of the S.E.C., defendants wonder if they can be fair.”); Jon Shazar, *WSJ: SEC Courts May Be of Kangaroo-ish Variety, but They Are Effective, Dealbreaker* (May 8, 2015), <http://dealbreaker.com/2015/05/sec-courts-may-be-of-kangaroo-ish-variety-but-they-are-effective/> (on file with the *Columbia Law Review*) (describing the ALJs as “judges hired and paid by the SEC”).

68. Memorandum from Carl W. Hoecker, Inspector Gen., SEC, to Mary Jo White, Chair, SEC 1 (Jan. 21 2016), <http://www.sec.gov/oig/reportspubs/Final-Report-of-Investigation.pdf> [<http://perma.cc/QN6F-NZU4>] (finding “[no] evidence to support the allegations of improper influence”).

ALJs.⁶⁹ Then, once ALJs have been appointed, they have “statutory protection from agency oversight to protect their decisional independence.”⁷⁰ For example, agencies are not permitted to grant bonuses to ALJs as a reward⁷¹ and agencies may remove ALJs only for “good cause established and determined by the Merit Systems Protection Board” after a formal administrative hearing.⁷²

Still, claims that SEC ALJs are subject to some degree of capture by the Commission are not entirely implausible, as the Commission is able to exert influence over ALJs in ways less explicit than outright removal, for example, by setting the procedural rules that dictate the information that reaches ALJs in proceedings, or even unintentionally inculcating the SEC ALJs with the views of the SEC.⁷³ In a concerning illustration of this latter possibility, former SEC ALJ Lillian McEwen publicly alleged that she had been the subject of improper attempts at influence by then-Chief ALJ Brenda Murray; although the SEC’s internal investigation found the ALJs to be sufficiently independent, the fact alone that McEwen felt pressure—whether real or imagined—to rule in favor of the SEC supports the conceivability of bias via unintentional inculcation.⁷⁴ In sum,

69. Vanessa K. Burrows, Cong. Research Serv., RL34607, *Administrative Law Judges: An Overview 2* (2010), <http://ssaconnect.com/tfiles/ALJ-Overview.pdf> [<http://perma.cc/R6QW-4AYR>].

70. Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1655 (2016) [hereinafter Barnett, *Administrative Judges*].

71. 5 C.F.R. § 930.206(b) (2015).

72. 5 U.S.C. § 7521(a) (2012).

73. Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. Chi. L. Rev. 481, 481 (1990) (“[A]gencies can promulgate rules that establish substantive standards to govern decisionmaking by their [ALJs].”); see also Barnett, ALJ Quandary, *supra* note 58, at 817 (“Because an ALJ has a role in accomplishing ‘an agency task,’ as opposed to reviewing the other branches’ actions, she ‘cannot be entirely impartial.’” (quoting John L. Gedid, ALJ Ethics: Conundrums, Dilemmas, and Paradoxes, 11 Widener J. Pub. L. 33, 54 (2003))). It may also simply be the case that, entirely outside the realm of bias accusations, the rules in administrative proceedings are more favorable to the SEC and in this sense “bias” the outcomes. See William McLucas & Matthew Martens, *Commentary, How to Rein In the SEC*, Wall St. J. (June 2, 2015), <http://www.wsj.com/articles/how-to-rein-in-the-sec-1433285747> (on file with the *Columbia Law Review*).

74. See Memorandum from Carl W. Hoecker, Inspector Gen., SEC, to Mary Jo White, Chair, SEC, *supra* note 68, at 8, 21 (“Former and current staff affiliated with the Office of ALJs, including McEwen, stated that ALJ decisions were made independently and free from influence of SEC Chief ALJ Murray.”). But see Jody Godoy, *SEC Probe Finds In-House Court Not Biased*, Law360 (Feb. 18, 2016), <http://www.law360.com/articles/760409/sec-probe-finds-in-house-court-not-biased> (on file with the *Columbia Law Review*) (noting that an SEC internal probe did not find evidence to support SEC ALJ McEwen’s claims). But still again see Cara Salvatore, *SEC Judge Refuses to Say Whether He Favors Agency*, Law360 (June 12, 2015), <http://www.law360.com/articles/667248/sec-judge-refuses-to-say-whether-he-favors-agency> (on file with the *Columbia Law Review*) (noting that a different ALJ was invited by the SEC to file an affidavit regarding his impartiality and this ALJ refused to do so).

ALJs at the helm of the SEC's administrative proceedings are likely neither entirely captured by the SEC nor entirely free from risk of bias.

B. *Exclusive Subject Matter Jurisdiction and Administrative Proceedings*

Having discussed some of the most salient changes to SEC administrative enforcement vis-à-vis Dodd-Frank, and by implication the motivation for industry actors to challenge the SEC's emboldened behavior, this section turns to the doctrinal framework governing these challenges. Section I.B.1 introduces the *Thunder Basin* framework implicated by questions of exclusive subject matter jurisdiction in administrative proceedings. Section I.B.2 then reviews the jurisprudential backdrop to *Thunder Basin* alongside a brief discussion of administrative preclusion and exhaustion.

1. *The Doctrinal Framework: Thunder Basin Factors.* — When the SEC, or any government agency for that matter,⁷⁵ elects to bring an action via administrative proceeding as opposed to in federal district court, the party subject to the enforcement action may challenge any or all aspects of the nature of the administrative proceeding itself.⁷⁶ In the typical case in the context of SEC administrative proceedings, the target of the SEC's in-house enforcement action seeks to enjoin the SEC in an Article III court from further pursuing the internal enforcement;⁷⁷ the SEC then responds by asserting that the statutory framework authorizing the internal enforcement scheme precludes review by an Article III court pending conclusion of the administrative proceeding.⁷⁸

At this point, the reviewing Article III court faces the dilemma of determining whether or not it has jurisdiction over the request for injunctive relief on constitutional grounds.⁷⁹ If the statute at issue does

75. For an example of this type of constitutional challenge in the context of the CFPB, see *John Doe Co. v. CFPB*, 849 F.3d 1129, 1134–35 (D.C. Cir. 2017) (approvingly citing *Tilton* and referencing the *Thunder Basin* factors to analyze the constitutional challenge to the CFPB).

76. See, e.g., *Hill v. SEC*, 825 F.3d 1236, 1239 (11th Cir. 2016) (challenging the SEC ALJ proceeding on Article II Appointments Clause grounds, among other constitutional claims); *Bebo v. SEC*, 799 F.3d 765, 768 (7th Cir. 2015) (challenging the SEC ALJ proceeding on equal protection grounds, among other constitutional claims). For a well-done summary of recent constitutional challenges to SEC administrative proceedings, see Platt, *Backlash*, supra note 3, at 11–22.

77. See *Gupta v. SEC*, 796 F. Supp. 2d 503, 506 (S.D.N.Y. 2011) (“In response to this seeming exercise in [SEC] forum-shopping, [Defendant] promptly filed in this Court a Complaint for Declaratory and Injunctive Relief . . . against the SEC.”).

78. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (noting the government argument that the administrative scheme provided an “exclusive route to review”).

79. See, e.g., *Duka v. SEC*, 103 F. Supp. 3d 382, 390 (S.D.N.Y. 2015) (“The Court notes . . . that the issue being reviewed here is whether the Court has subject matter jurisdiction over Plaintiff's constitutional claim for injunctive and declaratory relief.”), abrogated by *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016).

not expressly preclude federal court jurisdiction,⁸⁰ the court must resolve the jurisdictional question with a view to implicit delegation or withholding of jurisdiction.⁸¹

In order to resolve this question, courts look to *Thunder Basin Coal Co. v. Reich*, which lays out a general framework within which courts are instructed to consider whether Congress intended to limit the jurisdiction of federal courts pending the conclusion of an agency proceeding.⁸² In *Thunder Basin* itself, the petitioning mine operator refused to comply with a regulation of the Department of Labor's Mine Safety and Health Administration requiring mine operators to publicly post certain union representative information, promulgated pursuant to the Federal Mine Safety and Health Amendments Act of 1977.⁸³ Instead, petitioner "filed suit in the United States District Court" and the "District Court enjoined respondents from enforcing [the regulation]" on grounds that requiring the petitioner to challenge the interpretation of the Act in the statutory review process would constitute a Fifth Amendment Due Process violation.⁸⁴

On appeal, the Supreme Court upheld the Tenth Circuit's decision, concluding that the Act "preclude[d] district court jurisdiction over the pre-enforcement challenge made" and that judicial review "in the appropriate court of appeals" is precluded until completion of the administrative review.⁸⁵ The Court identified three factors to help lower courts determine whether Congress intends, absent an explicit directive, to limit Article III court jurisdiction over such challenges:

[W]e presume that Congress does not intend to limit jurisdiction [1] if "a finding of preclusion could foreclose all meaningful judicial review"; [2] if the suit is "wholly collateral to a statute's review provisions"; and [3] if the claims are "outside the agency's expertise."⁸⁶

80. Section 701(a)(1) of the APA provides that judicial review may be expressly precluded by the relevant organic act. 5 U.S.C. § 701 (2012).

81. See *Tilton*, 824 F.3d at 281 ("The statutes that establish the SEC's scheme of administrative and judicial review, including the Dodd-Frank Act and the Investment Advisers Act, do not expressly preclude federal district court jurisdiction over the appellants' Appointments Clause claim. The crucial jurisdictional issue . . . is whether the statutes do so implicitly.").

82. 510 U.S. 200 (1994).

83. *Id.* at 202-04.

84. *Id.* at 205-06.

85. *Id.* at 206-08.

86. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin*, 510 U.S. at 212-13).

The so-called “*Thunder Basin* factors” have remained operative, with little substantive change, in the years since *Thunder Basin* was decided.⁸⁷ The continued utility of the *Thunder Basin* test seems to reflect, in part, a dual intuition that the administrative state is the proper forum for certain claims but not others (for example, constitutional claims) and the desire to give aggrieved parties the opportunity for meaningful judicial review before Article III judges.⁸⁸

2. *The Evolution of Thunder Basin.* — *Thunder Basin* does not exist in isolation. The question of whether claims against an agency may be precluded or delayed from judicial review implicates the fairly robust bodies of administrative law on implied preclusion (which asks *if* judicial review will be available) and exhaustion (which asks *when* judicial review will be available). An in-depth discussion of either topic here is unnecessary, but even the cursory review provided below underscores three important points about these bodies of law relevant to this Note. First, courts as a general matter seem to disfavor preclusion, particularly of constitutional questions.⁸⁹ Second, in cases where administrative action entails a *coercive* effect, courts appear skeptical of either preclusion or forcing the aggrieved party to exhaust its administrative remedies.⁹⁰ Finally, notwithstanding the first and second points, courts recognize that imposing *no* preclusion or exhaustion requirements may improperly disrupt an administrative scheme.⁹¹

Preclusion is grounded in the language of the APA. Under § 701(a)(1) of the APA, judicial review is available “except to the extent that—(1) statutes preclude judicial review.”⁹² While there is an interesting line of cases demonstrating the ability of courts to creatively provide

87. It is worth emphasizing, particularly given the focus of this Note, that not a single Supreme Court case since *Thunder Basin* has explicitly questioned the framework itself; instead, courts adhere closely to the factors identified and vigorously debate application to the facts at hand. See, e.g., *Elgin v. Dep’t of the Treasury*, 567 U.S. 1, 15–16 (2012) (quoting the *Thunder Basin* factors); *Free Enter.*, 561 U.S. at 489 (citing *Thunder Basin* as the appropriate framework).

88. Cf. *Elgin*, 567 U.S. at 16 (“[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.” (internal quotation marks omitted) (quoting *Thunder Basin*, 510 U.S. at 215)); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358–59 (1989) (“When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.” (internal quotation marks omitted) (quoting *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909))).

89. See *infra* note 97 and accompanying text.

90. See *infra* notes 98–99 and accompanying text.

91. See *infra* notes 100–104 and accompanying text; see also *Chau v. SEC*, 72 F. Supp. 3d 417, 425 (S.D.N.Y. 2014) (“This Court’s jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate.”), *aff’d*, 665 F. App’x 67 (2d Cir. 2016).

92. 5 U.S.C. § 701 (2012).

for review even in cases of *express* preclusion,⁹³ more pertinent here is the question of *implied* preclusion, as the SEC has not, to date, argued that judicial review of parallel constitutional challenges was *expressly* precluded by Congress.⁹⁴

Under the doctrine of implied preclusion, the Supreme Court has held that the presumption of judicial review is a “heavy burden”⁹⁵ to overcome but also that this presumption may be countered when congressional intent to preclude is “fairly discernible in the statutory scheme.”⁹⁶ The Court has held that the presumption of review is strongest in cases raising questions of constitutional or statutory interpretation.⁹⁷

In *Sackett v. EPA*, a relatively recent treatment of implied preclusion, the Supreme Court refused to find a challenge to the issuance of an EPA compliance order (these orders entail potential fines of up to \$75,000 per day for noncompliance) precluded from judicial review.⁹⁸ The Court specifically rejected the Government’s “efficiency” argument, that is, that compliance orders “can obtain quick remediation through voluntary compliance” with the Clean Water Act:

The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think the [Act] was uniquely designed to enable the strong-arming of regulated parties . . . without the opportunity for judicial review.⁹⁹

On the other hand, *Block v. Community Nutrition Institute (CNI)* illustrates the Court’s countervailing concern with *excessive* access to judicial

93. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 368 n.9 (1974) (finding “final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review” as not preclusive); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) (finding “final” in the organic act not preclusive).

94. See, e.g., *Hill v. SEC*, 825 F.3d 1236, 1245 (11th Cir. 2016) (framing the discussion in terms of implied preclusion); *Bebo v. SEC*, 799 F.3d 765, 768 (7th Cir. 2015) (same).

95. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 672 (1986).

96. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (“[T]he presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole.”).

97. See, e.g., *Bowen*, 476 U.S. at 678 (“[I]t is implausible to think [Congress] intended that there be *no* forum to adjudicate statutory and constitutional challenges . . .”); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (1968) (“Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.”).

98. 566 U.S. 120, 131 (2012).

99. *Id.* at 130–31. For more background on the APA’s presumption of reviewability, see generally Donald M. Levy, Jr. & Debra Jean Duncan, *Judicial Review of Administrative Rulemaking and Enforcement Discretion: The Effect of a Presumption of Unreviewability*, 55 *Geo. Wash. L. Rev.* 596, 604 (1987) (“The legislative history of the APA, by stressing the availability of judicial review for ‘abuse of discretion,’ and by adopting a strong presumption in favor of judicial review, implies that the APA’s preclusion of judicial review of administrative discretion should be read narrowly.”).

review.¹⁰⁰ In *CNI*, the Court refused to allow individual milk *consumers* to challenge milk market orders issued under the Agricultural Marketing Agreement Act of 1937.¹⁰¹ The Court reasoned that access to review was intended only for milk *producers and handlers*, and to hold otherwise would disrupt the operation of the scheme enacted by Congress.¹⁰²

CNI also provides an instructive segue to the closely related doctrine of exhaustion, which in some cases requires parties to present their arguments to the relevant agency before bringing these arguments into an Article III court. Although later cases have seemingly stymied the long-standing practice of judicial superimposition of exhaustion requirements on top of the APA,¹⁰³ *CNI* recognized the potential disruption that might result from parties using the presumption of reviewability to avoid exhaustion of administrative remedies: “It would provide handlers with a convenient device for evading the statutory requirement that they first exhaust their administrative remedies.”¹⁰⁴

At the crux of this tension—between impeding the ability of agencies to function and depriving regulated entities from meaningful review—lies *Thunder Basin*. *Thunder Basin* cobbled together several of the cases cited above, in addition to various others,¹⁰⁵ in order to provide an analytical tool for courts—absent explicit Congressional guidance—to differentiate the *types* of challenges to agencies that are best funneled through agency administrative schemes from those challenges best brought directly to Article III courts.¹⁰⁶

Before proceeding, it should be noted that referring to *Thunder Basin* as a “tool” rather than a “resolution” is intentional. The *Thunder Basin* decision itself reflected the difficulty that courts face in determining when judicial review will be “meaningful,” suggesting in one instance that eventual judicial review can be meaningful,¹⁰⁷ while suggesting in another that eventual judicial review may lack meaning when parties cannot obtain “full postdeprivation relief.”¹⁰⁸ The *Thunder Basin* factors

100. 467 U.S. at 347–48 (describing how expanding judicial review would give regulated entities ways to circumvent the administrative procedures prescribed by Congress).

101. *Id.* at 341.

102. *Id.* at 348 (“Allowing consumers to sue the Secretary would severely disrupt this complex and delicate administrative scheme.”).

103. See, e.g., *Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

104. *CNI*, 467 U.S. at 348.

105. For example, the *Thunder Basin* Court referenced *Mathews v. Eldridge* as an instance in which the Court found that 42 U.S.C. § 405(g), the organic act at issue, required administrative exhaustion of Social Security disability benefits claims, but *not* of the constitutional due process questions raised simultaneously. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 213 (1994) (citing *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976)).

106. *Id.* at 212.

107. *Id.* at 215 (finding that eventual review by the relevant court of appeals would provide meaningful judicial review).

108. *Id.* at 213.

provide a clear example of law implicating policy. As such, in keeping with the line of cases leading to *Thunder Basin*, courts are likely to achieve the best results by tying decisions to the practicalities of the particular scheme at issue.

II. BACKLASH: CONSTITUTIONAL CHALLENGES AND *TILTON V. SEC*

The recent line of cases leading to and including *Tilton v. SEC* illustrates the three general problems that have been exacerbated by Article III courts refusing to exercise subject matter jurisdiction over constitutional challenges to SEC administrative proceedings pending completion of the administrative action. First, reading *Thunder Basin* to imply that “meaningful” review is satisfied by any *eventual* review¹⁰⁹ effectively reduces *Thunder Basin* to a binary analysis (“will review be available at some point?”) without consideration of the coercive or constitutionally dubious elements of an administrative proceeding. Second, given the incentive for parties to settle prior to reaching a trial, administrative or otherwise, this cabining of constitutional challenges constrains the ability of Article III courts to develop administrative and constitutional law. Third, the insulation of SEC administrative proceedings from constitutional challenge runs counter to fairness intuitions, feeding suspicions of gamesmanship¹¹⁰ and undercutting the perceived legitimacy¹¹¹ of the SEC.

Importantly, this section assumes—and indeed, greatly relies upon—the SEC’s self-interest in maintaining institutional legitimacy, even as it seeks to prosecute more aggressively post-Dodd-Frank. Section II.A briefly chronicles several constitutional challenges to SEC administrative proceedings that closely predated *Tilton*. Section II.B then provides a close reading of *Tilton*, underscoring the problems exacerbated by the outcome.

A. *Constitutional Challenges*

The manifestation of the industry-consternation zeitgeist vis-à-vis Dodd-Frank-induced SEC internal enforcement has been an array of

109. *Chau v. SEC*, 72 F. Supp. 3d 417, 434 (S.D.N.Y. 2014) (holding that defendants seeking to enjoin administrative proceedings “must patiently await the denouement of proceedings within the Article II branch” (internal quotation marks omitted) (quoting *USAA Fed. Sav. Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988))), *aff’d*, 665 F. App’x 67 (2d Cir. 2016). While “eventual” review is often enough to moot claims of improper preclusion, courts appear generally less likely to preclude jurisdiction or require exhaustion when constitutional issues are raised or when the administrative action entails a coercive effect, as discussed above. See *supra* notes 95–97 and accompanying text.

110. Gamesmanship concerns have only been made more acute by the SEC’s failure to articulate a clear standard for forum selection when bringing enforcement actions. See *Platt, Backlash*, *supra* note 3, at 2–3.

111. For more on the aesthetic of legitimacy being important to actual legitimacy, see *infra* note 188 and accompanying text.

attacks on the constitutionality of SEC administrative proceedings.¹¹² Given the combination of industry outrage and the stakes of SEC enforcement actions, several have observed that it seems unlikely for the pace or creativity of challenges akin to *Tilton* to decrease without action on the part of the SEC, Congress, or federal courts.¹¹³ In each case of constitutional challenge, up to and including *Tilton*, Article III courts must decide at the outset whether the administrative scheme at issue precludes judicial review pending the conclusion of the agency action.

It is important to understand when *Tilton* occurred on the timeline of circuit court decisions that considered the issue of exclusive subject matter jurisdiction.¹¹⁴ While *Tilton* emerged after the Seventh¹¹⁵ and D.C.¹¹⁶ Circuits had ruled on the issue, *Tilton* was also decided in the context of *Gupta v. SEC* and *Duka v. SEC*, two lower court decisions in the Southern District of New York coming out strongly the opposite way,¹¹⁷ and a district court judge criticizing the policy implications of expanded SEC enforcement jurisdiction.¹¹⁸ *Tilton* was also decided only months before the Eleventh Circuit overturned a lower court decision functionally identical to *Duka* and *Gupta*.¹¹⁹

112. See, e.g., Peter J. Henning, SEC's Use of the "Rocket Docket" Is Challenged, N.Y. Times: DealBook (Aug. 25, 2014), <http://dealbook.nytimes.com/2014/08/25/the-s-e-c-s-use-of-the-rocket-docket-is-challenged/> (on file with the *Columbia Law Review*) [hereinafter Henning, Rocket Docket]; see also Platt, Backlash, supra note 3, at 1 ("The [SEC] is under attack. The agency has been confronted with a wave of broad constitutional challenges to its prosecution of securities violations in administrative proceedings.").

113. Jones, supra note 28, at 536 ("Due Process, Equal Protection, and Appointments Clause . . . claims will continue for the foreseeable future unless . . . (1) the Supreme Court decides the validity of those claims; or (2) the SEC's Rules of Practice and criteria are revised . . ."); see also Robert N. Rapp & Virginia Davidson, Calfee, Halter & Griswold LLP, Challenges to SEC In-House Courts Intensify as Federal Appellate Courts Are Poised to Determine Constitutional Validity 1 (2015), <http://www.lexology.com/library/document.ashx?g=f0824096-94b8-4635-accd-e6b7b522580e> [<http://perma.cc/WM36-C5AQ>].

114. *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016).

115. *Bebo v. SEC*, 799 F.3d 765, 775 (7th Cir. 2015).

116. *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015).

117. See *Duka v. SEC*, 103 F. Supp. 3d 382, 385 (S.D.N.Y. 2015), abrogated by *Tilton*, 824 F.3d 276; *Gupta v. SEC*, 796 F. Supp. 2d 503, 510 (S.D.N.Y. 2011).

118. Rakoff, supra note 1, at 11–12. It is worth acknowledging that Judge Rakoff in particular has a reputation for hostility to administrative proceedings, including some conspicuous criticism of SEC Consent Judgment proposals. See, e.g., *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 509 (S.D.N.Y. 2009) ("[T]he proposed Consent Judgment is neither fair, nor reasonable, nor adequate.").

119. *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016). For more on the relative advantage of employing the analysis advocated in *Duka* and *Gupta*, see infra section III.B. For a detailed discussion of the lower court's ruling in *Hill* and subsequent reversal, see Maxwell Weiss, The Constitutionality of SEC Administrative Law Judges: Exploring *Hill v. SEC*, 84 Geo. Wash. L. Rev. 1407, 1411–12 (2016). *Tilton* also was handed down prior to the Fourth Circuit's finding of preclusion in *Bennett v. SEC*, 844 F.3d 174, 186 (4th Cir. 2016).

The Seventh Circuit's decision in *Bebo v. SEC* provided the first example of a federal appeals court engaging this question of subject matter jurisdiction.¹²⁰ In *Bebo*, after the SEC alleged that Laurie Bebo had committed various securities violations, Bebo brought suit in the district court for the Eastern District of Wisconsin, alleging that the SEC's enforcement scheme violated the Equal Protection Clause.¹²¹ The Seventh Circuit, affirming the district court, found that 15 U.S.C. § 78(y), the statute governing the SEC's administrative scheme, indicated that "Congress intended plaintiffs in Bebo's position 'to proceed exclusively through the statutory review scheme'" and refused to exercise subject matter jurisdiction.¹²²

Bebo's disposition was less significant than the Seventh Circuit's two notable observations on the *Thunder Basin* factors.¹²³ First, the court concluded that the "meaningful judicial review" prong is the most important of the three-pronged test, relegating the "wholly collateral" and "outside agency expertise" prongs to an ambiguous role in the framework, to the extent they retain any force at all.¹²⁴ Second, the court made clear that "meaningful judicial review" could be satisfied by *any* eventual judicial review in an Article III court.¹²⁵

The Seventh Circuit's reading of the *Thunder Basin* factors makes it very difficult, if not impossible, for parties to have constitutional claims heard in Article III courts prior to the conclusion of administrative proceedings, even when these claims are outside the agency's expertise and wholly collateral to the statute's review provisions, so long as the statutory provision allows for *any* hearing in front of an Article III court. Indeed, this is exactly what happened in *Bebo*: The *Bebo* court conceded that "Bebo's suit can reasonably be characterized as 'wholly collateral' to the statute's review provisions and outside the scope of the agency's expertise," and yet it still refused to exercise subject matter jurisdiction over the claims because Bebo could eventually raise her complaints in the D.C. Circuit on appeal.¹²⁶

120. 799 F.3d 765.

121. *Id.* at 767.

122. *Id.* (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 10 (2012)).

123. Note that the *Bebo* court refers at times to the *Thunder Basin* factors as the "*Free Enterprise Fund*" factors, referencing *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), which, with a few glosses beyond the scope of this Note, restates the *Thunder Basin* factors. See *Bebo*, 799 F.3d at 772. As such, to avoid confusion, this Note refers to the three-pronged test only as the "*Thunder Basin* factors."

124. *Bebo*, 799 F.3d at 774 ("We think the most critical thread in the case law is the first *Free Enterprise Fund* factor: whether the plaintiff will be able to receive meaningful judicial review without access to the district courts.")

125. *Id.* (noting Bebo could "raise her objections in a circuit court of appeals established under Article III" only "after the pending enforcement action has run its course").

126. *Id.* at 767.

In rendering this final decision, the Seventh Circuit appeared preoccupied with the possibility that allowing the exercise of subject matter jurisdiction could open the floodgates to defendants using constitutional challenges to evade SEC administrative proceedings.¹²⁷ Rather than risk introducing a potential avenue of evasion, the court raised a formidable jurisdictional barrier.¹²⁸

Bebo requires parties to undergo the expense and negative publicity associated with an SEC prosecution and to endure several layers of administrative review prior to the hearing of constitutional arguments before an Article III court, at which point the damage of the allegedly unconstitutional proceeding will have already been done.¹²⁹ Indeed, in all likelihood the case will at that point have been settled.¹³⁰ Some observers, surprised with this implication, predicted *Bebo* would become an outlier for its jurisdictional holding.¹³¹

This intuition was proven incorrect in *Jarkesy v. SEC*.¹³² Because *Jarkesy* gave voice to several policy concerns with allowing parallel subject matter jurisdiction for constitutional challenges to SEC in-house procedures, it merits close attention.

In *Jarkesy*, the SEC brought an administrative enforcement action against George Jarkesy, Jr. on the basis of alleged securities fraud.¹³³ After Jarkesy countered with a parallel suit in D.C. district court raising several constitutional challenges to the proceeding, the district court found Congress had “implicitly precluded concurrent district-court jurisdiction.”¹³⁴ On appeal, the D.C. Circuit applied the *Thunder Basin* factors and upheld the preclusion. Judge Srikanth Srinivasan, writing for the court, provided the following *Thunder Basin* gloss:

127. *Id.* at 775 (“Every person hoping to enjoin an ongoing administrative proceeding could make this argument.”). When this question ultimately reached the Fourth Circuit, the court raised a similar concern. See *Bennett v. SEC*, 844 F.3d 174, 188 (4th Cir. 2016) (“Adopting Bennett’s argument would provide no limiting principle: Anyone could bypass the judicial-review scheme established by Congress simply by alleging a constitutional challenge and framing it as ‘structural,’ ‘prophylactic,’ or ‘preventative.’”).

128. Cf. *Jones*, *supra* note 28, at 522 (noting that, if one assumes *any* judicial review will be meaningful, “meaningful judicial review will virtually always exist, and the claim would fail the first prong of the *Thunder Basin* test”).

129. *Bebo*, 799 F.3d at 775 (explicitly rejecting *Bebo*’s argument that “by the time she is able to seek judicial review in a court of appeals, she will have already been subjected to an unconstitutional proceeding”).

130. See *supra* note 52.

131. See, e.g., Joseph Quincy Patterson, Note, Many Key Issues Still Left Unaddressed in the Securities and Exchange Commission’s Attempt to Modernize Its Rules of Practice, 91 *Notre Dame L. Rev.* 1675, 1691 (2016) (“Currently, *Bebo* seems to be the exception, and more courts are deciding that defendants have subject matter jurisdiction.”).

132. 803 F.3d 9 (D.C. Cir. 2015).

133. *Id.* at 12.

134. *Id.*

We do not understand those considerations to form three distinct inputs into a strict mathematical formula. Rather, the considerations are general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design.¹³⁵

Judge Srinivasan did not cite to *Thunder Basin* to support this interpretive proposition. This is not to suggest Judge Srinivasan was necessarily incorrect in refusing to “mathematically” apply the *Thunder Basin* factors but rather to underscore the fact that the *Jarkesy* opinion appears to implicitly blur the factors and consequently privilege the “meaningful judicial review” factor over the remaining two. Perhaps more tellingly, Judge Srinivasan specifically noted, with approval, that the *Bebo* court appeared to merge several of the *Thunder Basin* steps in the fashion discussed above.¹³⁶

Jarkesy is noteworthy for two additional background elements that suggest an awareness of the general industry tumult reviewed above and a tendency toward defensive opining: First, the D.C. Circuit seemed concerned that defendants like *Jarkesy* could use facial attacks on the constitutionality of a statute to deflect any SEC administrative enforcement to the federal forum.¹³⁷ Second, the court indicated that the logistical kerfuffle and cost that would be permitted by exercising jurisdiction could throw into disarray the entire framework established by Congress.¹³⁸

Bebo and *Jarkesy* demonstrate two crucial points: First, the courts evinced, not necessarily unreasonably, concern that exercising subject matter jurisdiction over these constitutional challenges could open the floodgates to use of these challenges as a dilatory vehicle¹³⁹ or, worse, a large-scale attack on the administrative state. Second, both courts read the *Thunder Basin* three-factor test as prioritizing consideration of “meaningful judicial review,” but with that factor interpreted purely as

135. *Id.* at 17.

136. *Id.* at 22 (“[T]he Seventh Circuit declined to find . . . jurisdiction on [the basis of meaningful judicial review] alone, which the court viewed to be the ‘most critical’ factor.”); see also *Chau v. SEC*, 665 F. App’x 67, 70 (2d Cir. 2016) (echoing the sentiment that “[the court has] recognized that the first factor—meaningful judicial review—is most important”).

137. *Jarkesy*, 803 F.3d at 25 (“[A]n exception to an otherwise exclusive scheme for constitutional challenges in general . . . would encourage respondents . . . to frame their challenges to the [SEC’s] actions in those terms.”).

138. *Id.* at 29 (“The rationale underlying Congress’s decision to create statutory schemes like the one before us is that ‘coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts.’” (quoting *City of Rochester v. Bond*, 603 F.2d 927, 937 (D.C. Cir. 1982))).

139. *Bebo v. SEC*, 799 F.3d 765, 773 (7th Cir. 2015) (concluding, among other things, that the court ought to consider “whether the constitutional claims are being raised as a ‘vehicle’ to challenge agency action taken during an administrative proceeding”).

“eventual” judicial review. It is this second doctrinal mutation that comes to the fore in *Tilton*, and with which Judge Christopher Droney in dissent took issue.

B. *Tilton and Its Implications*

This section provides a close reading of *Tilton v. SEC*; such a reading suggests that the *Tilton* court ignored the fact that, even if the “meaningful judicial review” prong of *Thunder Basin* overpowers in some sense the other two, review cannot be meaningful if defendants must suffer the very harm, that is, the reputational and expense costs of litigation (not to mention alleged constitutional impropriety), that they seek to enjoin.¹⁴⁰

1. *Tilton Background*. — In March 2015, the SEC initiated an in-house proceeding against Lynn Tilton, known affectionately as the “Diva of Distressed” for her work with troubled companies,¹⁴¹ for alleged violations of the Investment Advisers Act.¹⁴² The SEC alleged Tilton defrauded investors by mischaracterizing assets of her fund Patriarch Partners.¹⁴³ Tilton then filed suit in the Southern District of New York seeking an injunction, raising the affirmative defense that the in-house proceeding was unconstitutional because the presiding ALJ’s appointment violated Article II’s Appointments Clause.¹⁴⁴ The district court

140. For analogous reasoning, see *Touche Ross & Co. v. SEC*, 609 F.2d 570, 577 (2d Cir. 1979) (“[T]o require appellants to exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking.”).

141. Nate Raymond, SEC, ‘Diva of Distressed’ Tilton Face Off in Fraud Trial, Reuters (Oct. 24, 2016), <http://www.reuters.com/article/us-sec-tilton-idUSKCN12O2MM> [<http://perma.cc/5G2L-647H>].

142. *Tilton v. SEC*, 824 F.3d 276, 280 (2d Cir. 2016).

143. Raymond, *supra* note 141.

144. *Tilton*, 824 F.3d at 280. On the one hand, the nature of the challenge seems to entail an implausible outcome, insofar as it could destabilize much of the administrative state or at the very least require rethinking of the appointment and behavior of the ALJs active not only at the SEC but also at other administrative agencies. Platt, *Backlash*, *supra* note 3, at 17 (“ALJs are utilized across the federal bureaucracy. A judicial ruling finding them unconstitutional . . . would be potentially transformative.” (footnote omitted)); Philip J. Griffin, Comment, Developments in SEC Administrative Proceedings: An Evaluation of Recent Appointment Clause Challenges, the Rapidly Evolving Judicial Landscape, and the SEC’s Response to Critics, 19 U. Pa. J. Bus. L. 209, 228 (2016) (“A Supreme Court determination that the SEC’s ALJ appointment process is unconstitutional would affect not only the SEC, but also all 31 other federal administrative agencies, which together appoint more than 1,300 ALJs.”). Indeed, depending on one’s views as to the degree of implausibility, one might take the more extreme position that these challenges are so “objectively unreasonable in constitutional law” as to be a form of “constitutional bad faith.” David E. Pozen, *Constitutional Bad Faith*, 129 Harv. L. Rev. 885, 933 (2016). On the other hand, this was not enough to stop a recent Tenth Circuit panel in *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016), from accepting an Appointments Clause challenge identical to that put forth by *Tilton*, splitting with the opposite holding of the D.C. Circuit in *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016). Indeed, after the D.C. Circuit declined to rehear *Lucia* en banc, *Lucia v. SEC*, 868 F.3d 1021, 1021 (D.C.

dismissed the suit for lack of subject matter jurisdiction,¹⁴⁵ creating a split within the Southern District of New York.¹⁴⁶

On appeal to the Second Circuit, Tilton argued that the failure of the SEC to appoint ALJs in accordance with the Appointments Clause rendered the administrative proceeding unconstitutional, warranting a permanent injunction of the administrative proceeding.¹⁴⁷ As such, the ongoing proceeding would “itself constitute a grave constitutional injury that could not be redressed after the fact.”¹⁴⁸ To support this position, Tilton raised, among others, the following related arguments: First, *Thunder Basin* has been understood to evaluate “not whether denying district court jurisdiction could preclude *all* judicial review, but rather, whether such a denial would preclude all ‘meaningful’ judicial review.”¹⁴⁹ Second, forcing exhaustion upon Tilton would lead to meaningless review in that it would fail to offer the relief sought, that is, an injunction to block an allegedly unconstitutional proceeding, and force injury upon Tilton in the form of “the attendant ‘embarrassment, expense, . . . ordeal[,] . . . [and] state of anxiety and insecurity’” particularly given the multiple layers of review Tilton would need to endure to reach an Article III court.¹⁵⁰

2. *The Tilton Majority.* — At a key inertial moment, that is, at a time when it seemed possible to some that federal courts might find exercise of subject matter jurisdiction proper under *Thunder Basin*,¹⁵¹ the Second Circuit refused 2-1 to exercise jurisdiction over Tilton’s constitutional claims. Writing for the majority, Judge Robert Sack reviewed the *Thunder Basin* factors in the mode endorsed by *Bebo* and *Jarkesy*: Judge Sack acknowledged that the questions of whether the suit was “wholly

Cir. 2017), the Supreme Court granted a writ of certiorari on January 12, 2018. *Lucia v. SEC*, No. 17-130, 2018 WL 386565 (Jan. 12, 2018). For background on the *Bandimere* challenge and its significance, see generally Casey M. Olesen, Case Note, Creating Mischief: The Tenth Circuit Declares the SEC’s Administrative Law Judges Unconstitutional in *Bandimere v. Securities Exchange Commission*, 70 Me. L. Rev. 137, 138 (2017).

145. *Tilton*, 824 F.3d at 280.

146. See *Duka v. SEC*, 103 F. Supp. 3d 382, 382 (S.D.N.Y. 2015) (holding that the Article III court had subject matter jurisdiction over the constitutional claims), abrogated by *Tilton*, 824 F.3d 276; *Gupta v. SEC*, 796 F. Supp. 2d 503, 507 (S.D.N.Y. 2011) (same).

147. Brief for Plaintiffs-Appellants at 10–11, 30–43, *Tilton*, 824 F.3d 276 (No. 15-2103), 2015 WL 4400932.

148. *Tilton*, 824 F.3d at 283.

149. Brief for Plaintiffs-Appellants, *supra* note 147, at 17 (citing *Free Enterprise Fund* as an example of this approach to *Thunder Basin*).

150. *Tilton*, 824 F.3d at 286 (alteration in original) (quoting Brief for Plaintiffs-Appellants, *supra* note 147, at 19, 21).

151. See *Patterson*, *supra* note 131, at 1691 (describing *Bebo* as an “exception” at the time and anticipating most courts would find proper exercise of subject matter jurisdiction); see also *supra* notes 116–119 and accompanying text (noting several federal cases holding that federal courts may exercise subject matter jurisdiction within the meaning of *Thunder Basin*).

collateral to a statute's review provisions" and whether the claims were "outside the agency's expertise" presented close calls,¹⁵² but stressed that the Appointments Clause claim *would* be subject to meaningful judicial review through administrative channels and that this "weigh[ed] strongly against district court jurisdiction."¹⁵³

In refusing to exercise jurisdiction, Judge Sack specifically rejected the argument that review cannot be meaningful as a product of "inherent remedial limitations of post-proceeding review," and made clear, as did the *Bebo* and *Jarkesy* courts, that "meaningful judicial review" may be satisfied by "any" judicial review.¹⁵⁴ Acknowledging that post-proceeding relief may fail to restore "financial and emotional resources," Judge Sack nonetheless maintained that this "imperfect" relief "suffices to vindicate the litigant's constitutional claim."¹⁵⁵ To support this proposition, Judge Sack pointed to *FTC v. Standard Oil Co. of California*,¹⁵⁶ in which an oil company argued that the requirement to exhaust all administrative options before bringing suit in federal court should be waived because the company would suffer injury from "expense and disruption" if compelled to complete the administrative proceeding.¹⁵⁷ In *Standard Oil*, the Supreme Court recognized that the company would suffer "substantial" expense and disruption at the hands of the administrative proceeding, but that this hardship was "part of the social burden of living under government," rather than an irreparable injury requiring immediate judicial review.¹⁵⁸

Judge Sack then proceeded to provide relatively brief treatments of the second and third *Thunder Basin* factors. Regarding the question of whether Tilton's claim was wholly collateral to the administrative proceeding, Judge Sack argued that the Appointments Clause claim *could* be "narrowly categorized as collateral to the statutory merits" but was not "*wholly* collateral to the SEC's administrative scheme more broadly," given that the claim was "procedurally intertwined" with the proceeding.¹⁵⁹

152. *Tilton*, 824 F.3d at 282.

153. *Id.* Judge Sack tellingly cited *Bebo* to support the proposition that meaningful judicial review is the "most important" *Thunder Basin* factor. *Id.*

154. *Id.* at 284 (noting the key to "meaningful judicial review" is the "accessibility of post-proceeding review by a federal court of appeals," not the adequacy of post-proceeding remedies). One peculiar feature here is Judge Sack's recognition that *Free Enterprise Fund*, heavily relied upon by Tilton to argue post-proceeding review would be meaningless, entailed a scheme that did not in fact entirely preclude review, although the remaining path to review was excessively "circuitous." *Id.*

155. *Id.* at 285.

156. 449 U.S. 232 (1980).

157. *Id.* at 232–33.

158. *Id.* at 244 (internal quotation marks omitted) (quoting *Petroleum Expl., Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938)).

159. *Tilton*, 824 F.3d at 287–88. As Judge Droney pointed out in dissent, this seems to effectively eliminate the "wholly collateral" question in any case in which an administrative proceeding has begun. *Id.* at 296 (Droney, J., dissenting).

Regarding expertise, Judge Sack briefly noted that perhaps the SEC could bring to bear its expertise in resolving factual issues related to the constitutional claims, even if this relationship between factual and constitutional issues was proven solely by the SEC's ability to "obviate" the need to hear Tilton's constitutional arguments with an order in favor of Tilton.¹⁶⁰

All told, the Second Circuit added momentum to the interpretations given in *Bebo* and *Jarkesy*, finding both that "meaningful judicial review" is the key prong of the *Thunder Basin* review and that this prong can be satisfied by eventual review in an Article III court, even if the harm sought to be avoided has, by that time, already occurred.¹⁶¹ Shortly after *Tilton*, the Eleventh Circuit reversed the Northern District of Georgia's willingness to exercise subject matter jurisdiction, noting in part that the court "agree[d] with the Second and Seventh Circuits that the first factor—meaningful judicial review—is 'the most critical thread in the case law.'"¹⁶²

3. *Judge Droney's Dissent.* — Judge Droney's *Tilton* dissent provides the only example at the circuit level of serious concern regarding the prioritization of "meaningful judicial review" over the remaining *Thunder Basin* factors. Judge Droney, seeing nothing in the case law to justify this emergent hierarchy within the *Thunder Basin* framework, argued that the majority's holding eviscerated the remaining two factors.¹⁶³

Judge Droney reasoned that the majority's singular focus on whether the statutory scheme provides for Article III review (as a proxy for meaningful judicial review) changed the *Thunder Basin* analysis from one aimed at *substantively* evaluating the constitutional claims at issue into one *procedurally* concerned with whether petitioners had the ability to eventually reach an Article III forum.¹⁶⁴ To this end, the majority, per Judge Droney's interpretation, had misread *Thunder Basin* to suggest that "a claim is not wholly collateral if it has been *raised in response to*, and so is

160. *Id.* at 289–90.

161. See *id.* at 291.

162. *Hill v. SEC*, 825 F.3d 1236, 1245 (11th Cir. 2016) (quoting *Bebo v. SEC*, 799 F.3d 765, 774 (7th Cir. 2015)).

163. *Tilton*, 824 F.3d at 292 (Droney, J., dissenting) ("The majority's application of the *Thunder Basin* factors has stripped the 'wholly collateral' and 'outside the agency's expertise' factors of any significance: in its view, as long as administrative proceedings have been initiated, those two factors are always satisfied.").

164. *Id.* at 293–95 (arguing the *Thunder Basin* Court "consider[ed] the substance of the claims" and "made no reference to the procedural aspects of the claim"). For a similar intuition that *Thunder Basin* aims to encourage substantive case-specific analysis, see *Chau v. SEC*, 72 F. Supp. 3d 417, 425 (S.D.N.Y. 2014) ("*Thunder Basin* . . . teach[es] that the question of whether a special statutory scheme provides for adequate review of administrative actions involves case-specific determinations. Whether jurisdiction exists in a particular instance depends in significant part on the nature of the constitutional claim at issue."), *aff'd*, 665 F. App'x 67 (2d Cir. 2016).

procedurally intertwined with, an administrative proceeding,¹⁶⁵ and that a claim was not outside agency expertise if the agency's decision "might fully dispose of the case."¹⁶⁶ The end result, Judge Droney argued, was a reduction of the "wholly collateral" and "agency expertise" prongs to a binary analysis of whether or not administrative proceedings are ongoing.¹⁶⁷

After critiquing the doctrinal shift away from *Thunder Basin's* "holistic analysis" of congressional intent, Judge Droney turned to the proverbial elephant in the Note: meaningful judicial review. Judge Droney began his discussion of meaningful judicial review by conceding that, per the majority's analysis, "this factor tends to weigh in favor of preclusion because a subsequent appeal to this Court following a final Commission order is available."¹⁶⁸ And yet, perhaps spurred by "wholly collateral" and "agency expertise" losing doctrinal significance in any substantive sense, Judge Droney raised the "substantial question as to whether subsequent judicial review here would be 'meaningful.'"¹⁶⁹

Judge Droney reasoned that review cannot be meaningful if the proceeding defendants seek to challenge has already occurred by the time defendants reach a federal court:

Forcing the appellants to await a final Commission order before they may assert their constitutional claim in a federal court means that by the time the day for judicial review comes, they will already have suffered the injury that they are attempting to prevent. . . . In my view, this diminishes the weight of [the meaningful judicial review factor], for while there may be review, it cannot be considered truly "meaningful" at that point.¹⁷⁰

Judge Droney's dissent engaged the exact tension raised in the discussion of implied preclusion and exhaustion above.¹⁷¹ In determining

165. *Tilton*, 824 F.3d at 295 (Droney, J., dissenting) (internal quotation marks omitted) (quoting the *Tilton* majority) (emphasis added).

166. *Id.* (internal quotation marks omitted) (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 23 (2012)).

167. *Id.* at 295–96 (suggesting this binary approach is inconsistent with *Thunder Basin* and its progeny). Judge Droney later points out that, under a substantive analysis of agency expertise, it is clear that "the SEC has no particular expertise in determining whether the system of appointing its [ALJs] comports with the Appointments Clause of the Constitution." *Id.* at 297.

168. *Id.*

169. *Id.*

170. *Id.* at 298. Another, albeit more extreme, form of Judge Droney's argument might take the position that eventual review is truly meaningless insofar as a court reviewing the constitutionality of an internal SEC proceeding after the proceeding has concluded would be forced to dismiss this challenge for mootness. See Weiss, *supra* note 119, at 1430 ("[O]n direct review, a court would likely hold [the] challenge was moot, and thus presented a nonjusticiable question to the court. As such, the appeal would be denied without considering the merits of the challenge.").

171. See *supra* section I.B.2 (discussing the doctrinal frameworks governing implied preclusion and exhaustion).

whether exhaustion or preclusion is appropriate, courts attempt to balance the “institutional interest” of the agency in forcing parties to proceed through administrative channels against the “individual interest” in prompt Article III court review.¹⁷² In some contexts, eventual review appears to be sufficient.¹⁷³ In other contexts, perhaps most saliently constitutional challenges or instances in which an administrative action is deemed coercive, courts appear highly uncomfortable with equating meaningful and eventual review.¹⁷⁴ Judge Droney is no doubt aware that preclusion is a permissible and longstanding feature of administrative law, but he seemed to dissent out of concern that an absolute reduction of preclusion analysis to a binary question of whether “eventual” review is available may not be a desirable outcome.

4. *Tilton Epilogue*. — Suffice it to say, in light of all the foregoing, the present cocktail of industry outrage, expansion of SEC authority, and failure to grant the regulated community the opportunity for meaningful—rather than “eventual”—hearing of their constitutional complaints, is undesirable and unstable. Spirited challenges to the SEC’s enforcement framework seem unlikely to subside,¹⁷⁵ the legitimacy-threatening accusations of gamesmanship seem unlikely to dissipate, and Article III courts will be impeded from developing administrative doctrine and acting as a meaningful constitutional check on the behavior of administrative agencies.¹⁷⁶

172. See, e.g., *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (“In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.”).

173. See, e.g., *Mikuriya v. Leavitt*, 248 F. App’x 818, 820 (9th Cir. 2007) (finding the statutory scheme at issue required exhaustion unless “administrative procedures would mean denying all judicial review”).

174. See, e.g., *Gray Fin. Grp., Inc. v. SEC*, 166 F. Supp. 3d 1335, 1345 (N.D. Ga. 2015) (“[T]he Court finds that the SEC’s definition [that is, ‘eventual judicial review’] provides no *meaning* to the term ‘*meaningful*.’”), vacated and remanded sub nom. *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016).

175. See Sarah A. Good, *Not the Last Challenge to SEC’s Use of ALJs*, Pillsbury (May 12, 2016), <http://www.pillsburylaw.com/en/news-and-insights/not-the-last-challenge-to-sec-use-of-aljs.html> [http://perma.cc/S5A2-DN2C] (noting several emerging circuit splits borne out of challenges to the SEC’s ALJs); supra note 144 (noting the recent creation of a circuit split on the Appointments Clause challenge to SEC ALJs).

176. Cf. William F. Funk, *To Preserve Meaningful Judicial Review*, 49 *Admin. L. Rev.* 171, 178 (1997) (“Absent the threat of meaningful judicial review, agencies may well give short shrift to legal requirements and limitations.”); Thornley & Blount, supra note 25, at 281 (“All of these procedural shortcomings might be forgiven, or at least overlooked, if there were an opportunity for a meaningful appeal from the hearing. However, any appeal from an SEC ALJ’s initial ruling proceeds to the SEC.”). The aftermath of *Tilton v. SEC* is instructive in this regard. Following the Supreme Court’s denial of certiorari to *Tilton*’s appeal from the Second Circuit’s ruling, *Tilton* ultimately won her case on the merits of the alleged securities violations, securing a dismissal from SEC ALJ Carol Fox Foelak. Lynn *Tilton*, SEC Release No. 1182, 117 SEC Docket 14, 2017 WL 4297256, at *49 (ALJ Sept. 27,

III. RETURN TO MEANINGFUL JUDICIAL REVIEW

It should be clarified emphatically at the outset, before turning to the proposals below, that this Note is concerned with what Article III courts, the SEC, and Congress *should* do, rather than what each body *could* do within the bounds of the law. Notwithstanding the doctrinal critique—a critique this author happens to believe is meritorious—regarding the recent lack of faithfulness to *Thunder Basin*, concern with industry outrage, interest in preserving SEC legitimacy, and worry that SEC in-house prosecution may stunt Article III court development of administrative and constitutional law are all concerns of *policy* and institutional design.¹⁷⁷

This Note simply seeks to draw attention to a doctrinal development that has effectively stripped the *Thunder Basin* evaluation of any serious attention toward substantive, *meaningful* review of constitutional challenges, which may have repercussions both insofar as it insulates the SEC from Article III court review given the incentives to settle¹⁷⁸ and in the sense that outright hostility from the regulated community is not a desirable policy outcome. Moreover, this niche jurisdictional question has proven a vehicle for shadowboxing over the proper role of the

2017) (initial decision). One could argue that Tilton's victory before an SEC ALJ cuts against arguments of bias or gamesmanship. However, this argument fails to consider two critical points: First, Tilton's victory in defending against the securities charges ensured that her constitutional challenges never received a hearing in an Article III court, as her claims would have been moot. Second, as Tilton herself later acknowledged, her ability to spend "many tens of millions of dollars" is not common to all SEC defendants, which suggests that Tilton's ability to see her defense through to a judgment on the merits may not be an option for other defendants pressured into a settlement before having the opportunity for review by the SEC Commissioners, let alone an Article III forum. See Alison Frankel, Lynn Tilton: It Took 'Many Tens of Millions of Dollars' to Beat Skewed SEC System, Reuters (Sept. 28, 2017), <http://in.reuters.com/article/legal-us-otc-tilton/lynn-tilton-it-took-many-tens-of-millions-of-dollars-to-beat-skewed-sec-system-idINKCN1C32ZT> (on file with the *Columbia Law Review*) ("I feel truly grateful to Judge Foelak," Tilton said. "But it doesn't change my opinion that cases like these belong in federal court. I absolutely feel my rights were compromised.").

177. Potentially, although surely not without considerable popular resistance, Congress could, pursuant to Article III, strip jurisdiction *entirely* from Article III courts for matters relating to securities enforcement. Daniel A. Farber, Legislative Constitutionalism in a System of Judicial Supremacy, *in* The Least Examined Branch: The Role of Legislatures in the Constitutional State 431, 442 (Richard W. Bauman & Tsvi Kahana eds., 2006). And almost certainly, Congress has the power to amend Dodd-Frank to explicitly preclude Article III subject matter jurisdiction over constitutional challenges to ALJ proceedings pending the conclusion of the proceeding. See Griffin, *supra* note 144, at 221 (noting the conditions under which Congress can limit the original jurisdiction of federal district courts over constitutional claims). Arguably this type of radically revised congressional approach to the role of the Article III courts would be a more transparent method for raising the questions regarding allocation of authority between Article III courts and administrative agencies raised by this Note.

178. See *supra* note 52.

administrative state in pursuing complex statutory objectives, and as such, it offers an opportunity for more forthright dialogue between the SEC and the regulated community.

This Part proposes two solutions: (1) The SEC or Congress should promulgate detailed, and binding, forum selection guidelines, thereby reducing the impression that SEC forum decisions are arbitrary or evidence of gamesmanship; (2) future courts hearing challenges similar to *Tilton* should apply standard injunction analysis akin to *Duka v. SEC*.¹⁷⁹

A. *Forum Selection Guidelines*

The SEC or Congress should clearly indicate the types of enforcement actions that will be brought internally within the SEC as opposed to those pursued in federal district court. Through this adoption of binding forum selection guidelines, private parties will be able to spend more time ensuring compliance with securities laws and preparing for the possibility of prosecution in a particular forum and less time contesting the nature of the forum. In May 2015, the SEC released a very brief commentary on its process for forum selection.¹⁸⁰ However, this statement, identifying a “non-exhaustive list of factors” to help determine the proper forum, was both nonbinding and too general to have meaningful impact on industry frustration.¹⁸¹ That is to say, when the forum guidelines are drafted such that the SEC has enough wiggle room to effectively retain complete discretion, the guidelines will do little to assuage the regulated community’s suspicions that the SEC is leveraging the forum purely to secure an advantage.

Providing more specific forum selection guidelines, and binding the SEC to these guidelines, should appeal both to the regulated community insofar as it avoids being blindsided by SEC forum choice and also to the

179. 103 F. Supp. 3d 382, 389 (S.D.N.Y. 2015), abrogated by *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016); see also *infra* section III.B (discussing *Duka* in detail).

180. SEC, Division of Enforcement Approach to Forum Selection in Contested Actions (2015), [http://files.drinkerbiddle.com/Templates/media/files/pdfs/SEC-Guidance\(1\).pdf](http://files.drinkerbiddle.com/Templates/media/files/pdfs/SEC-Guidance(1).pdf) [<http://perma.cc/E8DJ-D6AY>]; see also Grundfest Testimony, *supra* note 52, at 3 (“[T]he Commission has issued a statement describing four factors it considers when deciding whether to initiate proceedings in an administrative forum or in federal court. These factors have been criticized as exceptionally malleable and as not placing any meaningful limit on the Commission’s exercise of discretion.”).

181. Nicholas Bourtin et al., Sullivan & Cromwell Discusses SEC Guidance on Approach to Forum Selection in Contested Actions, CLS Blue Sky Blog (June 15, 2015), <http://clsbluesky.law.columbia.edu/2015/06/15/sullivan-cromwell-discusses-sec-guidance-on-approach-to-forum-selection-in-contested-actions/> [<http://perma.cc/72RF-8X46>] (noting that, notwithstanding the issuance of forum selection guidelines, the SEC maintains “the circumstances of each particular case will ultimately govern where the case is brought”); see also Platt, Backlash, *supra* note 3, at 2–3 (“These changes . . . would surely be a step in the right direction if adopted. But they are too little, too late. Challengers will not be deterred and critics will not be won over unless the SEC undertakes a broader, deeper review and recalibration.”).

SEC, given the SEC's explicit recognition of the souring public impression of internal enforcement.¹⁸² While "industry outrage" is not necessarily itself cause for concern,¹⁸³ the fact that this outrage translates to challenges threatening major changes to the SEC's enforcement apparatus should give the SEC reason for pause.¹⁸⁴ If the SEC or Congress were to adopt forum selection guidelines, this would allow the SEC or Congress to take command of the SEC's future rather than wait for a potentially adverse outcome in challenges to the very nature of the SEC.

Section III.A.1 argues that detailed and binding forum selection guidelines will help to bolster the SEC's legitimacy insofar as they counter the impression that forum selection has become an exercise in prosecutorial advantage. Section III.A.2 then presents the related argument that forum selection guidelines, regardless of the allocation codified, will serve as a starting point for a much-needed discussion over the proper scope and role of SEC internal enforcement among legislators, the SEC, and the regulated community.

1. *Maintain SEC Legitimacy.* — Forum selection guidelines may go a long way toward bolstering the perceived legitimacy of the SEC as an enforcement body to the extent that these guidelines could combat the critique that the SEC is leveraging the bias of in-house judges to prosecute difficult cases.¹⁸⁵ That being said, several have argued that, much like the SEC's in-house judges, Article III judges have problematic biases of their own. In *The Real World of Arbitrariness Review*, Professors Thomas Miles and Cass Sunstein, after empirical review, conclude that judges' "[p]olitical commitments" significantly impacted their ability to unbiasedly review agency adjudicative decisions in cases involving the EPA and NLRB.¹⁸⁶

This Note can muster two brief responses to this objection: First, the biases of Article III judges, unlike the supposed one-directional biases of

182. See Platt, Backlash, *supra* note 3, at 46 (noting that former SEC Commissioner Michael Piwowar "suggested the agency adopt guidelines governing the choice of forum, in order to 'avoid the perception that the Commission is taking its tougher cases to its in-house judges, and to ensure that all are treated fairly and equally'" (quoting Michael S. Piwowar, Comm'r, SEC, A Fair, Orderly, and Efficient SEC, Remarks at 2015 SEC Speaks Conference (Feb. 20, 2015), <http://www.sec.gov/news/speech/022015-spchcmosp.html> [<http://perma.cc/2C87-23P2>])).

183. See *supra* note 49 and accompanying text.

184. Consider *Bandimere v. SEC*, discussed above, in which the Tenth Circuit upheld an Appointments Clause challenge—finding ALJs unconstitutionally appointed—with far-reaching implications for the functionality of the SEC and administrative state more broadly. 844 F.3d 1168, 1188 (10th Cir. 2016).

185. See, e.g., Morgenson, Home-Court Edge, *supra* note 34 ("[S]ome legal experts say these proceedings suffer from potential bias because the judges operate within the agency bringing them. The possibility of a home-court advantage or a sympathetic adjudicator, critics say, raises questions of fairness . . .").

186. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 767 (2008).

SEC ALJs, are cross-cutting—that is, Democrat-appointed and Republican-appointed judges are more likely to be sympathetic to liberal and conservative agency decisions, respectively.¹⁸⁷ Second, and more importantly, regardless of the extent to which actual bias exists in either the SEC or Article III courts, it is difficult to contest the fact that a body (in this case, the SEC) with the ability to investigate, prosecute, and judge parties in-house gives rise to a somewhat troubling fairness aesthetic. If this is indeed the case, the absence of forum selection guidelines may lead skeptics to question the propriety of the SEC's forum choices, even when these choices are justified. In the words of one commentator: “Even if it doesn't create actual bias, it doesn't look good.”¹⁸⁸ In an oft-cited passage, Professor Gary Lawson outlines one stylized progression of agency enforcement that reflects the intuitive distaste for intra-agency combination of functions:

Consider the typical enforcement activities of a typical federal agency—for example, of the Federal Trade Commission. The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before

187. *Id.* (“When the agency decision is liberal, the Democratic validation rate is 72 percent and the Republican validation rate is 58 percent. When the agency decision is conservative, the Democratic validation rate drops to 55 percent and the Republican validation rate rises to 72 percent.”). The SEC has taken the claims of ALJ bias seriously enough to conduct an internal investigation on the matter. See *supra* note 68. It may very well be the case, however, that the *appearance* of bias is just as significant as the question of whether bias *actually* exists. See *infra* note 188 (discussing the psychological impacts of appearances of bias).

188. Morgenson, *Home-Court Edge*, *supra* note 34 (internal quotation marks omitted) (quoting Ronald J. Riccio, Dean Emeritus, Seton Hall Law Sch.); see also Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (1965) (“The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”); Barnett, *Administrative Judges*, *supra* note 70, at 1671 (“By prohibiting the appearance of partiality, one primarily seeks to protect the integrity of the adjudicating body and validate the process. . . . [A] valid process helps to validate final agency action with litigants, reviewing courts, Congress, and the public.” (footnote omitted)); Grundfest, *Fair or Foul*, *supra* note 16, at 1153 (“The appearance of impropriety under these circumstances is clear, even if one believes that the administrative process is itself largely fair and efficient.”).

a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then, and *only* then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and law.¹⁸⁹

One could perhaps counter with the point that SEC ALJs are well aware that they will ultimately be subjected to Article III review, however circuitous the procedure to get there, and will therefore render unbiased decisions.¹⁹⁰ However, the fact that most SEC enforcement actions settle¹⁹¹ calls into question the constraining effect of subsequent judicial review. Ultimately, given the troubling aesthetic of the SEC both prosecuting and judging the same action,¹⁹² forum selection guidelines could improve confidence in the regulated community.

2. *Encourage Dialogue Regarding the Proper Role of SEC Internal Enforcement.* — Promulgation of detailed forum selection guidelines would provide the opportunity for all interested parties—the SEC, Congress, regulated actors, and so on—to constructively debate a baseline forum allocation.¹⁹³ In light of the uncontested differences in procedural

189. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1248–49 (1994) (footnotes omitted). The Supreme Court has proven highly unreceptive to Lawson’s separation of powers critique, acknowledged by Lawson himself. *Id.* at 1249 (“The post-New Deal Supreme Court has never seriously questioned the constitutionality of this combination of functions in agencies.”). Still, there is little doubt that the modern administrative state, and agency adjudication in particular, has exerted considerable pressure on at least some traditional constitutional understandings, such that it is not impossible to imagine the regulatory community reaching a breaking point of sorts and agitating for a reinvigoration of nondelegation principles. Cf. Caleb Nelson, *Adjudication in the Political Branches*, 107 *Colum. L. Rev.* 559, 594 (2007) (describing the ways in which modern administrative adjudication has exerted pressure on the traditional “public rights” and “private rights” dichotomy).

190. There are several who take this position. See, e.g., William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 *Yale L.J.* 38, 59–60, 70 (1975) (suggesting that judicial review of agency decisionmaking can impose “useful discipline” on the agency).

191. See *supra* note 52 and accompanying text (discussing pressures to settle).

192. *Grundfest Testimony*, *supra* note 52, at 2 (“While respondents have the right to appeal any Commission ruling to a federal court of appeals, the Kafka-esque quality of an appeal to the body that authorized the prosecution cannot be denied.”).

193. Henning, *Rocket Docket*, *supra* note 112 (“Requiring the S.E.C. to provide . . . some guidance about what drives a case to a particular forum would help potential defendants understand what they are up against Guidelines would impose a measure of accountability on the S.E.C. to explain how it will treat violations in a fair and consistent manner.”).

While this Note does not take a position as to the proper allocation of actions vis-à-vis in-house and federal court proceedings, several commentators have offered tenable

mechanisms available in federal court versus an ALJ proceeding¹⁹⁴ (and bracketing, for a moment, claims that SEC ALJs are far more likely than Article III judges to return a guilty verdict), it is crucial for both the SEC and regulated parties to consider how to best differentiate the types of cases properly heard in front of an Article III judge versus an ALJ.

To some extent, the “debate” regarding the propriety of expanded SEC jurisdiction and discretion has already begun, but without the essential component of guidelines to evaluate. For example, several have argued that allowing the SEC to continuously widen its enforcement scope will undercut the SEC’s mission by limiting federal courts from developing the law and effectively insulating SEC decisionmaking from meaningful checks.¹⁹⁵ Others, perhaps most prominently Professor David Zaring, argue that the complete discretion of the SEC to prosecute where it chooses is an essential component of its ability to enforce effectively.¹⁹⁶

proposals. Professor Joseph Grundfest has argued for an arrangement in which the federal courts act as “traffic cop[s],” determining whether various actions are properly suited to an administrative or federal forum, dividing administrative actions into three categories: “The first category would include all cases statutorily required to be litigated in the administrative forum as well as all cases for which administrative proceedings are appropriate because of the nature of the question presented and the SEC’s specialized expertise,” “a second category would be composed of cases that must be heard in federal court and that may not be brought in administrative proceedings except with defendants’ consent” (for example, those actions calling for remedies not available in administrative proceedings), and “[t]he third category would be composed of cases that fall in neither of these two categories. In these residual cases, if the Commission decides to bring an administrative action, then the respondent would be permitted to petition a federal district court for removal at the court’s discretion.” Grundfest, *Fair or Foul*, *supra* note 16, at 1154–55.

194. U.S. Chamber of Commerce, *Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Processes and Practices* 3 (2015), http://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf [<http://perma.cc/6K86-Y259>] (“While the types of actions and the remedies [available] are similar, the two forums have substantial differences in process. These differences can have a significant impact on the procedural rights of a defendant/respondent and, ultimately, on the respondent’s ability to obtain a full, fair, and impartial adjudication.”).

195. Rakoff, *supra* note 1, at 12 (“I would urge the S.E.C. to consider that it is neither in its own long-term interest, nor in the interest of the securities markets, nor in the interest of the public as a whole, for the S.E.C. to become, in effect, a law [unto] itself.”). Note also that several have argued that forum selection ambiguity has also led to “under-criminalization.” See, e.g., Eithan Y. Kidron, *Systemic Forum Selection Ambiguity in Financial Regulation Enforcement*, 53 *Am. Crim. L. Rev.* 693, 694 (2016). But see Gillian E. Metzger, *Administrative Constitutionalism*, 91 *Tex. L. Rev.* 1897, 1900–02 (2013) (defending “administrative constitutionalism,” that is, the “elaboration of new constitutional understandings by administrative actors”).

196. Zaring, *Enforcement Discretion*, *supra* note 27, at 1159. For a direct response to Zaring’s argument, see generally Gideon Mark, *Response, SEC Enforcement Discretion*, 94 *Tex. L. Rev.* See Also 261 (2016), <http://texaslawreview.org/wp-content/uploads/2016/10/Mark-94-SeeAlso.pdf> [<http://perma.cc/AU92-2TD4>].

In either case, having clear forum selection guidelines offers an opportunity for parties to propose, without excessive speculation absent guidelines, ways to limit what many deem “unacceptable systematic ambiguity.”¹⁹⁷ Moreover, to the extent outlining forum selection guidelines mitigates the outrage of the regulated community, this solution might help anticipate and prevent the industry agitating for a destabilizing overreaction to the SEC’s aggressive enforcement tactics.¹⁹⁸

B. *Duka*, *Meaningful Judicial Review*, and *Injunction Analysis*

While forum selection guidelines—both their creation and improvement—have been proposed in other contexts,¹⁹⁹ doctrinal proposals are far less frequent. Recall that in *Tilton*, the Second Circuit was faced with a district court split on this question of subject matter jurisdiction.²⁰⁰ The court chose to affirm Judge Abrams’s analysis in the trial court, thereby refusing to exercise subject matter jurisdiction, and in doing so rejected Judge Berman’s alternative approach in *Duka v. SEC*, which involved the use of standard injunction analysis to review the constitutional challenges. This Note argues that future courts hearing challenges akin to *Tilton* should apply the framework employed most explicitly in *Duka*, which allows aggrieved parties the opportunity for meaningful judicial review of constitutional claims in an Article III court while enabling the Article III court to quickly return the case to the SEC ALJ if the constitutional challenge appears unlikely to succeed on the merits.

197. Kidron, *supra* note 195, at 696. Moreover, it is important to note, however briefly, that Congress could inject a great deal of clarity via some type of federal overlay constraining the SEC or at the very least channeling the SEC’s use of ALJs in a fashion that is more predictable to the industry. As the dissent in *Tilton* pointed out, the entire purpose of the *Thunder Basin* framework is to determine Congress’s intent. *Tilton v. SEC*, 824 F.3d 276, 296 (2d Cir. 2016) (Droney, J., dissenting). As such, Congress would be within its Article I powers to clearly provide an answer on jurisdictional preclusion in this context.

198. Consider a recent proposal by Republican Representative Jeb Hensarling, chair of the House Financial Services Committee, which would “effectively gut the use of [SEC] in-house courts for cases.” Peter J. Henning, S.E.C. Victories Delay Challenge on In-House Judges, *N.Y. Times: DealBook* (July 5, 2016) <http://www.nytimes.com/2016/07/06/business/dealbook/sec-victories-delay-challenge-on-in-house-judges.html> (on file with the *Columbia Law Review*). For Representative Hensarling’s proposal, see H.R. 5983, 114th Cong. (2016), http://financialservices.house.gov/uploadedfiles/choice_act_discussion_draft.pdf [<http://perma.cc/6CA6-9YJG>].

199. See, e.g., Thomas A. Hanusik et al., What’s Missing from the SEC’s Forum Selection Guidance, *Law360* (May 21, 2015), <http://www.law360.com/articles/658532/whats-missing-from-the-sec-s-forum-selection-guidance> (on file with the *Columbia Law Review*) (critiquing the SEC’s 2015 public statement on forum selection).

200. See *Tilton*, 824 F.3d at 280 (“While the district court heard argument and deliberated, several other federal judges reached conflicting decisions on the same jurisdictional issue, creating a split both within and outside the Southern District.”); *supra* section II.B.1.

Duka involved a paradigmatic case as far as this Note is concerned: The SEC initiated an internal enforcement action against Barbara Duka for alleged violations of section 17(a) of the Securities Act and Duka countered by filing an injunction in the Southern District of New York, claiming that ALJs are unconstitutionally insulated from presidential oversight in violation of Article II of the Constitution.²⁰¹ Judge Berman held that (1) the court had subject matter jurisdiction over Duka's constitutional claims, *but* (2) the preliminary injunction ought to be denied on grounds that the court deemed Duka unlikely to succeed on the merits.²⁰² *Duka* thus provided both *meaningful* judicial review while avoiding the trap of entertaining (what the court deemed) a meritless challenge.

1. *Putting the "Meaningful" Back in Meaningful Judicial Review.* — *Duka's* willingness to exercise subject matter jurisdiction over the constitutional claim intimated the Court's sensitivity to the frustration of defendants who feel that the inability to bring challenges in district court has unfairly stacked the deck in the SEC's favor.²⁰³ The *Duka* court took the position that "eventual" judicial review of a constitutional challenge to an administrative proceeding cannot in any real sense be *meaningful* if the challenge is relegated to the aftermath of the administrative action, indicating that money spent on litigation and reputational costs were worthy of consideration.²⁰⁴ That is to say, regardless of outcome, *Duka* framed the decision to clearly signal that the court took the constitutional challenge seriously, as opposed to simply a defense mechanism to the SEC enforcement.²⁰⁵

201. *Duka v. SEC*, 103 F. Supp. 3d 382, 385 (S.D.N.Y. 2015), abrogated by *Tilton*, 824 F.3d 276.

202. *Id.* at 385–86.

203. In a telling maneuver, Judge Berman framed the opinion with a quotation from *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989), on the right of parties to choose federal court when jurisdiction is proper: "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Duka*, 103 F. Supp. 3d at 385 (alteration in original) (internal quotation marks omitted) (quoting *New Orleans Pub. Serv., Inc.*, 491 U.S. at 358–59).

204. *Duka*, 103 F. Supp. 3d at 390.

205. *Duka's* posture in this regard, that is, conveying sensitivity to the plight of a party faced with potential harsh sanctions, is arguably not without precedent in the history of federal equity. Indeed, under the *Ex parte Young* lineage, even with *Armstrong's* more recent gloss, private parties have long had the right to seek injunctions of purportedly unconstitutional actions by federal officers. See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383–84 (2015); *Ex parte Young*, 209 U.S. 123, 155–56 (1908). This remedial right has recently been characterized by the Court as the "creation of courts of equity," capable of displacement by express congressional action, but otherwise malleable by federal courts in the pursuit of equitable outcomes. *Armstrong*, 135 S. Ct. at 1384. As such, it is not out of the question to suggest that federal courts could formally fashion an injunctive remedy similar to the *Duka* approach to handle constitutional challenges to the SEC.

One possible objection to *Duka's* threshold consideration of the merits of the constitutional challenge would be to argue that this approach wastefully imposes costs on the SEC Enforcement Division, which must convince an Article III court to dismiss a constitutional challenge before proceeding with the administrative action. This may very well be true, but this argument ignores the possibility that the ire of the regulated community may, via lobbying or otherwise, encourage an overly heavy-handed legislative response that causes far more disruption to the SEC enforcement regime than the *Duka* approach.

This possibility is far from insubstantial—in April of 2017, Congressman Warren Davidson (R-Ohio) introduced H.R. 2128, the Due Process Restoration Act, which proposes to “provide respondents in SEC enforcement cases with the option to have their proceedings advance in a federal district court instead of internal SEC administrative courts.”²⁰⁶ Congressman Davidson’s proposal, currently pending before the House Financial Services Committee, declines *Duka's* relatively middle-ground approach and instead would allow *all* defendants to simply opt out of administrative enforcement.²⁰⁷ Article III courts, as well as all believers in the merits of administrative adjudication, therefore have good reason to adopt a compromise approach of the *Duka* ilk rather than await current industry antipathy to manifest itself in an incautious rollback of SEC enforcement capabilities.

2. *Granting Injunctions (or Not) Using Standard Injunction Analysis.* — The key decisional element that this Note argues makes *Duka* the desirable framework is the *second* step of the analysis, that is, considering the success of the constitutional challenge on the merits. By employing standard injunction analysis²⁰⁸—asking whether “Plaintiff (1) is likely to succeed on the merits of her claim, (2) will suffer irreparable harm absent injunctive relief, and (3) the public interest weighs in favor of granting the injunction”—*Duka's* approach catalyzes several positive

206. Press Release, U.S. Congressman Warren Davidson, Rep. Davidson Introduces the Due Process Restoration Act of 2017 (Apr. 26, 2017), <http://davidson.house.gov/media-center/press-releases/rep-davidson-introduces-due-process-restoration-act-2017> [<http://perma.cc/G84Y-YDXT>] [hereinafter Davidson Press Release]. Other similarly drastic, at least relative to the status quo, legislative proposals have also been introduced. See H. Comm. on Fin. Servs., *The Financial Choice Act: Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs* 96–101 (2016), http://financialservices.house.gov/uploadedfiles/financial_choice_act_comprehensive_outline.pdf [<http://perma.cc/H6EA-LN5B>] (proposing to (1) allow defendants in SEC enforcement actions to remove at-will to federal district court and (2) eliminate judicial deference to ALJ findings).

207. Davidson Press Release, *supra* note 206. For a strong criticism of this proposal, see, e.g., David Zaring, *The Due Process Restoration Act of 2015 Would Kill Administrative Adjudication at the SEC*, Conglomerate (Nov. 3, 2015), <http://www.theconglomerate.org/2015/11/the-due-process-restoration-act-of-2015-would-kill-administrative-adjudication-at-the-secnd-.html> [<http://perma.cc/NN7M-GA7A>].

208. *Duka*, 103 F. Supp. 3d at 392.

effects: First, entertaining subject matter jurisdiction and *then* reviewing likelihood of success on the merits allows defendants to receive a hearing in federal court without having to navigate the serpentine internal processes of the SEC, with the very likely possibility of the parties settling during the interim.²⁰⁹ Second, as was the case in *Duka*, the second step of injunction analysis, which includes review of the likelihood of success on the merits, will weed out frivolous constitutional challenges, thereby encouraging defendants *ex ante* to carefully consider whether to raise a constitutional challenge at all.

Concern that allowing district courts to exercise subject matter jurisdiction allows wealthy defendants to deflect meritorious SEC prosecutions is not unreasonable. However, this Note takes the position that this concern is misguided. As Judge Rakoff explained in another recent case:

To be sure, it would not be prudent to allow every subject of an SEC enforcement action who alleges “bad faith” and “selective prosecution” to be able to create a diversion by bringing a parallel action in federal district court. But such diversionary tactics can be quickly disposed of in the ordinary case through dismissal for failure to plead a plausible claim.²¹⁰

Moreover, it is certainly not inconceivable that the SEC, emboldened by the current hands-off approach of the circuits addressing the issue, could become even more aggressive about prosecuting in-house and in so doing, cross the line into the unconstitutional, thus calling for more aggressive prophylactic measures.²¹¹

3. *The Cost of Duka*. — Implementing injunction analysis in keeping with *Duka* would not be without cost. Dodd-Frank, the spark behind the recent backlash toward SEC behavior, was enacted with the purpose of tightening regulation on the financial industry in the aftermath of one the worst financial crises the United States has experienced since the Great Depression.²¹² Indeed, one could argue with little difficulty that

209. See *supra* note 52.

210. *Gupta v. SEC*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011). Judge Rakoff went on to explain, “A fear of abuse by litigants in other cases should never deter a federal court from its unfailing duty to provide a forum for vindication of constitutional protections to those who can make a substantial showing that they have indeed been denied their rights.” *Id.*

211. In the case of this eventuality, “injunctive relief has long been recognized as *the proper means for preventing entities from acting unconstitutionally*,” and *Duka* would align with this intuition. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (emphasis added).

212. Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act, White House Office of the Press Sec’y (July 21, 2010), <http://obamawhitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act> [<http://perma.cc/24JU-YMBU>] (“Over the past two years, we have faced the worst recession since the Great Depression. Eight million people lost their jobs. Tens of millions saw the value of their homes and retirement savings plummet.”).

Dodd-Frank was passed with the express purpose of placing a thumb on the scale in favor of entities like the SEC.²¹³ Were Article III courts to adopt the approach in *Duka* and exercise subject matter jurisdiction, even cursorily to determine feasibility of a claim before returning the matter to the SEC, this would no doubt interrupt the SEC's enforcement actions, imposing costs on the SEC resulting from having to halt the in-house action and litigate in an Article III court before potentially returning in-house.²¹⁴

Still, the countervailing costs may be even more troubling. In dismissing Tilton's claims, the Second Circuit noted: "The litigant's financial and emotional costs in litigating the initial proceeding are *simply the price of participating in the American legal system.*"²¹⁵ On this view, the requirement to endure an SEC in-house administrative action prior to reaching an Article III court acts as a kind of tax on such challenges. This cost is compounded, as already argued, by the reputational damage, litigation expense, and risk (particularly for public companies) entailed by seeing an action through the many layers of SEC review before reaching a court of appeals. These costs, in turn, strongly incentivize settlement prior to Article III adjudication.²¹⁶ If this is an accurate picture, challenges based in constitutional and administrative law may *never* reach an Article III hearing, threatening to stunt the growth of both areas of law with respect to the administrative state at a time when the administrative state is heavily relied upon.²¹⁷ Just as it may be excessively dire to suggest that the entire SEC apparatus is unconstitutional, it may be too dismissive to suggest that the SEC, given sufficient insulation from Article III court review, will not be tempted to push the envelope into the realm of unconstitutional behavior.

CONCLUSION

The post-Dodd-Frank SEC operates in a climate that simultaneously demands rigorous regulation of financial actors and is characterized by

213. *Id.* ("[T]hese reforms represent the strongest consumer financial protections in history.").

214. But see *Gupta*, 796 F. Supp. 2d at 514 ("A fear of abuse by litigants in other cases should never deter a federal court from its unfailing duty to provide a forum for vindication of constitutional protections.").

215. *Tilton v. SEC*, 824 F.3d 276, 285 (2d Cir. 2016) (emphasis added).

216. See *supra* note 52 and accompanying text.

217. For an illustration of the SEC's potential to prevent Article III courts from developing federal securities law, see John P. Flannery and James D. Hopkins, Securities Act Release No. 9689, Exchange Act Release No. 73840, Advisers Act Release No. 3981, Investment Company Act Release No. 31374, at 12 (Dec. 15, 2014), <http://www.sec.gov/litigation/opinions/2014/33-9689.pdf> [<http://perma.cc/87YY-S6RQ>] (providing the SEC's own interpretation of the statute at issue to resolve "inconsistencies," as characterized by the SEC, in federal district court).

widespread attacks, both meritorious and otherwise, on the administrative state itself. As such, it has become increasingly important for the SEC to clearly articulate a reasoned and diligent enforcement strategy while maintaining its legitimacy as a fair and apolitical body. The increased enforcement capabilities of the SEC combined with the move to prosecute more frequently in-house has generated a mutual antipathy that undermines the legitimacy of the SEC and has materialized in challenges to the SEC that could destabilize the Commission.

This climate has only been exacerbated by the refusal of Article III courts to exercise subject matter jurisdiction over constitutional challenges to the nature of SEC administrative proceedings and the failure of the SEC to articulate clear forum selection guidelines.

Allowing Article III courts to exercise subject matter jurisdiction over constitutional challenges to the SEC's in-house proceedings—whether achieved doctrinally via *Thunder Basin* or legislatively through forum selection guidelines—has the potential to reduce the temperature of the controversy surrounding SEC in-house proceedings, bolster the SEC's legitimacy as an enforcement body, and ensure that Article III courts remain independently capable of developing administrative and constitutional law.