

Cozen Currents: The GOP's Political Awakening

The Cozen Lens

- The GOP wants to say RIP to ESG as the fight against "woke capitalism" is prevalent in all corners of the Republican Party.
- The US Supreme Court has agreed to hear a case regarding the constitutionality of the Consumer Financial Protection Bureau's funding structure, posing an existential threat to a core regulatory mechanism of progressive activism.
- The House is shaping up to be an extremely close electoral battle in 2024. While much of the current attention is on the newfound power of the GOP's Freedom Caucus, vulnerable moderate incumbents on both sides of the aisle are trying to differentiate themselves and build their own separate brand based on issues of outsized importance in the suburbs, such as taxes and crime.

GOP Might Be at Crossroads Over Trump But Not Over ESG

What The GOP Agrees On. The Republican Party is united in pushing back against the consideration of environmental, social, and governance criteria (ESG) for investing and corporate finance.

- Even if retail investors and voters don't know much about what ESG investing is, the GOP donor class cares a whole lot. It's the donor class from both parties that has outsized influence on policy priorities.
- The GOP views "wokeness" as a winning political issue that resonates with the average American, including even some Democrats. As former President Obama famously said, "This idea of purity, and you're never compromised, and you're always politically 'woke,' and all that stuff, you should get over that quickly."
- Every Republican (and even a few Democrats) in Congress supported overturning the Department of Labor's (DOL) ESG rule. Republican presidential aspirants from Trump to anti-Trump Governor Chris Sununu (R-NH) oppose ESG.
- Most people don't know what ESG is. In a poll of retail investors last year, only 24 percent could define ESG investing and only 21 percent knew what the letters "E-S-G" represented.

The GOP's ESG Agenda. President Biden will use his veto pen for the first time to block the disapproval resolution of the DOL's ESG rule. Yet the ESG policy platforms, bills, and oversight hearings of today could be the ESG laws and regulations of a Republican-controlled DC as soon as 2025.

- Republicans see ESG as the next front in the culture wars. The perception is that progressives are using a workaround of the democratic process to implement their views through other institutions of power.
- This isn't your mother's Republican Party. Telling companies and investors what they can do was once anathema to the GOP. Now, they are actively trying to curtail ESG activities at the state and federal level.
- Just as the Biden administration is flexing its executive powers and using federal investments to push once-failed legislative priorities, a Republican administration could push its powers for anti-ESG ends.

ESG Isn't Going Away. Republicans hold a structural advantage in government at the federal level based on the representation of rural areas in the Senate and the Electoral College, but other stakeholders still want ESG, albeit with a few changes.



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- Democrats are pushing forward on an ESG agenda at the state and federal level. This isn't just about promoting ESG but creating better transparency and disclosures for what ESG is and how it's marketed.
- People still want the corporate world to have a stand on issues. Stakeholder capitalism is far from dead, but how it's expressed is evolving.
- The courts once again have an outsized role on a policy and cultural issue. Republicans are challenging DOL's ESG rule and will challenge the Securities and Exchange Commission's climate disclosure rule once it's finalized. Republicans may also try to push the bounds of antitrust law against ESG investors.

CFPB Under Threat from SCOTUS (Again)

Supreme Court Accepts CFPB Case. Although it was expected that the Supreme Court would take up the latest case challenging the validity of the Consumer Financial Protection Bureau (CFPB), the Court threw its own curveball by delaying the hearing until fall 2023.

- The Biden administration petitioned the Court to review the Fifth Circuit Court of Appeals' ruling that the CFPB's current funding mechanism violates the Appropriations Clause of the US Constitution. The Fifth Circuit is one of the most conservative appellate courts in the country and is often a venue for opponents of progressive regulation.
- The Court had the option to accept the case and consider additional legal arguments outside that narrow policy area, but instead it will only consider the narrow constitutional funding question.
- In response to the Court's agreeing to take the case, the CFPB issued a statement saying, "We are confident in the constitutionality of the CFPB's funding mechanism, which is not novel or unusual. As it did for the Federal Reserve Board and other federal banking regulators, Congress authorized the CFPB's funding through legislation other than annual spending bills."

Business as Usual (for Now). Since the case will not be heard this term, the earliest that it will be heard is in October 2023 and a ruling may not be released until the summer of 2024, right in the midst of the 2024 election campaign.

- As a result of the delay in the Court's ruling, the CFPB will be motivated to finalize the current spate of rulemakings that it is working on. Perhaps ironically, the latest legal challenge to the CFPB's independence will lead to an increase in the pace of regulation, at least in the near term.
- This means that consumer finance companies will need to adjust their business models to these new rules, such as the one limiting credit card late fees, as disregarding any new rules in hopes of a favorable court ruling is not a viable legal option.
- Even in a scenario where the Court rules that the CFPB's funding is unconstitutional and Congress fails to fund it, effectively neutering the bureau's enforcement powers, companies will still be liable for any violations of existing policies once the funding situation is resolved and the CFPB has leadership appointed by a Democratic president.

Ruling Delay Increases Odds Republicans Leave CFPB Unfunded. By pushing the Court ruling to the summer of 2024, right in the middle of campaign season, congressional Republicans will have little incentive to pass any legislation to fund the CFPB if the current mechanism is deemed unconstitutional, although much depends on the scope of the ruling.

- What this means in practice is that the Court could say that the CFPB itself remains constitutional, but Congress must appropriate its funding. Republicans and Democrats are going to have enough trouble agreeing on funding less controversial elements of the federal government, so there is a real risk that the CFPB's activities, including its enforcement capabilities, become restricted not due to a lack of authority but rather a lack of funding.
- If Republicans feel the need to show they can govern, then compromise solutions of imposing a bipartisan board versus a single director like the Federal Deposit Insurance Corporation and funding the CFPB via the annual appropriations process could potentially be acceptable to Democrats. To that end, House Financial Services Committee Chair Patrick McHenry (R-NC) continues to preview his committee's potential response, the Taking Account of Bureaucrats' Spending (TABS) Act, although it is highly likely that at least some Republicans

will also want to impose additional policymaking limitations, making any cohesive response all the more difficult.

The Battle for the House Begins Anew

House Race Begins on Knife's Edge. Control of the House of Representatives has flipped twice in the last three cycles, and the resulting majorities have been narrow, reflecting the current partisan divide in America.

- The number of competitive districts has plummeted over time. Forecasts show that only 20 Republican seats and 24 Democratic seats are rated as “toss-ups” or “leans” – comprising just 10 percent of the House.
- Republicans’ present four-seat majority is a mirror of the four-seat majority Democrats held after the 2020 election. Redistricting and the urban-rural divide increasingly sorting people’s political preferences are both acting to shore up incumbents into safer races.
- With the electoral battlefield so narrow, it’s much harder than in the past for either side to come out on top with a commanding majority.

Control to be Decided by Barnburners. The speaker’s gavel rests on a handful of court cases. A staggering number of district maps remain in limbo.

- Redistricting arguably gave the House to Democrats in 2020 and Republicans in 2022. Changes in redistricting from court cases could affect as many as 15-19 seats in 2024. With margins so tight, the way each and every district is drawn matters.
- Cases before the Supreme Court and courts in Ohio and North Carolina could shift several seats to Republicans. The possibility of gains in the state supreme courts of Wisconsin and New York give Democrats some hope of their own.
- But with the most conservative Supreme Court in a century, the coming decisions represent more of a liability than a boon to Democrats.

A Profile of the Vulnerable Member. Across states and districts, the common thread of the deciding races is a suburban, upper-middle class worried about taxes and crime.

- There are 18 Republicans in seats Biden won in 2020. On the other hand, there are seven seats held by Democrats in Trump-country. Incumbents need to bend over backwards on local issues to cultivate a brand that will outperform the top of the ticket in 2024.
 - Most of these are suburban neighborhoods in California and New York outside of major metro areas. They disproportionately care about two things: the State and Local Tax deduction (SALT) and crime.
 - Double-digit numbers of Republicans face an existential incentive to buck their leadership on items that could make it difficult for Speaker Kevin McCarthy (R-CA) to get to 218 on broader deficit reduction and a 2025 tax agenda.
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