JUDGES AND THE REGULATORY STATE: TRENDS OF RESISTANCE AND RESTRAINT

LUKE P. NORRIS*

I
INTRODUCTION

The last great confrontation between courts and the regulatory state occurred at the turn of the previous century. As courts in the first decades of the twentieth century resisted regulatory laws designed to protect workers and curb market excesses, they sustained broad legal and public critique, including claims that they were guardians of corporate power and monied and propertied interests.[1] The showdown, as is familiar fare, was seemingly resolved in the New Deal, with the Supreme Court and judiciary largely accepting the constitutionality of federal and state regulatory laws.[2] The compromise that emerged, dubbed the "New Deal settlement," ostensibly called for judicial restraint in the regulatory realm, even as courts were more active in enforcing civil rights.[3]

Today, judges are once again at the center of battles over the regulatory state.[4]

This Article is also available online at http://lcp.law.duke.edu/

* Professor of Law, University of Richmond School of Law. For helpful feedback and comments, I thank Bruce Green, Leslie Levin, Andrew Hammond, Skye Jackson, Injee Hong, Brandon Avers, the excellent editors at *Law & Contemporary* Problems, and participants in the *Law & Contemporary Problems* Symposium workshop at Fordham Law School.

1. *See, e.g.*, EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 11–38 (2000) (overviewing progressive efforts to regulate the economy, judicial resistance, and the growing critique of courts). For an in-depth overview of the contest between courts and labor, see generally WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

2. For a recent account of the showdown between FDR and the Court, emphasizing the political acumen reflected in FDR's court-packing effort, see generally LAURA KALMAN, FDR'S GAMBIT: THE COURT-PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM (2022). *See also* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 105–31 (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS pt. III (1998) (describing the New Deal transformation as a "constitutional moment").

3. *See, e.g.*, Laura Weinrib, *Breaking the Cycle: Rot and Recrudescence in American Constitutional History*, 101 B.U. L. REV. 1857, 1866 (2021) ("Many embrace the so-called New Deal settlement, commonly associated with footnote four of *United States v. Carolene Products Co.*, which calls for deference to legislators and administrators on social and economic issues coupled with judicial enforcement of minority rights and judicial policing of the integrity of the political process.").

4. In this article, I refer to the "regulatory state" to encompass the efforts of legislators and other

Judges have erected barriers to public and private enforcement of regulatory law, undermined the rights of workers and consumers, cabined Congress' ability to design regulatory rights of action, and undercut agency rulemaking and governance.[5] In the administrative realm, the Supreme Court this past Term undid the Biden Administration's student-debt relief plan under its evolving "major questions" doctrine[6] and this Term upended forty years of strong judicial deference to agency interpretation of ambiguous statutes by overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[7] For these actions and others, the Court has placed itself at the center of a growing dialogue over judicial power and the regulatory state—encompassing scholars, social movements, lawyers, and journalists. Scholars have argued that the Court is "imperial"[8] and engaged in a "new judicial power grab."[9] A series of commentators have described the Court as a force facilitating rising plutocratic conditions,[10] oligarchic drift,[11] and democratic erosion.[12] Others have explored how its decisions entrench the power of corporate and monied interests and cement economic inequality.[13] These critiques at times echo those of the past century. In the *New York Times*, for example, columnist Jamelle Bouie has written, "It is difficult to overstate the hostility of the Roberts court to organized labor and the rights of American workers" and that what "must be emphasized is how, with its war on workers, the Roberts court is only acting in the Supreme Court's historical capacity as an agent of capital."[14]

---

democratic actors to regulate various aspects of economic and social life, principally through legislation, with particular emphasis on judicial and administrative enforcement of regulatory policy. The challenges to the regulatory state that I identify often rise or fall based on different arguments—some constitutional, others matters of ordinary statutory interpretation—but are part of a broader challenge to the regulatory state's functioning today. *See infra* Part II.

5. *See infra* notes 43–62 and accompanying text.

6. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373–75 (2023); Blake Emerson, *Administrative Answers to 'Major Questions': On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2018, 2022 (2021) ("[I]n a series of cases in the past three decades, the Supreme Court has held that where a statutory ambiguity raises a question of great 'economic and political significance,' it will presume that Congress did *not* intend the agency to resolve the issue.").

7. *See* Loper Bright Enterprises v. Raimondo, 603 U.S. _ (2024).

8. *See generally* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

9. *See generally* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. (2023).

10. *E.g.*, RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS (2016).

11. *E.g.*, Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse,* 122 MICH. L. REV. (forthcoming Oct. 2023).

12. *See* Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right in Vacuo? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 BUFF. L. REV. 523, 584–610 (2022) (exploring how shifts in standing doctrine are contributing to democratic erosion); Hershkoff & Norris, *supra* note 11, at 45–49 (exploring how shifts in jurisdictional doctrine are contributing to democratic erosion).

13. *E.g.*, ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA (2020); Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 3 UTAH. L. REV 389 (2014).

14. Jamelle Bouie, *There Is One Group the Roberts Court Really Doesn't Like*, N.Y. TIMES (June 6,

One might draw the conclusion from these critiques that we are witnessing a twenty-first century redux of last century's struggles, with judges once again putting themselves at odds with the regulatory state and drawing public ire—and facing a mounting lack of confidence—for their efforts. There are, to be sure, throughlines, and part of this Article's endeavor is to trace them. But, to understand the judicial shifts today, to grasp the problems they pose for the judiciary and the public, and to reason about how they might be addressed, it is important to situate and distinguish these shifts and to understand the movements, actors, and forces that have produced the modern and increasingly muscular judicial resistance to the regulatory state.

This Article focuses on judges, the regulatory order, and crisis—this century and at the turn of the last. Judicial resistance to the regulatory state in the previous era was in part a product of judges extending and interpreting the classical liberal commitments of the extant legal and political order.[15] In the first decades of the twentieth century, lawmakers were engaged in a form of state-building and policy innovation that sought to shift and develop the nation's longstanding administrative and regulatory infrastructure to meet the challenges of a sprawling, industrializing society.[16] Judges overturning or weakening regulatory interventions could draw on then-prevalent classical liberal commitments in their decision-making in that context, even if their arguments were often strained and their efforts to cement the power of growing business enterprises were at times scarcely hidden. Their moves, put otherwise, drew from the animating logics of the prevailing order.

But the New Deal ushered in a new political order—what William Novak has called a "new American democratic state"—defined by its commitment to social and economic legislation, administrative implementation, and affirmative governmental duties vis-à-vis the marketplace.[17] Thus, modern judicial resistance to the regulatory state would have origins that posed it against the newly-prevailing order, New Deal liberalism. And the New Deal settlement, with judges no longer overturning regulatory statutes and excising them altogether, meant that judicial resistance to the regulatory state would take a new form, moving from a combination of direct and collateral attack to principally collateral attack.[18] Any regulatory law is only as good as its enforcement apparatus, and judges resistant to the regulatory state turned from overturning regulatory laws to undermining the possibility of their enforcement and implementation, whether

2023), https://www.nytimes.com/2023/06/06/opinion/roberts-court-glacier-labor-workers.html [https://perma.cc/J6SH-DYLV].

15. *See infra* Part II.

16. *See, e.g.*, WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (exploring America's long history of regulation).

17. *See* WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 25 (2022).

18. This is not to say that judges then did not also utilize methods of collateral attack. *See, e.g.*, PURCELL, *supra* note 1, at 15 (describing federal courts' common law and statutory decisions that Progressives believed undermined regulatory enforcement).

in court or by agencies. And one can understand the turn to history and the Founding as an effort to return to older sources steeped in classical liberalism and away from the logic and modus operandi of the extant political order.

Judicial resistance to the regulatory state helped to turn the tides, slowly and incrementally, away from New Deal liberalism and towards neoliberalism. Where New Deal liberalism was characterized by faith in government and its ability to correct the excesses of markets, neoliberalism has been characterized by faith in market arrangements and skepticism about governmental "intervention."[19] Neoliberalism began to take hold in the 1970s in the United States and it has been characterized in the policy sphere by efforts to "roll back" the social and economic policies of the New Deal and Great Society and "roll out" policies that augment existing forms of market power.[20] Legal scholars, myself included, have explored how law and judging belong in the larger story of the neoliberal turn.[21] Part of my claim in this Article is that modern judicial resistance to the regulatory state is both part of and reflects the rise of neoliberalism and its role as the economic expression of core parts of the conservative legal movement as it developed in the 1980s and after. My claim is not that neoliberalism is a project of the conservative legal movement alone, nor that judges with conservative bona fides alone are the sole forces behind judicial regulatory resistance today. It is, instead, that to understand these shifts in judging and judicial orientation, it is valuable to understand as one piece of the puzzle the rise of the movement, its embrace of neoliberal ideas, and its nascent views about judging and the regulatory state.

Part of the Article's project is therefore to marry the literatures on the conservative legal movement and neoliberalism to give a fuller account of modern judicial resistance to the regulatory state today—its methods, context, and commitments.[22] The resistance is less direct, with judges largely keeping New Deal and Great Society policies intact, even as they collaterally undermine their vitality and, at times, possibility of functioning. This is the modern context that has defined judicial resistance to the regulatory state over the past half-century. None of this, of course, is to make a prediction about what the future may hold.

---

19. *See, e.g.*, GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA 2 (2022) ("The New Deal order was founded on the conviction that capitalism left to its own devices spelled economic disaster. It had to be managed by a strong central state able to govern the economic system in the public interest. The neoliberal order, by contrast, was grounded in the belief that market forces had to be liberated from government regulatory controls that were stymieing growth, innovation, and freedom.").

20. *Id.* at 107–88; *see also* Samuel Aber, *Neoliberalism: An LPE Reading List and Introduction*, LPE PROJECT 1–2, https://lpeproject.org/wp-content/uploads/2020/07/Neoliberalism-Primer.pdf [https://perma.cc/RY5J-YF6K], (describing how neoliberalism was committed to projects of both "roll back" of existing regulatory commitments and "roll out" of market-protective commitments).

21. *See infra* note 75 and accompanying text.

22. As this Article was going to press, Mehrsa Baradaran's book, *The Quiet Coup: Neoliberalism the Looting of America*, was published. While her focus is less on exclusively on regulatory retrenchment, Baradaran tells a sweeping story of neoliberalism centering the Federalist Society, law-and-economics, and methodologies like textualism and originalism, which I commend to readers. *See* MEHRSA BARADARAN, THE QUIET COUP: NEOLIBERALISM THE LOOTING OF AMERICA ch. 5 (2024).

On the one hand, with increasingly muscular moves, including Supreme Court justices not as deeply committed to stare decisis, further resistance may be on the horizon. On the other hand, some within the conservative legal movement are increasingly skeptical of corporate power and appear to be less opposed to the litigation state, with one scholar defending class actions as regulatory vehicles from the perspective of conservative thought.[23] This Article thus offers an account of the economic ideology of core parts of the conservative legal movement but does not speculate about its future.

To tell the story of modern judicial resistance to the regulatory state, this Article engages with the work of historians and political scientists on neoliberalism as well as with historical work on the rise of the conservative legal movement. The Article also reflects on how this increasing trend of judicial resistance is producing a mounting crisis that justifies reform. Part of the crisis is one of public opinion, as the Supreme Court and federal courts are increasingly being seen again as guardians of economic power. And part of the crisis is one of democracy; indeed, even where decisions fly under the radar, they undermine the regulatory state, possibilities of democratic governance, and the vitality of coordinate branches and state regulatory power. While many of this symposium's pieces helpfully focus on internal reforms that would reshape judging, this Article argues that the trend of judicial resistance to the regulatory state augments the set of reasons for considering power-shifting reforms that would shrink or delimit the judiciary's influence in regulatory governance. And it considers how judicial resistance itself might be resisted, both by social movements and scholars, reasoning about the role that increased attention by legal scholars to questions of political economy might play in stemming the tide of judicial resistance to the regulatory state.

II

NEW DEAL REDUX? COURTS AND THE REGULATORY STATE—THEN AND NOW

Every law student is familiar with the judicial resistance to the burgeoning regulatory order that developed in the Progressive Era and continued in its strongest form into the first days of the New Deal. Directly undermining the evolving regulatory state, the Supreme Court and federal courts struck down a variety of enactments, including workplace wage and hour laws and those prohibiting employers from banning union membership, while using injunctions and creative procedure to thwart worker associational power.[24] The federal

23. *See* Ian Millhiser, *The Federalist Society's Newest Wnemy: Corporate America*, VOX (Nov. 18, 2021) (describing Federalist Society critiques of growing corporate power); BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019) (defending the class action as a form of private enforcement of law that should be embraced by conservatives).

24. *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating a New York hour limitation law); Adair v. United States, 208 U.S. 161, 179–80 (1908) (invalidating a federal law banning railroads

courts were then increasingly viewed as being friendly to corporate parties seeking to cast off the shackles of regulation as the Republican Party sought to cement the power of the judiciary as a guardian of economic liberty.[25] At the time, the Republican Party had developed a focus on economic nationalism, a "preoccupation with the defense of property' and 'economic respectability' for large-scale enterprise[s]."[26] The Party saw the federal courts as hospitable fora for their project, seeking through jurisdictional statutes to "redirect civil litigation involving national commercial interests out of state courts and into the federal judiciary,"[27] believing that the federal courts were "'forums of order' for national commercial interests."[28] Through the regime ushered in by *Swift v. Tyson*,[29] judges were able to develop a "general" and "commercial" common law that was solicitous to corporate interests and, as Edward A. Purcell, Jr. has shown, in doing so, were able to undermine regulatory regimes protecting workers and consumers.[30]

Judges during this period both labored in and interpretively extended a field of classical liberalism. Classical liberalism acoustically separates the public from the private, the state from the market, and sees a minimalistic role for the state in policing marketplace arrangements—limited to projects like protecting property rights and enforcing contracts.[31] By the turn of the twentieth century, classical liberal views underlaid judge-made common law and constitutional doctrine, creating "an elegant formal system" to which traditionalist judges adhered as they viewed certain regulatory statutes as illegitimate interventions into a natural sphere of exchange.[32] A generation of progressive thinkers at the time—including the architects of what has been called the "first law and economics movement"[33]—rebutted this laissez-faire thinking.[34] These legal

demanding workers not join a labor union as a condition of employment); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 468, 482–506 (2017) (describing labor injunctions and the historical struggles around them).

25. *See* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 517 (2002) (describing how Republicans sought to staff the courts "with judges who were ideologically sympathetic to" their economic nationalist mission).

26. *Id.* at 516.

27. *Id.* at 517.

28. *Id.* at 518.

29. 41 U.S. 1 (1842).

30. *See* PURCELL, *supra* note 1, at 51–63 (discussing how *Swift v. Tyson* contributed to undermining regulatory and worker-protection laws).

31. For a discussion of the classical liberalism of the era and how it influenced judging, *see* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 146–48 (2022). For a fuller exploration of classical legal thought, *see generally* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (1975).

32. FISHKIN & FORBATH, *supra* note 31, at 147.

33. Herbert J. Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993, 994 (1990).

34. *See* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE

scholars showed how the state, not the "natural laws of economics,"[35] was ineluctably involved in creating the legal rules of the marketplace and how market ordering was not always a hypothesized sphere of free exchange but one involving elements of constraint, power, and inequality.[36] These scholars helped to frame the thinking of law students and New Deal lawyers by showing how judges steeped in classical liberalism ignored enduring patterns of regulation and state intervention. And they provided intellectual architecture for the rise of what Novak has called "the creation of the modern American state," where "[n]ineteenth-century traditions of local self-government and associative citizenship" were increasingly "replaced by a modern approach to positive statecraft, social legislation, economic regulation, and public administration."[37]

As classical liberalism ceded to New Deal liberalism, with the judiciary relenting after a fierce constitutional battle, the terrain shifted. In the New Deal settlement, the judiciary assumed a posture of largely accepting the constitutionality of social and economic legislation and applying heightened scrutiny to laws that had effects on particular groups, famously focusing on "discrete and insular minorities."[38] Those opposed to the evolving regulatory order, however, had hardly given up. Indeed, the effort to undermine the New Deal began just after it was won.[39] Judges, for example, have a long tradition of interpreting the National Labor Relations Act in anemic ways that undermine the associational aims of workers, and this is one area, among others, where the enduringly complicated relationship between judges and the regulatory state is evident.[40]

The magnitude of judicial resistance today, however, has a different character than it did in the first decades after the New Deal was won and its imperfect achievements were further developed, once again imperfectly, with the Great Society enactments.[41] The settlement did some work in the judiciary in the first decades after the New Deal, in part as the rise of legal liberalism—with its focus on process values and neutrality—shifted attention away from questions of economic distribution and power and towards issues of civil rights, political

AND THE FIRST LAW AND ECONOMICS MOVEMENT (1999) (using Robert Hale's work as a focal point for understanding the progressive attack on laissez-faire in the 1880s through the 1930s).

35. Hovenkamp, *supra* note 33, at 1022.

36. *See id.* at 993–1000 (exploring how legal economists reshaped thinking about the state, law, and markets).

37. NOVAK, *supra* note 17, at 1.

38. *See supra* notes 2–3 and accompanying text; U.S. v. Carolene Prods., 304 US 144, 155 n.4 (1938).

39. *See, e.g.*, Jeremy K. Kessler, *The Political Economy of "Constitutional Political Economy"*, 94 TEX. L. REV. 1527, 1548–53 (2016) (describing the conservative attack on the New Deal order in the late 1930s and through the 1950s).

40. *E.g.*, Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modem. Legal Consciousness: 1937-1941*, 62 MINN. L REV. 265 (1978).

41. For an exploration of how the Great Society built upon and extended New Deal foundations, *see* BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION (2018).

equality, and procedural fairness.[42] The rise of communism also did work, as even the American Bar Association, then more conservative, came to embrace access-to-justice and private legal aid, in part as a way of resisting the socialization of legal work.[43]

But beginning in the 1970s and through the present, there has been a pronounced shift, with judges—perhaps most prominently, Republican-appointed judges, but hardly them alone—undermining the regulatory state in increasingly muscular ways.[44] Their methods have been largely collateral, undermining the regulatory state by undercutting the possibility of robust implementation and enforcement. While a full accounting is beyond the parameters of this Article, various areas and examples exemplify this shift:

- *Private judicial enforcement.* The U.S. regulatory system distinctively relies on private citizens—often referred to as private enforcers—to enforce a bevy of regulatory laws, and as Stephen B. Burbank and Sean Farhang show in *Rights and Retrenchment*: *The Counterrevolution Against Federal Litigation*, judges have reinterpreted longstanding procedural rules, statutes, and the Constitution to "retrench" private litigation as a mechanism of regulatory enforcement.[45] Whether the example is the shift towards more stringent pleading standards in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, the Court's reinterpretation of the Federal Arbitration Act to facilitate corporate efforts to move disputes out of courts and into private fora, or the Court's unfriendliness to aggregate litigation, the Supreme Court and likeminded lower court judges have made it increasingly difficult for private enforcers to shoulder regulatory work and enforce their rights.[46] And, of a piece with the Court's piecemeal dismantling of workers' rights, it has also

42. *See, e.g.*, STEVEN M. TELES, THE RISE OF THE CONVERSATIVE LEGAL MOVEMENT: THE BATTLE FOR THE CONTROL OF LAW ch. 2 (2008) (describing the rise and commitments of legal liberalism).

43. *Id.* at 28–33.

44. For an account of how Democrats also shaped the judiciary by appointing almost exclusively prosecutors and corporate lawyers, with pro-employer effects in decisions, *see generally* Joanna Shepherd, *Jobs, Judges, and Justice: The Relationship between Professional Diversity and Judicial Decisions*, DEMAND JUSTICE, https://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf [https://perma.cc/MQL5-SU6B].

45. *See generally* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS & RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017). Some examples of the voluminous literature describing private enforcement as a regulatory tool include THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE US (Lynda Dodd, ed., 2014); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2011); David L. Noll & Luke P. Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1642, 1654–59 (2023); Luke Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1505 (2022).

46. *See, e.g.*, Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471, 484–503 (2022) (describing the Court's restrictive pleading and arbitration decisions and their neoliberal character).

constricted the ability of workers to band together and litigate.[47]

- *Public judicial enforcement.* As Helen Hershkoff and I show in *The Beleaguered Sovereign*, the Supreme Court and likeminded lower court judges have also made it more difficult for government lawyers—whether with the Department of Justice, Federal Trade Commission, Department of Labor, or other agencies—to bring and maintain suits enforcing regulatory law.[48] Judges have narrowed the government's standing, the scope of its statutory interests, its ability to intervene in litigation, and have increasingly dismissed the government's complaints under the plausibility pleading framework.[49]
- *Agencies.* Furthering and accelerating a trend of "contemporary anti-administrativism" encompassing an effort to undermine the administrative state while retaining a strong unitary executive,[50] the Court and lower courts have overturned agency regulations under the major questions doctrine,[51] invalidated for-cause removal protections for administrators (limiting Congress's power to fashion administrative structures),[52] invalidated statutory schemes under the non-delegation doctrine,[53] limited agency remedies,[54] and found health and workplace safety standards to be outside of OSHA's statutory mandate.[55] And the Supreme Court just this Term upended *Chevron* deference[56] and undercut the ability of the Securities and Exchange Commission to bring in-house enforcement actions seeking civil penalties.[57]

---

47. *See* Epic Systems Corp. v. Lewis, 584 U.S. 497, 503 (2017).

48. *See* Helen Hershkoff & Luke P. Norris, *The Beleaguered Sovereign*, 103 TEX. L. REV. _ (forthcoming 2025) (manuscript on file with author).

49. *See id* at 16–31.

50. Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017).

51. *See* Biden v. Nebraska, 143 S. Ct. 2355 (2023) (striking down the Biden Administration's student debt relief plan under the major questions doctrine); West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022) (striking down the EPA's 2015 Clean Power Plan on the theory that the agency lacked clear congressional authorization to adopt the plan).

52. *See* Free Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477 (2010) (holding that the dual for-cause limitations on the removal of board members contravene the Constitution's doctrine of separation of powers).

53. *See* Department of Transportation v. Ass'n of American Railroads, 721 F.3d 666 (D.C. Cir. 2013), *vacated and remanded*, 135 S. Ct. 1225 (2015), *aff'd on reh'g*, 821 F.3d 19 (D.C. Cir. 2016) (invalidating statutory scheme in the rail service context on the theory that it contained a delegation of regulatory power to private parties).

54. *See, e.g.*, AMG Capital Management LLC v. Federal Trade Commission, 593 U.S. 67 (2021) (finding that the Federal Trade Commission Act does not vest the Federal Trade Commission with the power to seek equitable monetary relief, including disgorgement and restitution).

55. *See* National Federation of Independent Business v. Dep't of Labor, Occupational Safety and Health Administration, 595 U.S. 109 (per curiam) (2022) (striking down OSHA's authority to demand Covid-19 vaccinations for individuals who work for employers with over 100 employees).

56. Loper Bright Enterprises, 603 U.S. _ (2024).

57. SEC v. Jarkesy, 603 U.S. _ (2024)

- *States.* The Court has interfered with the States' abilities to regulate and protect their publics in various ways—including by preempting state legislation and doctrine designed to protect workers and consumers,[58] limiting the ability and interests of States to pursue *parens patriae* actions,[59] and limiting their ability to regulate public health, schools, and safety.[60]
- *Congress.* The Court has hamstrung Congress in its ability to create new regulatory rights of action,[61] create campaign finance restrictions to protect democracy from excessive economic power and to ensure legislative responsiveness,[62] design effective agency structures,[63] and enforce the Fourteenth Amendment, among other examples.[64]

The picture that emerges from these developments of the past several decades is one of the Supreme Court and some lower court judges collaterally undermining regulatory governance by hamstringing core actors in the regulatory system as they seek to perform their functions. These developments in turn impact the ability of the regulatory state to function effectively. To understand this recent trend of judicial resistance to the regulatory state, it is useful to first understand the formative years and economic aims of a core part of the modern conservative legal movement.

III

ROOTS OF JUDICIAL REGULATORY RESISTANCE TODAY

Political scientist Steven Teles' book, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*, provides a useful starting point for understanding the origins and dynamics of judicial resistance to the regulatory state today.[65] The book explores the conservative legal movement's roots in resistance to the New Deal legal and regulatory order.[66] The order was

58. *See e.g.*, Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1924–25 (2022); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231, 238–39 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343–44 (2011); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616, 624–25, 640 (1985) (all highlighting how preemption is especially prevalent in state efforts to regulate worker and consumer arbitration).

59. *See, e.g.*, Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972) (concluding that Hawaii could not bring a parens patriae suit under the Clayton Act to protect its economy and citizens and damage to its economy but could only sue to vindicate the state's own commercial, pecuniary interests).

60. For an overview of these efforts, *see* Lemley, *supra* note 8, at 109.

61. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205–12 (2021) (concluding that the harms Congress creates rights to remedy must have close historical or common-law analogues).

62. A recent example is *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022), in which the Court found that candidates possess a First Amendment right to loan their campaigns unlimited amounts of money.

63. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2143, 2192 (2020) (concluding that the Consumer Financial Protection Bureau's leadership structure violated separation of powers).

64. For an overview of these trends and others, see Lemley, *supra* note 8, at 102–103.

65. *See generally* TELES, *supra* note 42.

66. *See id*. at 6–9 (describing the roots of the movement in its resistance to the legal liberalism that emerged from the New Deal order).

characterized by policy commitments to reining in the excesses of capitalism through governmental regulation and by its integration of those policy aims into legal culture—into a system of legal liberalism that embedded lawyers into a "support structure" implementing those policy commitments.[67] The conservative legal movement, as it evolved in the past half-century, was in significant respects a counter-response to legal liberalism, on both constitutional and policy grounds. While the movement had many commitments—not all shared by all of its members—its orientation towards the regulatory state was shaped by resistance to the growing administrative and judicial regulatory ecosystem and a desire to trim it or undo it—a desire shared by business interests willing to fund the movement.[68]

Conservative opposition to a robust regulatory state has longstanding roots, but it was channeled in particular ways in the legal context. Teles shows how the architects of the modern conservative legal movement understood that they needed a "parallel set of elite organizations"[69] to those that supported legal liberalism, including ones that could shape law students and legal discourse, influencing the kinds of arguments that would move from being "off the wall" to "on the wall" in courts.[70] With a locus in the Federalist Society, the movement sought to build an "alternate governing coalition," along with a network of conservative entrepreneurs and patrons to support the coalition.[71]

For Teles, the movement's focus on legal education was a core component of its success.[72] Part of the reason is institutional. Because courts have less agenda control than legislators do, litigants matter, and legal education produces ideas and approaches that shape the careers and trajectory of lawyers and, ultimately, the menu of options placed before judges.[73] As the "dominant forces in training successive generations of lawyers," law schools can influence which ideas are legitimate and model what a lawyerly career might entail, and the ideas expressed in law schools can create "oppositional consciousness" to extant legal commitments.[74] The Federalist Society helped to denaturalize for a generation of conservative and libertarian students the inherited ideas and norms of legal

67. *Id.* at 12 (describing the importance of support structures to movements); *id.* at ch. 2 (describing the legal support structure that legal liberalism provided for New Deal and Great Society policies).

68. *Id.* at 2–5.

69. *Id.* at 6.

70. *See, e.g.*, Jack M. Balkin, *The Framework Model and Constitutional Interpretation*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 8–11 (David Dyzenhaus & Malcom Thorburn, eds., 2016) (describing process where positions move from "off the wall" to "on the wall" and where "[n]orm entrepreneurs—including legal intellectuals, social and political movements, politicians, and political parties—can work assiduously to shift the boundaries of the reasonable and the unreasonable.").

71. TELES, *supra* note 42, at 17.

72. *See* TELES, *supra* note 42, at 12–18.

73. *See* TELES, *supra* note 42, at 12–13 ("[G]roups with disproportionate control of the institutions that produce and legitimate legal ideas . . . will enjoy a significant advantage in persuading judges and other significant legal actors that their demands are reasonable and appropriate.").

74. *Id.; see also id.* at 17–18.

liberalism—including its faith in government intervention and legal and administrative implementation of social and economic policy.[75] The Society cast into doubt New Deal liberalism and re-upped arguments about its constitutional bona fides. Today, there are Federalist Society chapters across the legal education landscape and the Federalist Society has played a critical role in shaping the judiciary, including the Supreme Court.[76]

Part of de-naturalizing New Deal legal liberalism entailed offering an alternative view of law and its aims vis-à-vis the market and state.[77] Teles stops short of defining that view, perhaps for good reason: his concern is with the conservative legal movement writ large, whereas my aim is to understand the sources of judicial resistance to the regulatory state that emerged out of the movement. But a core part of the view of law, judging, and the regulatory state that developed in conservative circles during the 1980s—and in some ways into the present—is best encompassed by the concept of neoliberalism.[78]

Neoliberalism is, among other things, a political creed that professes faith in markets and market arrangements, and that seeks to shift power back to market actors and away from regulatory commitments that constrain them.[79] Historian Gary Gerstle has recently chronicled the rise of neoliberalism as a "political order" in the United States, which in his view supplanted the New Deal order and has been "grounded in the belief that market forces had to be liberated from government regulatory controls that were stymieing growth, innovation, and freedom."[80] Neoliberal reforms were begun piecemeal by President Carter, who, torn between New Dealers and those favoring deregulation in his own administration, began a path of deregulation focused on the airlines, telecommunications, and trucking industries.[81] The Reagan, Bush I, Clinton, and

75. *See id.* chs. 4–6.

76. *See, e.g.*, Andy Kroll, Andrea Bernstein, & Ilya Marritz, *We Don't Talk About Leonard: The Man Behind the Right's Supreme Court Supermajority*, PROPUBLICA (Oct. 11, 2023, 5:00 AM), https://www.propublica.org/article/we-dont-talk-about-leonard-leo-supreme-court-supermajority [https://perma.cc/FA6V-AG3J].

77. *Id.*

78. For scholarly development of neoliberalism in the legal space, *see, e.g.*, Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25 (2014); Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS. 71 (2014); Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014); Amy Kapczynski, Intellectual Property's Leviathan, 77 LAW & CONTEMP. PROBS. 131 (2014); Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575 (2020); Tayyab Mahmud, *Debt and Discipline: Neoliberal Political Economy and the Working Classes*, 101 KY. L.J. 1 (2013); Norris, *supra* note 46; and Darren Botello-Samson, *The Neoliberal Erosion of Rights in Administrative Law*, 19 TEX. TECH ADMIN. L.J. 247 (2018).

79. *E.g.,* GERSTLE, *supra* note 19, at 2; *see also* Aber, *supra* note 20. For fuller historical accounts of neoliberalism, *see generally* WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (2015), ANDREW GLYN, CAPITALISM UNLEASHED: FINANCE, GLOBALIZATION AND WELFARE (2006), *and* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

80. GERSTLE, *supra* note 19, at 2.

81. *See id.* at 49–73.

Bush II Administrations embraced and accelerated neoliberal policies in the banking, labor, taxation, trade, budgetary, consumer protection, and welfare realms, among others.[82] Neoliberalism has also had wide breadth. Gerstle argues that neoliberal views about markets and freedom and juxtaposition of marketplace liberty with the constraining bureaucratic state were popularized by Ayn Rand,[83] facilitated in part by the "new Left" and its critiques of "the system,"[84] and migrated into the academy, most prominently at the economics department at the University of Chicago, where scholars re-upped laissez-faire thinking and reintegrated it into the academic mainstream.[85]

These ideas, too, came to shape significant parts of the conservative legal movement. While Gerstle focuses on the Olin Foundation as a funder of neoliberal causes from the 1970s onward and economics as a discipline,[86] Teles shows how the Olin Foundation funded law-and-economics institutes and scholars in law schools and shaped the conservative legal movement and Federalist Society, particularly in the 1980s and 1990s, with the Foundation seeing a natural alliance between its deregulatory aims and the pro-market and anti-statist views of some prominent law-and-economics scholars.[87] The Olin Foundation "saw in law and economics a powerful critique of state intervention in the economy, and a device for gaining a foothold in the world of elite law schools."[88] With a powerful base also at the University of Chicago, albeit at the law school, law-and-economics took off as a discipline that had strong roots in classical, free-market views and critiques of evolving regulatory policy—even if these were not the views shared by all law-and-economics scholars, then or now.[89] Teles explores how, through embracing law-and-economics, the conservative legal movement trained a generation of judges, shifted thought in law schools, and expressed and shaped the economic commitments of many members of the Federalist Society.[90] If the Federalist Society was the broad glue holding together the modern conservative legal movement, the neoclassical branch of law-and-economics provided much of the economic glue.

The conservative legal movement, through law-and-economics and the Federalist Society, integrated neoliberal economic ideas and commitments into

82. *See id.* at 121–205.

83. *Id.* at 100–02.

84. *Id.* at 8, 99–102.

85. *Id.* at 88–104.

86. *See id.* at 109–114.

87. *See* TELES, *supra* note 42, at 90.

88. *Id.*

89. *Id.* at 90–99. For accounts of how one of the modern founders of law and economics, Guido Calabresi, departed from the Chicago-school of thought, *see* NORMAN I. SILBER, *Ch. 8: Grasping and Education* and *Ch. 10: A Law Student at Mid-Century,* OUTSIDE IN: THE ORAL HISTORY OF GUIDO CALABRESI 161–208 and 221–60 (2023), *and* Karen Tani, *Guido Calabresi and the "Economic Style," The Law & Economics Education of Guido Calabresi*, LEGAL HISTORY BLOG (May 8, 2023), https://legalhistoryblog.blogspot.com/2023/05/guido-calabresi-and-economic-style-part.html [https://perma.cc/WT6F-8TWZ].

90. *See generally* TELES, *supra* note 42, chs. 4–6.

legal culture, creating an economic framework for legal mobilization resisting the political economy commitments of the New Deal order.[91] This is not to deny the real constitutional concerns that many members of the conservative legal movement have with the modern regulatory state. Nor is it to say that neoliberalism has been a project only of the right—a core part of Gerstle's thesis is that it has been a project of both major parties—or that it is an ideology linking all conservative lawyers.[92] A good number of lawyers who would not identify with the conservative legal movement have market-valorizing views. And Democratic judicial appointment choices have helped to shape the judiciary in a neoliberal direction, with appointments choices being slanted towards corporate lawyers and prosecutors and away from lawyers from the plaintiffs', labor, and civil rights bars—a trend that is letting up some in the Biden Administration.[93] The fuller story of legal liberals and the rise of neoliberalism is yet to be told. My aim is not to deny that part of the story but instead to reflect on the prominence and significance of the conservative legal movement in shaping lawyers and judges with strong pro-market and anti-regulatory views.

These lawyers and judges have, in turn, played significant roles in facilitating the regulatory resistance surveyed in Part II. As scholars are increasingly exploring, neoliberal ideas about the state and the market espoused by law-and-economics scholars and adopted by many members of the Federalist Society have been transported by judges—often, but not exclusively, those with strong ties to the conservative legal movement—into legal decision-making.[94] One can see, for example, judges assured of the way free markets function and skeptical of governmental regulation—and litigation as its instrument—in areas as diverse as civil procedure[95] and intellectual property.[96] And one can better appreciate the collateral judicial undermining of the regulatory state—with its procedural, administrative, and constitutional methods—by understanding how the conservative legal movement framed and shaped views within the legal profession about the problematic nature of the regulatory order and of law's role in facilitating it. None of this is to deny that judging is complex and that most judges operate in good faith in trying to resolve disputes fairly, striving to cast

91. *See* Angela P. Harris, *From Stonewall to the Suburbs?: Toward A Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1556 (2006) (discussing the neoliberal commitments of the Federalist Society); Keren, *supra* note 78, at 603 (situating the Federalist Society in a broader "Neoliberal Thought Collective"); Sida Liu, *Legal Elites and the Fading History of Global Legal Imperialism*, 48 LAW & SOC. INQUIRY 693, 695 (2023) ("[T]he rise of the Federalist Society in the 1980s not only remade the conservative legal establishment through new legal theories (e.g., originalism in constitutional law) but also contributed to the globalization of neoliberal ideology.").

92. *E.g.,* GERSTLE, *supra* note 19, at 1–3.

93. *See* Norris, *supra* note 46, at 516-18 (discussing these trends and their shaping of neoliberal civil procedure).

94. *See* sources cited *supra* note 78 and accompanying text.

95. *See generally* Norris, *supra* note 46; *see also* David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2510–13 (2021) (describing the neoliberalism of the federal procedural rules system).

96. *See generally* Kapczynski, *supra* note 78.

aside their policy views. But it would also be myopic to understand the modern judicial resistance to the regulatory state without understanding these broader shifts in the political and legal culture, including the conservative legal movement's anti-New Deal roots and its adoption of neoliberal views about markets, the state, and law.

IV

CRISIS AND REFORM

This Part considers what might be entailed in stemming the tide of judicial resistance to the regulatory state as part of a larger project of restoring faith in the judiciary. My effort, of course, is not to claim that every judicial decision that restricts regulatory enforcement litigation or administrative activity is problematic, but instead to respond to the deeper judicial resistance to the regulatory state and the growing and increasingly muscular trend of judges undermining longstanding regulatory commitments, regimes, and enforcement structures.

At the outset, there is a complicated question of whether the present judicial resistance to the regulatory state is producing a crisis. While public critique of the Court has perhaps not yet reached the peak that it did in the first years of the New Deal, there are growing signs of unrest and public dissatisfaction with the Court and the federal courts—indeed, increasing developments not unlike those that came into shape in the Progressive Era and lead-up to the New Deal constitutional crisis. Moreover, the trends surveyed in Part II also undermine democratic governance.

Begin with public confidence. Some of the Court's decisions, like *Citizens' United v. Federal Election Commission*,[97] with its opening of the doors to outsized political spending by the wealthy and corporate donors, have been opposed by strong supermajorities of the public.[98] And, more broadly, just as courts at the turn of the last century were critiqued as being protectors of economically powerful interests, so they are increasingly critiqued today, with the decisions surveyed in Part II in the vanguard. One reads today, as one would a century ago, that the Court "favors the rich and powerful,"[99] is fueled by and advances partisan and corporate interests,[100] and that the nation has reached a "crisis point" where "too often the federal courts have become a tool for carrying out the agendas of

97. 558 U.S. 310 (2010).

98. *See Dan Eggen, Poll: Large Majority Opposes Supreme Court Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010).

99. Adam Cohen, *How the Supreme Court Favors the Rich and Powerful*, TIME (Mar. 3, 2020, 7:00 AM), https://time.com/5793956/supreme-court-loves-rich/ [https://perma.cc/F7AV-5LAR].

100. *See, e.g.*, *Dark Money and the Courts: The Right-Wing Takeover of the Judiciary*, AM. CONST. SOC., https://www.acslaw.org/analysis/reports/dark-money/ [https://perma.cc/79ZP-R85F] (last visited on Mar. 1, 2024).

special interests and corporations."[101] Similarly, academic studies—also gleaning media attention[102]—show the slant of the Court's decisions, with one finding that "the Roberts Court will quite likely end its run as the most pro-business Court in history."[103]

Furthermore, the notion percolating that judges are biased towards powerful marketplace actors and against parties like workers and consumers can undermine faith in the judiciary and the rule of law, especially when combined with a series of journalistic accounts about justices socializing with regulated and wealthy parties, accepting private air travel and other benefits without disclosing them—a topic some of the other articles in this symposium consider.[104]

There is also a problem of democratic governance. Not all of the Court's decisions undermining the regulatory state produce public response; indeed, many are likely to fly under the radar. But the larger trend of judicial resistance to the regulatory state has troubling democratic implications, including separation-of-powers and federalism ones, which add to the onus for reform and could well lead to public confrontations between the branches that further erode public confidence in the courts. The modern regulatory state is a product of legislative design choices and longstanding institutional practices within the executive branch and the states, and often embodies a form of legislative constitutionalism, with legislators articulating affirmative commitments to equality, modern liberty, and social protection.[105] The decisions surveyed in Part II show the judicial branch increasingly encroaching on the legislative sphere, executive sphere, and the capacity of states to govern and protect their citizens and secure the general welfare—thus the notions of an "imperial" Court and "new judicial power grab."[106]

The Court's undermining of the regulatory state and democratic capacity—and its increasingly muscular moves elsewhere, epitomized by its overturning of

101. Sam Berge & Daniel Root, *Structural Reforms to the Federal Judiciary: Restoring Independence and Fairness to the Courts*, CTR. AM. PROGRESS (May 8, 2019), https://www.americanprogress.org/article/structural-reforms-federal-judiciary/ [https://perma.cc/K9TS-G9RU].

102. *See, e.g.*, Felix Salmon, *The Most Pro-business Supreme Court Ever,* AXIOS (Aug. 4, 2022), https://www.axios.com/2022/08/04/supreme-court-john-roberts-business [https://perma.cc/6PDW-B9HB].

103. Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920-2020*, 107 MINN. L. REV. HEADNOTES 49, 71 (2022).

104. *See, e.g.*, Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas Secretly Participated in Koch Network Donor Events*, PROPUBLICA (Sept. 22, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-secretly-attended-koch-brothers-donor-events-scotus [https://perma.cc/4EQ3-8UBD].

105. *See* FORBATH & FISHKIN, *supra* note 31, at 4–6 (explaining how constitutional political economy claims were often affirmative claims of legislative constitutionalism). *See generally* Luke Norris, The Workers' Constitution, 87 FORDHAM L. REV. 1459 (2019) (exploring core New Deal statutes through the lens of legislative constitutionalism geared around economic security).

106. *See supra* notes 8–9 and accompanying text.

reproductive rights precedents[107] and its gutting of the Voting Rights Act[108]—have made the topic of Court reform increasingly move from being "off the wall" to "on the wall."[109] Many of this symposium's fantastic contributions look at what one can think of as *internal reforms*—those that would have judges regulate themselves or comport themselves more professionally. But understanding the politics and trends of judicial resistance to regulatory governance provides further reasons to consider *power-shifting reforms*—those that would shift power away from courts or shrink their sphere of power.[110] My aim here is not to endorse any reform, but instead to explore the costs and benefits of some reforms that would be responsive to judicial resistance to the regulatory state and the mounting crisis of democracy it poses.

There is a long tradition of skepticism about the role of judges in regulatory governance—indeed, the idea weaves throughout the labor movement's history in this country.[111] The account provided above provides at least some support for continuing skepticism and for considering reforms that would center judges less in regulatory governance. One could imagine many such reforms. One would be to disrupt a comparatively distinctive feature of the U.S. regulatory system—the reliance on courts, in suits triggered by private citizens and government lawyers, to enforce and implement regulatory statutes—and shift enforcement power more exclusively to agencies.[112] If one thinks that agency administrators and

107. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

108. For an overview of the Court's treatment of the Voting Rights Act, *see* Myrna Pérez, *7 Years of Gutting Voting Rights*, BRENNAN CTR. FOR JUSTICE (June 25, 2022), https://www.brennancenter.org/our-work/analysis-opinion/7-years-gutting-voting-rights [https://perma.cc/2XLK-X6JV].

109. There is a large and growing literature on Court reform. *See, e.g.*, William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631 (2022); Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747 (2020); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021); Adam Chilton et al., *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1 (2021); Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV 2077 (forthcoming 2023); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021); Daniel Epps, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609 (2021); Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON PERSPECTIVES 119 (2021); Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 (2020); Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J. F. 93 (2019); Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018); Christopher J. Sprigman, *A Constitutional Weapon for Biden to Vanquish Trump's Army of Judges*, THE NEW REPUBLIC (Aug. 20, 2020), https://newrepublic.com/article/158992/biden-trump-supreme-court-2020-jurisdiction-stripping [https://perma.cc/3VZJ-9XCD].

110. *See* Moyn & Doerfler, *supra* note 106, at 1725–28 (discussing "disempowering" reforms and contrasting them with "personnel" reforms).

111. *See, e.g.*, Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1594 (2016) (describing judicial hostility to labor and ongoing labor movement skepticism of courts).

112. *See generally* Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, 123 MICH. L REV. _ (forthcoming 2025) (proposing to disempower courts as agents of statutory interpretation and implementation), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4787041 [https://perma.cc/4FH2-6AH7].

adjudicators are (or could be) overall less likely to undermine regulatory governance, this approach holds promise. One limitation this approach faces is the scope of reform it would require. Private enforcement judicial causes of action, for example, number at least in the hundreds at the federal level,[113] and conservatively number more than three thousand at the state level.[114] This does not account fully for the regulatory functions and implications of debt collection, housing and eviction, traffic, family law, and other laws at the state level.[115] Courts and judicial enforcement make up much of the tissue of the U.S. regulatory system, and excising courts would be incredibly difficult, requiring a comprehensive and broad rewiring of regulatory policy.

Other responses exist in the regulatory realm itself and involve Congress and state legislatures asserting their power to rein in the judiciary. Where the Court has not imposed constitutional limits, legislators can be more explicit about standing, provide incentives for suits, more clearly delineate agency authority—to avoid the invocation of the major questions doctrine—and potentially, as some scholars have suggested, strip the courts of jurisdiction to review certain statutes.[116] These responses hold the promise of legislative dynamism as a response to judicial overreach but face the obstacle that legislative bodies are not entirely responsive to the broader public and often are more responsive to powerful and monied interests.[117] The challenges also highlight the need for democratic mobilization and pressure—directed at legislatures but also courts themselves.[118]

One might also seek to develop a more progressive judiciary. The boldest iteration of this reform would be to cultivate and appoint "movement judges" to

113. *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 643–47 (2013) (describing the rise and prominence of federal private enforcement regimes).

114. *See* Zachary D. Clopton & David L. Noll, *Litigation States* (preliminary data on file with author) (finding more than 3,000 private rights of action in the states); Diego A. Zambrano, Neel Guha, Austin Peters, & Jeffrey Xia, *Private Enforcement in the States*, 172 U. PA. L. REV. 61, 62 (2023) (finding 3,500 private rights of action by conservative estimates through employing machine learning techniques).

115. *See, e.g.*, Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1185 (2022) (describing how state courts—including "those that hear family, housing, small claims, and debt collection cases"—hear ninety-eight percent of civil cases); Justin Weinstein-Tull, *Traffic Courts*, 112 CAL. L. REV. (forthcoming 2024) (developing a comprehensive study of traffic courts).

116. *See, e.g.*, Doerfler & Moyn, *supra* note 109, at 1725–28 (discussing jurisdiction-stripping as a "disempowering reform").

117. *See, e.g.*, Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1462–65 (2016) (presenting political science findings on the influence of money in politics and slanted political representation).

118. Today, there are various efforts of movements to organize in and around the lower courts. *See generally* JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION (2023) (describing how ordinary people are engaging in court watching and providing resources for those facing the criminal justice system); Amna A. Akbar, *Justice from Below: Affirmative Organizing in the Lower Courts*, N+1 (Fall 2023), https://www.nplusonemag.com/issue-46/politics/justice-from-below/ [https://perma.cc/F5PX-49G4] (describing collective efforts in the housing, immigration, and other legal spaces).

counter these trends of resistance. Drawing and building on the shift in legal scholarship towards envisioning "movement law,"[119] scholars have recently begun articulating the concept of a movement judge.[120] Movement law envisions scholars in dialogue and engagement with social movements,[121] and movement judging considers how judges affiliate with, intersect with, and further the goals of social movements.[122] As Robert L. Tsai and Mary Ziegler define it, a movement jurist is "someone who is socially embedded in movement-aligned networks outside of the legal system and is willing to use a judge's tools of the trade in the service of a movement's goal."[123] Brandon Hasbrouck makes an affirmative call for movement judges who grasp "that our Constitution contains the democracy-affirming tools we need to dismantle systems of oppression and to achieve true equality for all people"[124] and who "develop their democracy-affirming jurisprudence in solidarity with mass social movements."[125]

In this vein, one might call for judges to draw inspiration from and to seek to advance the aims of movements of workers, consumers, student debtors, and movements engaged in bargaining for the common good, in which community and union members partner to demand changes not only in the workplace but also work to produce structural changes in the wider community.[126] Indeed, in Hasbrouck's vision of movement judging, he offers labor as a liberationist movement whose goals movement judges might advance.[127] While bold and offering counterbalance, the approach of cultivating movement judges might be less palatable for those who are generally skeptical about courts and the possibilities of progressive judging, or for those who seek to separate judging from politics or are skeptical about movement judges for democratic or rule-of-law reasons, as are Tsai and Ziegler.[128]

Legal education might also play a role—particularly in the clinical space.

---

119. *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825–26 (2021) (discussing movement law as investigation and analysis with social movements).

120. *See generally* Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631 (2022); Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149 (2024); *see also* Daniel Farbman, *Judicial Solidarity?*, 33 YALE J.L. & HUM. 1, 4 (2022) (articulating a vision of adjudication in which "judges in particular can be participants, allies, and fellow travelers in movements demanding fundamental changes to the legal order").

121. *See* Akbar, Ashar, & Simonson, *supra* note 119, at 826 ("Movement lawyering aims to create space within public-interest practice to work with movements to build grassroots power. In contrast, our focus is on creating space within legal scholarship to think alongside social movements.").

122. *See* Hasbrouck, *supra* note 120, at 636 (exploring how movement judges "are receptive to the arguments of movement lawyering" and of social movements).

123. Tsai & Ziegler, *supra* note 120, draft at 2159.

124. Hasbrouck, *supra* note 120, at 633.

125. *Id.* at 669.

126. *See, e.g.*, Randi Weingarten, *Bargaining for the Common Good: How Unions and Labor Contracts Create A Better Life for All*, 43 BERKELEY J. EMP. & LAB. L. 241 (2022) (exploring the concept of bargaining for the common good).

127. Hasbrouck, *supra* note 120, at 656–67.

128. *See* Tsai & Ziegler, *supra* note 120, at 2218–30 (articulating a series of democratic and institutional concerns about movement judging).

Sameer Ashar has argued, for example, that every law student and lawyer should "learn to work with groups of relatively powerless people against the social and economic forces that they confront in their everyday lives."[129] Clinical training in the housing, consumer protection, and workers' rights areas, among others, can help future lawyers and judges to understand the struggles that ordinary people face. Doing that work might help future lawyers to see how judicial efforts to undermine regulatory laws protecting these parties have real-world effects and connect to and threaten broader values.

Legal education and scholarship, too, might play a role in unsettling the intellectual foundations underlying modern judicial resistance to the regulatory state. I explored above how actors within the Federalist Society understood legal education to be an important site for shaping lawyers and judges who could shift the legal system and challenge the New Deal regulatory order.[130] I also explored how some lawyers coming up during the early twentieth century had a more acute view of the contest surrounding judges who resisted the burgeoning regulatory state and a different understanding of the relationship of law to regulatory ordering.[131]

These two moments reveal both the power of legal education and the once-prominence of a view about law and markets that might counterbalance the view offered by strands of the conservative legal movement. There have, to be sure, been strong strands in legal education—including feminist and critical scholars—countering these views.[132] At the same time, much of the left-of-center has been defined by a commitment to a form of legal liberalism that has obscured earlier views about and justifications for regulatory governance.[133] Scholars have shown how legal liberals defended New Deal policy commitments while forgetting the political economy logic and views about law and markets that sustained them,[134] and how much of legal education moved away from these roots and towards embracing ideas of efficiency and wealth-maximization and minimizing questions

129. Sameer M. Ashar et al., *The Futures of Law, Lawyers, and Law Schools: A Dialogue*, U. PITT. L. REV. 1, 18–19 (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4555503 [https://perma.cc/5A8P-CPCZ].

130. *Supra* notes 72-76 and accompanying text.

131. *Supra* notes 31-37 and accompanying text.

132. For a summary of core aspects of critical and feminist thought and their relationship to the study of political economy today, *see generally* Bernard E. Harcourt, *Critical Legal Theory & Radical Political Practice,* LPE PROJECT (Oct. 19, 2023), https://lpeproject.org/blog/critical-legal-theory-radical-political-praxis [https://perma.cc/9LBE-A3DP].

133. Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1814 (2020); *see also* PURCELL, *supra* note 1, at 196–97 (describing how postwar socio-political changes shifted emphasis away from the Progressives' views of corporate power and focus on economic inequality).

134. Purcell's landmark account of *Erie Railroad v. Tompkins* shows how the case was shaped by a debate over courts, economic power, and corporate control, only to become a decision driven by neutral process values "unrelated to either social issues or problems of economic inequality." PURCELL, *supra* note 1, at 247.

of market power and inequality.[135] As many legal liberals came to assume that market baselines were generally good and diminished earlier political economy views in legal thought, it made it easier for neoliberalism—with its valorizing and naturalizing views about markets—to crop up and shape the legal profession.[136]

Today, a countervailing framework is emerging—one that might play a role in producing a generation of lawyers and judges who understand differently both the regulatory state and judging within it. A burgeoning group of scholars, among whom I count myself, are developing a "law and political economy" (LPE) framework, and law students have also been starting LPE chapters across the country, developing wide-ranging programming.[137] LPE scholars write in part as a counter-response to the rise of neoliberalism and its market-naturalizing and anti-statist views, and they strive to make the universe of thought in law schools about democracy and markets more complex, providing a counterweight to the views that have sustained the current era of resistance to the regulatory state.

LPE has roots in and connections to legal realism, as well as to critical and feminist theory,[138] and it also has deep roots in—and in some ways, promises a return to—the views of political economy that populated law schools at the turn of the last century.[139] Under conditions of mounting economic inequality and insecurity, LPE scholars in part call attention to those earlier political economy struggles—where issues of power, inequality, and distribution were central to legal analysis and discourse—and chart a shift away, as neoclassical views and a focus on neutrality and process values supplanted political economy.[140] LPE scholars seek to enrich understanding of how power works in markets—including by de-naturalizing them and showing how state power constructs market arrangements and providing attention to the ways in which economic and political power are "inextricably intertwined with racialized and gendered inequity and subordination."[141] And LPE scholars conceive of the project of democracy as reshaping economic arrangements in line with public values, and work to provide richer accounts of the democratic and egalitarian foundations

135. *See* Britton-Purdy et al., *supra* note 133, at 1789–91 (describing this shift as the "Twentieth-Century Synthesis").

136. For a discussion of the relationship between neutrality and neoliberalism in the procedural context, *see* Luke P. Norris, *Procedural Political Economy*, 66 WM. & MARY L. REV., draft at 8–9, 42–45 (forthcoming 2025) (manuscript on file with author).

137. For a foundational piece, *see generally* Britton-Purdy et al., *supra* note 133. Various writings analyzing law from a political economy perspective can be found on LPE BLOG, www.lpeproject.org/blog/[https://perma.cc/V4VG-ZGNM]. A list of student groups can be found at https://lpeproject.org/engage/ [https://perma.cc/ZNQ3-WB6Q].

138. *See supra* note 133 and accompanying text.

139. *See* Britton-Purdy et al., *supra* note 133, at 1793, 1823 (discussing LPE's relationship to other theories).

140. *See, e.g.*, Britton-Purdy et al., *supra* note 133, at 1792 (articulating a view of political economy connected to earlier legal realist struggles and describing the shift away from it). *See also* FISHKIN & FORBATH, *supra* note 31, at 349–86 (describing a "Great Forgetting" of the constitutional political economy tradition as economics and economic-style thinking came to prevail in law and policy circles).

141. Britton-Purdy et al., *supra* note 133, at 1792.

and functions of the regulatory state.[142]

LPE work might fulfill a few functions in stemming the tide of judicial resistance to the regulatory state. A basic function would be to illuminate the history of judges and the regulatory state as part of a larger project of shining light on neoliberalism and regulatory resistance. By making future lawyers and judges more keenly aware of the politics and struggle surrounding judges and regulatory governance, LPE work might also engender skepticism about the forays of muscular courts, producing more cautious jurists. In this way, the history of judges and the regulatory state can tame as much as it can teach. Another function would be to provide lawyers with exposure to different views about markets, law, and judging—perhaps creating oppositional consciousness to neoliberal views[143] and shaping lawyers and judges who might better understand and seek to facilitate, rather than thwart, the effectuation of regulatory commitments.[144] LPE as a project might, through doing so, shape demands for shifting power away from courts or prompt a reimagining of courts as engines of democratic-regulatory governance. It can also encourage critical thinking about the comparative roles of courts, agencies, and other sites of regulatory governance, producing lawyers who can think nimbly and critically about which legal institutions and mechanisms best serve democratic goals and aims.

V

CONCLUSION

This Article has contextualized and shone further light on one core aspect of modern judicial resistance to the regulatory state. The histories of the rise of the conservative legal movement and neoliberalism are still being written, and my effort has been to draw them together, building on the work of historians on the pervasiveness of neoliberal ideas by showing their extension in law and on the work of political scientists on the conservative legal movement by articulating core components of the movement's economic approach and ideology.

The Court's majority today shows no signs of relenting in undermining the regulatory state. These efforts are part—but not all—of what drives the mounting crisis of public opinion and democratic governance. There are also parallels between the evolving crisis and the one at the turn of the last century, even if the methods of judicial undermining of the regulatory state have changed. And now, as then, lawyers and legal scholars are resisting these efforts and committing renewed energy to defending and reimagining the regulatory state as a project of democracy and equality. What will become of these threads is far from clear. For the time being, courts and the regulatory state are once again on a collision course, and whatever the outcome, the trends of judicial resistance pose difficult

142. *Id.*

143. On the importance of oppositional consciousness, see TELES, *supra* note 42, at 17–18.

144. For an account of the Federal Rules of Civil Procedure as implementation infrastructure for regulatory enforcement suits, *see generally* Noll & Norris, *supra* note 45.

questions about the role of courts for those who believe that modern democracy requires robust and effective regulatory governance.