

Shredding the Social Safety Net

Introduction

The coronavirus pandemic of 2020 has revealed an urgent need to shore up our nation's infrastructure for supporting public health and welfare, as millions of Americans struggle to access health care and financial resources. Yet that infrastructure is in fact more endangered than ever – thanks in large part to a quiet right-wing revolution that has been taking place within the federal court system. Even after the current health crisis is over, this transformation will have the potential to change the nature of American life and, if it proceeds unchecked, could effectively choke off the next president's ability to govern.

Through strategic appointments to the federal bench, the far right has in recent years achieved astonishing progress toward its long-held goal to do away with a wide range of government powers and authorities that it sees as impeding the “free market.” Most alarmingly, these efforts have been focused on using the federal courts as tools to gut protections for public health, safety and welfare. It's a plan that aims to do nothing less than to [shred the social safety net](#) that has underpinned American society for decades, including all the landmark achievements of the New Deal.

No electorate would ever vote for candidates pledging to dirty the water, pollute the air, deprive senior citizens of Social Security or strip health care coverage for people with preexisting conditions. So Republicans have chosen to pursue these goals through the federal courts, which essentially allows them to achieve their ends while flying under the radar. Few Americans have paid much attention to the records of federal judicial nominees, and yet these individuals are being chosen precisely because they can be counted upon to achieve what right-wing politicians dare not propose on the campaign trail or in legislation.

In perhaps the most striking example, the public has been repeatedly subjected to the spectacle of Republican senators openly proclaiming that they will protect health coverage for people with preexisting conditions – *while simultaneously voting to confirm judges who have announced their determination to eradicate it*. This is hypocrisy and cynicism of the highest order. And it endangers the health and safety of all.

In this report, we will review how the right has decided to turn to the courts to achieve its goal of stamping out public protections, how the Trump administration has chosen judicial nominees with records that demonstrate they share that goal, how attacks on the Affordable Care Act best illustrate the use of courts to reach objectives that can't be reached through legislation, and how the strategy to seed the courts with right-wing judges bent on eradicating government safeguards for health and welfare is beginning to bear fruit.

A Goal Decades in the Making

The decades-long path to the crisis facing us today begins before the days of Ronald Reagan, when the far right coalesced around the objective of gutting the social-welfare infrastructure that began under Franklin Delano Roosevelt's New Deal. Created in response to the Great Depression, New Deal programs were set up to provide employment and economic assistance to Americans, grant working people important rights and regulate the financial sector. The infrastructure that was built to support the program includes agencies, their personnel and budgets and the legal underpinnings that give them authority. But the existence of this infrastructure riled conservatives, and they began seeking ways to cut or eliminate key programs like Social Security, Medicare, Medicaid and, more recently, the Affordable Care Act (ACA).

Equally important, according to far-right activists, is scrapping progressive laws and regulations designed to ensure the safety of food and effectiveness of drugs; to protect the minimum wage, a 40-hour workweek, and an opportunity for workers to bargain with their employers; to ensure that factories do not dangerously pollute the air and water; to prevent discrimination based on race, gender, and other characteristics so that it does not shape people's life opportunities; to protect health and safety on the job and much more.

There are several reasons for this effort by the far right. Clearly, it [supports](#) and is supported by big corporations and the wealthy seeking to enrich their bottom lines and, therefore, doing away with any regulations or government actions that they believe will hinder that objective makes perfect sense. There are also moral overtones coming from the far right that seep into the debate about the role of government. Read, for example, the writings of one Trump judicial nominee, Stephen Schwartz, who [wrote](#):

Government spending on Social Security, welfare, medical care, and the like is harmful not only to society as a whole but also to the ostensible beneficiaries of such programs . . . [P]eople who come to depend on an outside agent (be it a patron, government, or parent) for their livelihoods are inevitably somewhat less than fully mature adults.

Whatever the frame for the far right's opposition, it has found its solution in Donald Trump. With his full support, a network of outside organizations, with the full compliance of Senate Republicans, is engineering the lifetime confirmation of federal judges who will, by judicial fiat, repeal New Deal and other crucial programs and regulations. These judges will also prevent Congress, state legislatures and administrative agencies from creating and implementing new programs.

Legal scholars recognize this as a yearning to return to [the so-called *Lochner* era](#), the period in the early 20th century when right-wing judges invalidated minimum wage and other laws as violating the "freedom of contract" and other supposed "rights" of businesses and the wealthy, while undermining the health, safety and welfare of ordinary Americans.

The concept takes its name from the [Lochner v. New York](#) case in 1905. In that case, the Supreme Court struck down a state law that limited the number of hours an employer can require someone to work, holding that the Constitution protected the "right" of employers to

mandate that workers must put in more than 60 hours per week if they want to keep their jobs. Far-right advocates see *Lochner* as a decision that “[turbocharged](#) the court’s pro-business interventions into health, safety, and economic regulation” and laws, and are anxious to see such intervention happen again.

Trump officials have been remarkably candid about their objectives. Early Trump adviser Stephen Bannon pledged the “[deconstruction of the administrative state](#)” – right-wing code for repealing the New Deal and shredding the social safety net. Former White House Counsel Donald McGahn, one of the architects of the Trump judicial selection process, [told](#) the Federalist Society that “the greatest threat to the rule of law in our modern society is the ever-expanding regulatory state” and publicly stated that the administration had a “[coherent plan](#)” to pick federal judges who will gut federal laws, dismantle environmental protections, roll back civil rights and diminish worker and consumer protections. “These efforts to reform the regulatory state begin with Congress and the executive branch,” McGahn [said](#), “but they ultimately depend on the courts.”

Picking Nominees Who Fit the Bill

When Donald Trump took the oath of office in January of 2017, he was presented with an extraordinary gift from Senate Majority Leader Mitch McConnell: an immediate opportunity to nominate a Supreme Court justice, as well as scores of lower-court federal judges. This was due to the years-long machinations of McConnell, who had managed to hold the high court seat and many lower-court seats open by stonewalling President Barack Obama’s nominees.

It was a moment of glee for ultra-conservatives, who had already been supplying Trump with lists of their preferred judicial picks. Neil Gorsuch became Trump’s nominee to fill the seat that President Obama had nominated Merrick Garland to fill. Gorsuch’s [lengthy record](#) as a judge on the Tenth Circuit made him an ideal choice to assist in shredding the social safety net. There, he had consistently ruled against workers, consumers and persons with disabilities, and in favor of undermining laws Congress designed to hold employers and businesses accountable.

In the Tenth Circuit, one of Gorsuch’s most notable rulings occurred in the [case](#) of Alphonse Maddin, known as the “Frozen Trucker.” Gorsuch was the only one of seven judges who would have ruled against Maddin by ignoring a law Congress passed to protect the health and safety of transportation workers. In effect, Gorsuch’s opinion was that Maddin’s employer should have been allowed to force him to choose between his job and saving his own life, when Maddin had to abandon his disabled vehicle on a sub-zero night.

In addition, Gorsuch had crafted a strained interpretation of disability law that denied a child with autism access to the meaningful public education he was entitled to under the Individuals with Disabilities Act. That interpretation was later unanimously [rejected](#) by the Supreme Court in another case.

Another factor that [reportedly](#) had a major influence on McGahn and others who interviewed Gorsuch, reviewed his record and ultimately recommended that President Trump nominate

him, was Gorsuch's extensive writings about his view that *judges should have the power to second-guess government agency experts* and make it harder for agencies to protect our health, safety and the environment.

Before his nomination, Gorsuch had expressed deeply negative views of the so-called *Chevron* doctrine, which provides that courts should generally defer to administrative agencies' interpretation of the laws that Congress has charged them with enforcing. In fact, he had taken the highly unusual step of writing a concurring opinion to his own majority opinion in a case, to [argue](#) that *Chevron* should be overruled and that it represents an "abdication of the judicial duty." This viewpoint about the *Chevron* doctrine threatens serious harm.¹ For example, use of the *Chevron* doctrine was crucial to court decisions that upheld Department of Labor regulations that ensured that [coal miners](#) suffering from black lung disease would receive adequate compensation from mining companies; an EPA rule that [toughened](#) lead-based paint hazard requirements and helped protect "23,000 children under age 6"; and an FCC regulation that [required](#) cable companies to provide broadband access to consumers.

Since his confirmation, Gorsuch has performed [precisely as far-right advocates hoped](#) on the Supreme Court, as we will discuss below.

But Gorsuch was not to be President Trump's only Supreme Court nominee dedicated to turning back the clock. His second pick for the Court, Brett Kavanaugh, was also well-known as a lower-court judge for [consistently](#) voting to reverse actions by agencies. In fact, a Trump White House [memorandum](#) touted Kavanaugh's nomination by noting that he had overruled federal regulators *75 times* on cases involving clean air, consumer protections and other issues.

A true zealot, Kavanaugh had consistently ruled against workers and [called](#) Occupational Safety and Health Administration (OSHA) protections "paternalistic." He also regularly ruled to undermine environmental protections. In one [case](#), he rejected an EPA rule requiring that states bear responsibility for their fair share of toxic pollution that reaches states downwind of the source. The EPA [estimated](#) that the rule could prevent between 13,000 and 34,000 premature deaths, 19,000 hospital visits and 1.8 million days of missed work or school per year. The Supreme Court overturned Kavanaugh in a 6-2 decision.

In another [case](#), in which Kavanaugh tried to reverse an Environmental Protection Agency (EPA) fine against a company that had improperly shipped a corrosive chemical without taking proper precautions, he was outvoted by two other very conservative Republican appointees, who noted that the EPA action would help prevent "significant risks to public health and the environment" from hazardous wastes. Kavanaugh also [ruled](#) that the

¹ Named after a unanimous 1984 Supreme Court [decision](#), the *Chevron* doctrine provides that courts should generally defer to administrative agencies' interpretation of the laws that Congress has charged them with enforcing—particularly when the laws are ambiguous—unless the regulation or other interpretation is unreasonable. Based on that common-sense proposition, which even Justice Scalia largely agreed with, courts have usually upheld federal agency rules that protect health, safety, the environment, and other values. As Rep. Hank Johnson [explained](#) in opposing a House Republican bill seeking to eliminate the doctrine through legislation, repealing the *Chevron* doctrine would "shield entrenched economic interests from liability and make it harder for agencies like the Environmental Protection Agency to deal with emerging public health threats."

Consumer Financial Protection Bureau (CFPB) was unconstitutional because the president could only fire the CFPB director for cause, a view that the en banc majority [explained](#) “flies in the face” of Supreme Court precedent. This issue is now before the Supreme Court with Kavanaugh as its newest member.

But while much of the focus has been on Trump’s Supreme Court justices, they are far from the only Trump judicial appointees with pre-nomination records that showed they would seek to undermine critical protections and shred the social safety net. A number of people nominated by Trump to be powerful appeals court judges, including many on Trump’s [Supreme Court short list](#), share a longstanding opposition to the legitimacy of public protections and the ability of the government, as established nearly 100 years ago during the New Deal, to provide a safety net for the American people.

They include Neomi Rao, who once worked within the Trump administration to dismantle public protections as the head of the Office of Information and Regulatory Affairs (OIRA), and [criticized](#) the conservative justices on the Supreme Court for not creating a “revolution” that would overturn “important” and progressive laws such as the ACA. They include Andrew Oldham, who raged against the EPA and fumed that “no one ever pauses to wonder about whether the entire edifice of both the Clean Power Plan and the agency that promulgated it is just utterly and fundamentally illegitimate.” They also include Michael Truncale, who blasted Social Security and Medicare, called for the [abolition](#) of the Department of Education and claimed that the ACA was [unconstitutional](#).

One of Trump’s judicial nominees, Damien Schiff, offered perhaps the best [articulation](#) of the conservative objective: a “reinvigorated constitutional jurisprudence, emanating from the judiciary,” which “could well be the catalyst to real reform, as opposed to that reform coming from other branches.” He wrote that “the President is hampered by the modern administrative state” and “Congress, as a collective body of 535 persons, cannot act effectively.” But, he wrote, “the Supreme Court, with just five votes, can overturn precedents upon which many of the unconstitutional excrescences of the New Deal and Great Society eras depend.” Although Schiff was not confirmed, his philosophy is all too typical of Trump’s judicial nominees.

As [catalogued](#) by Alliance for Justice, scores of Trump’s judicial nominees are on record opposing protections for workers, consumers and clean air and clean water; civil rights, equality for women, LGBTQ Americans, and persons with disabilities; and access to quality health care – among other issues. For examples of lower-court nominees with explicit records of hostility to the “entire edifice” of federal agencies, the New Deal and social safety net, see Appendix A.

ACA in the Crosshairs

When it comes to advancing an anti-safety net agenda, perhaps no issue illustrates the conservative reliance on courts better than health care. Conservatives’ hostility to government-supported health programs runs deep; in fact, Trump judicial nominee Stephen

Schwartz, arguing for the privatization of Social Security and elimination of all health care and other social programs, stated bluntly that “the modern aim of guaranteeing [the elderly] a comfortable, modern standard of living and full medical coverage is not . . . a worthwhile goal for the government to undertake.”

Yet despite their consistent opposition to Social Security, Medicare, Medicaid and, more recently, the ACA, conservatives have been unsuccessful in eliminating these critical programs. In fact, Republicans failed to repeal the ACA and take away access to health care for millions of people, including persons with preexisting conditions, when they controlled both chambers of Congress and the White House. That leaves just one effective option: the courts.

Therefore, it is no surprise that Donald Trump explicitly [said](#) he would nominate judges who are hostile to the ACA, and who “will do the right thing, unlike Bush’s appointee John Roberts on Obamacare.” The marquee example is Brett Kavanaugh who, while on the D.C. Circuit, twice dissented from decisions upholding the ACA and in one dissent wrote what his former law clerk (now judge) Justin Walker described as a “[roadmap](#)” to invalidate the ACA. Another of Kavanaugh’s clerks, (now judge) Sarah Pitlyk, [said](#) of Kavanaugh, “No other contender on President Trump’s [SCOTUS] list is on record so vigorously criticizing the ACA.”

Meanwhile, Chad Readler, who as a Justice Department official filed a brief encouraging a federal court to invalidate the ACA, was nominated to the Sixth Circuit *the same day* he advocated striking down the law. The Republican Senate also confirmed to the D.C. Circuit Greg Katsas, who as deputy White House counsel [reportedly](#) worked on the administration’s efforts to “roll back regulatory powers across the federal government,” and was a leading lawyer [arguing](#) the ACA was unconstitutional.

Indeed, a [stunning number](#) of confirmed judges and nominees had not only opposed the ACA on policy grounds prior to their nomination but had also argued that Congress did not even have the authority to protect the health of the American people. In 2012, following the Supreme Court’s decision upholding the ACA, Leonard Grasz, now a judge on the Eighth Circuit, [claimed that](#) “[t]he Roberts opinion has itself placed the legitimacy of the court, as well as our freedom as Americans, in great jeopardy.” He claimed that the chief justice “ushered in the ultimate transfer of limitless power to the federal government.” Cory Wilson, nominated to a district court in Mississippi, used even stronger language when he [argued](#) the entire ACA was “illegitimate” and “perverse.”

As of this writing, the Supreme Court has again agreed to take up a challenge to the Affordable Care Act, underscoring the jeopardy facing the health care law as the Trump administration seeks to destroy it through litigation before Trump-appointed judges and justices. The Court’s decision to take up the case follows a Fifth Circuit case noted below, in which Trump appointee Kurt Engelhardt was instrumental in a ruling that kept legal challenges to the ACA alive, paving the way for the Supreme Court case now accepted for review.

The Strategy Begins to Bear Fruit

In terms of sheer numbers, the Trump administration's efforts to "[reshape the federal courts](#)" have been remarkably successful. The administration and Senate Republican Majority Leader Mitch McConnell have prioritized the influential courts of appeals, and a record number of Trump appellate court nominees, 51 as of March 1, 2020, have been confirmed. This means that more than one out of every four federal appellate judges has now been appointed by Trump. In total, 191 Trump appellate and district judicial nominees have been confirmed – representing about one-fifth of all federal judges – with more pending. One right-wing commentator predicted in 2018 that Trump-appointed judges will be "[participating in more than 15,000 decisions every year](#)" by 2019.

The impact of this high number of confirmations in a relatively short period of time has raised red flags among some lawmakers witnessing it first-hand. As a 2018 [report](#) by the Senate Judiciary Committee Democrats explained, the administration and Senate Republican leadership have pursued a strategy of "pushing right-wing ideological nominees onto the courts" in a way that threatens to "change the nature of the federal judiciary for decades" and significantly harm the rights of all Americans on "health care, the environment, workers' rights" and more.

As Sen. Richard Blumenthal put it, the Trump administration and the Republican Senate have "[weaponized](#)" judicial nominations to help "shut down" the crucial social safety infrastructure and the legacy of the New Deal. And, as catalogued by People For the American Way in its "[Confirmed Judges Confirmed Fears](#)" series, this strategy has begun to bear fruit, as demonstrated by rulings these judges have issued since their confirmations.

Supreme Court Trump appointee Neil Gorsuch has moved quickly against rights for workers. He cast the deciding vote in a [ruling](#) that more than 100,000 workers were not eligible for federally-mandated overtime pay and, as Justice Ruth Bader Ginsburg put it, undermined "more than half a century" of Supreme Court precedent on the National Labor Relations Act (NLRA), the New Deal-era law that has protected vulnerable workers for decades.

In another case, [Epic Systems Corp. v. Lewis](#), Gorsuch wrote a 5-4 decision that, according to Justice Stephen Breyer, undermines "[the entire heart of the New Deal](#)" by seriously weakening collective action by workers. Justice Ginsburg wrote a stinging [dissent](#), explaining that the majority ruling was "egregiously wrong," noting that it harks back to the pre-New Deal era of harmful "[yellow dog contracts](#)," when workers were forced to accept contracts that banned them from joining with other workers, including to form a union.

Gorsuch and Kavanaugh together have been crucial in forming 5-4 majorities that have also seriously harmed workers. In [Janus v. AFSCME](#), the 5-4 Court overturned an important 1977 case on the rights of workers ([Abood v. Detroit Board of Educ.](#)) and struck down state requirements that public sector employees who are not members of the unions that represent

them must pay “fair share” fees to cover the costs of that representation. Justice Kagan’s dissent explained that the majority had improperly “chosen the winners by turning the First Amendment into a sword and using it against workaday economic and regulatory policy” and millions of American workers. In [*Lamps Plus v. Varela*](#), the 5-4 majority made it easier for big business to force one-on-one arbitration on employees and customers, rather than allowing them to join forces as a group.

At the lower-court level, Trump appellate judges have acted decisively to limit the authority of Congress and state legislatures to promote the health, safety and welfare of Americans, including through the ACA. In [*Texas v. U.S.*](#), Trump Fifth Circuit judge Kurt Engelhardt cast the deciding vote to rule that Congress did not have the authority to enact the ACA mandate to buy insurance. The ruling kept alive a challenge to the *entire* Affordable Care Act, including protections for people with preexisting conditions. As discussed above, the Supreme Court will review this decision in 2020-21.

In another case, [*Association of Equipment Manufacturers v. Burgum*](#), Trump Eighth Circuit judge David Stras cast the deciding vote to effectively rule unconstitutional a law to protect farmers and local dealers from improper practices by big equipment manufacturers. The decision resurrected a *Lochner*-era doctrine and ruled that the law violated the “freedom of contract” of the manufacturers. A conservative Bush judge wrote in dissent that the decision improperly “second-guesses” the state legislature.

And in [*Collins v. Mnuchin*](#), Trump Fifth Circuit judge Don Willett wrote a divided opinion joined by the other Trump judges on the court — Kurt Engelhardt, James Ho, Kyle Duncan and Andrew Oldham — that struck down a congressional law protecting the independence of the Federal Housing Finance Agency, an entity set up to help protect consumers. The Supreme Court has deferred action on a petition to review the decision, pending action on the CFPB case discussed below.

Risks on the Horizon

Although it is hard to predict precisely what Trump justices and judges will do in the years to come to shred the social safety net, there are disturbing portents already, including cases that are scheduled for decision by the Supreme Court in 2020.

Although it likely will not reach a decision until 2021, the Supreme Court’s decision to hear another challenge to the ACA in 2020 bears mentioning again. The legal effort to destroy the health care law epitomizes the right’s hostility to the social safety net, and with Justices Gorsuch and Kavanaugh on the high court, the law’s future is far from certain. A Supreme Court ruling against the law has the potential to accomplish what full Republican control of the White House and Congress could not: destruction of the law and eradication of accessible health care for millions of Americans.

Another deeply troubling signal about the future direction of the Supreme Court is that all five Republican-appointed judges have gone [on record](#) suggesting they are prepared to revive a *Lochner*-era doctrine that could devastate Congress's ability to protect health, safety, and welfare. This is known as the [non-delegation doctrine](#), deployed to prevent Congress from delegating significant rulemaking authority to agencies. Reviving this doctrine would mean that regulatory agencies like the EPA, the National Labor Relations Board (NLRB), OSHA and others could not use their expertise to protect the communities they were created to serve. As Justice Elena Kagan has [pointed out](#), revival of the doctrine would mean that "most of Government is unconstitutional."

Nevertheless, a growing chorus of right-wing voices on the courts is calling for it to be brought back. A brief opinion by Justice Samuel Alito in 2019, in a case known as *Gundy v. United States*, essentially [invited](#) right-wing activists to send cases challenging Congress's delegation of authority to the courts. Alito and other conservatives on the Court suggested that they would be receptive to such claims. Several Trump appeals court appointees have argued that the courts should "[revive the nondelegation doctrine](#)" and that federal agencies improperly regulate "[an ever-expanding sphere of everyday life.](#)" A recent [comment](#) by Justice Kavanaugh makes clear that he also is interested in reviving the non-delegation doctrine. This could have disastrous consequences for the ability of Congress and federal agencies to protect public health, safety and welfare.

The Court had an opportunity to consider the role of independent agencies recently when it heard oral arguments in its review of the Ninth Circuit's decision in [Seila Law v. CFPB](#), which rejected a challenge to the important consumer protection agency. The challenge in the Ninth Circuit was similar to the one that the D.C. Circuit rejected several years ago, which produced a dissent by Kavanaugh that conservatives cheered. In that case, Kavanaugh argued that it was unconstitutional for Congress to have attempted to promote the independence of the CFPB by providing that its director could only be removed by the president "for cause," rather than for any reason or no reason, as is the case for cabinet officials. The full D.C. Circuit rejected Kavanaugh's claim and upheld Congress's authority to help insulate the CFPB from political pressure.

If the Court reverses the Ninth Circuit's ruling protecting the independence of the CFPB, the result could overrule past precedent and make it impossible for Congress to create independent agencies like the Federal Trade Commission (FTC) that are politically insulated from the president. It could also "[unravel the CFPB's decisions](#)" protecting consumers since the agency was created nine years ago. Based on March 2 oral arguments in the case, some observers suggest that the court's conservative majority could well adopt Kavanaugh's earlier position and curtail the independence of the CFPB.

Conclusion

For decades, Americans have understood that government has the constitutional authority and responsibility to provide for their basic health and well-being. A commitment to the security of senior citizens, food and medicine for children living in poverty, the rights of workers not to be exploited, and the right to clean air and water and the assurance that lethal products will be kept out of the hands of consumers are hallmarks of our values as a society and represent progress of which many of us are justly proud. Most recently, millions of people have gained access to health care thanks to the Affordable Care Act, which has saved lives and prevented untold pain and suffering.

But Donald Trump has selected, and the Republican Senate has put in place, numerous judges and justices who have already begun to accomplish the far right's long-held objective of shredding the social safety net, and serving the agendas of big corporations and the wealthy while endangering the health, safety, and welfare of Americans. This is deeply alarming. If Trump and Senate Republicans are reelected and more such justices and judges are placed on the bench for life, the danger only increases. We can be almost certain that the ACA and other important laws will be invalidated as unconstitutional and that the courts will prevent Congress, federal agencies, and state legislatures from enacting and carrying out future provisions to benefit all of us.

Appendix

Examples of Trump judges who came to the bench with records of overt hostility to the federal government’s ability to protect the public include:

[Neomi Rao](#), confirmed in 2019 to Brett Kavanaugh’s seat on the D.C. Circuit, previously worked within the Trump administration to dismantle public protections as the head of the Office of Information and Regulatory Affairs (OIRA). She had [criticized](#) the conservative justices on the Supreme Court for not creating a “revolution” that would overturn “important” and progressive laws, such as the ACA. She expressed interest [in getting](#) “libertarian law professors on the courts” in [order](#) to “fight the war” against “proponents of judicial restraint” and to turn back the clock on public protections.

[Don Willett](#), confirmed to the Fifth Circuit and on Trump’s Supreme Court short list, wrote extensively [advocating](#) that the courts should be more aggressive in reviewing and striking down laws and rules that protect health, safety, and social welfare but that (in his view) arguably violate economic rights, like freedom of contract. On the Texas Supreme Court, in [Patel v. Texas Dep’t of Licensing and Regulation](#), he encouraged courts to be more active in striking down government rules and laws to provide “more robust judicial protection of economic rights” and advocated reviving *Lochner* era jurisprudence, the long-discarded doctrine that was used to strike down minimum wage laws, child labor protections, maximum hour legislation, and erode workers’ rights in the name of economic liberty. Elsewhere, Willett [praised](#) decisions that “anointed a framework for smaller government” and “set up future wins to shrink Washington’s power.” As one [analyst](#) explained, Willett’s opinions paint “the picture of a man eager to roll back nearly a century of American law.

[Andrew Oldham](#), also confirmed to the Fifth Circuit and on Trump’s Supreme Court short list, also has advocated for tearing down legal protections. Oldham has argued that both the [EPA](#) and Department of Labor – *in their entirety* – are unconstitutional. As he [said](#), “One of the reasons why the administrative state is enraging, is not that you disagree with what the EPA does, although, I do disagree with a lot of what it does. That’s not the thing that makes it enraging. It’s the illegitimacy of it,” and “no one ever pauses to wonder about whether the entire edifice of both the Clean Power Plan and the agency that promulgated it is just utterly and fundamentally illegitimate.” Oldham was reportedly “[heavily involved](#)” in the “[Texas Plan](#)” to radically amend the U. S. Constitution and gut the enforcement of modern consumer, public health, and workplace protections: “What’s driving it from our perspective, from the Governor’s perspective and mine . . . is much deeper than that.” “It’s not that I disagree with a particular Department of Labor regulation or a particular IRS regulation. It is the entire existence of this edifice of administrative law is constitutionally suspect.”

As a lawyer, he helped file dozens of lawsuits challenging actions by federal agencies and advocated for making *all* labor, consumer, and environmental regulations “completely inoperable.”

[Steven Menashi](#), confirmed to the Second Circuit, complained that “our administrative law is marked not by fringe judicial zealotry but by judicial passivity in enforcing mainstream liberal norms.” He [criticized](#) “deferential judicial posture” towards agencies, as well as that “body of administrative law” that “no longer provides [a] mandated check upon the agencies.” He [decried](#) “extreme deference.” He [called](#) for “more probing judicial review of the merits – including the scientific merits – of agency decisions.” He [wrote](#) that courts should conduct “more muscular review of economic legislation,” in addition to the heightened scrutiny applied to government actions with respect to race. This would enable ultraconservative federal judges, like himself, to second-guess government regulations, like those protecting workers and consumers.

[David Stras](#) was nominated by Trump and confirmed to the Eighth Circuit Court of Appeals and is included on Trump’s Supreme Court short list. When Stras was nominated, then-Minnesota Senator Al Franken and others [explained](#) that his record, including his embrace of the philosophies of Clarence Thomas and Antonin Scalia, suggested that he would “reliably rule in favor of powerful corporate interests over working people.” This conclusion is evidenced by a number of his dissents on the Minnesota Supreme Court, such as in one [case](#) where he tried to narrowly interpret state law that was passed to protect accident victims so as to enable a large insurance company to severely limit the amount it had to pay out after a tragic school bus accident. In another [dissent](#), Stras claimed that a state law that regulated attorneys’ fees in workers’ compensation cases unconstitutionally infringed on the power of the judiciary, similar to Gorsuch’s arguments against *Chevron* deference. And in addition to applauding Scalia and Thomas, Stras wrote an article [praising](#) Justice Pierce Butler, one of the reactionary Supreme Court justices who voted to strike down New Deal regulations and minimum wage laws during the *Lochner* era. Stras specifically commended Butler for his “embrace” of “private property” rights, a cornerstone of opposition to the New Deal.

Although not as influential as court of appeals judges, Trump’s district court judges have also made clear their agenda to undermine public protections and the so-called administrative state. For example, **[Patrick Wyrick](#)**, confirmed to be a judge in Oklahoma, [told](#) a conservative audience in 2016 that “the whole administrative state is unlawful.” Already on Trump’s Supreme Court short list, Wyrick worked aggressively under then-Oklahoma Attorney General Scott Pruitt to [challenge EPA](#) environmental protections and advance the agenda of energy companies.

[Justin Walker](#), confirmed to be a judge in Kentucky, in an [article](#) titled “The Kavanaugh Court and the Schecter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable,” advocated for tying the hands of the agencies that Congress has recognized as having the knowledge and experience to enforce critical law, safeguard essential protections, and ensure the health and safety of the public.

[Michael Truncale](#), a Republican donor and activist confirmed as a trial judge in Texas, severely [criticized](#) Social Security and Medicare, called for the [abolition](#) of the Department of Education, and claimed that the ACA is [unconstitutional](#).