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## THE FUTURE OF SECURITIES LAW IN THE SUPREME COURT

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*Since the enactment of the first federal securities statute in 1933, securities law has illustrated key shifts in the Supreme Court's jurisprudence. During the New Deal, the Court's securities law decisions shifted almost overnight from open hostility toward the newly-expanded administrative state to broad deference to agency expertise. In the 1940s, securities cases helped build the legal foundation for a broadly enabling administrative law. The 1960s saw the Warren Court creating new implied rights of action in securities law illustrative of the Court's approach to statutes generally. The stage seemed set for the rise of "federal corporate law." The Court swiftly reversed itself, however, with Justice Lewis F. Powell, Jr. leading the effort to confine the reach of the securities laws. Powell succeeded in imposing a strict constructionism in securities law that never quite took hold in criminal or constitutional law. When there was a significant shift for the Court, securities law was prominent—at least until Powell's retirement. Since then, the Court has meandered in its approach to securities law, its decisions neither expansive nor restrictive. The Court's docket in this space has become a random walk of indifference.*

*What is the future of securities law in the Supreme Court? We doubt that securities law's bellwether status during its early days is likely to recur. The Securities and Exchange Commission, a groundbreaking agency of the 1930s, now seems like a small cog in a much larger administrative machine. Without prompting from the SEC, it is quite possible that the Court will continue to meander in the field of securities law. The Court—which Franklin Delano Roosevelt populated with appointees*

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*having front-line experience writing the securities statutes, running the SEC, or defending the constitutionality of the securities laws—has not had a member with any direct experience with securities law for more than thirty years.*

*If the Court’s spotlight were to shine again on securities, we suggest it might well be a Chevron question of the SEC’s authority. Proponents of corporate social responsibility could push the boundaries of the securities laws beyond the SEC’s historical focus on disclosure. Such a move could also be met by a federalism challenge to securities law preempting the field of state corporate law. These possibilities might once again put securities law at the center of the Court’s work to develop the law of the administrative state.*

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## I. INTRODUCTION

The future path of securities law in the U.S. will be influenced by a variety of factors and actors: statutes passed by

Congress, regulations promulgated by the Securities and Exchange Commission (SEC) and its enforcement of those statutes and regulations, SEC interpretive guidance and occasional special studies; innovations in the markets, international influences, and developments among the private parties who buy and sell securities. These disparate influences may generate descriptions of securities law that seem hard to reconcile at times, as in the traditional fable of the three blind men who provide widely different descriptions of touching the same thing because they, individually, are separately interacting with the trunk, body, and tail of an elephant. In this Article, we provide a perspective on the future of securities law that embraces one part of that elephant: the role of the Supreme Court.

Our comparative advantage on this topic derives from our study of the role of the Supreme Court in securities law up until now. In a forthcoming book—*The History of Securities Law in the Supreme Court*—we chronicle the Court’s work in securities law.<sup>1</sup> This history documents several distinct approaches by the Court since the inception of the federal securities laws in 1933. Each new approach was a sharp departure from its predecessor.

In the 1930s, the tumultuous challenges of the Great Depression were met by a dramatic expansion of the federal government. Nowhere was the expansion more visible than in securities law. The radical changes in the scope of federal regulation of the securities markets triggered an epic conflict between the administration of Franklin Delano Roosevelt and the Supreme Court. That conflict would eventually be resolved by Roosevelt’s appointment of a cadre of progressive

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<sup>1</sup> That book builds on a series of articles by this Article’s authors, including: A.C. Pritchard & Robert B. Thompson, *Securities Law in the Sixties: The Supreme Court, the Second Circuit, and the Triumph of Purpose Over Text*, 94 NOTRE DAME L. REV. 371 (2018) [hereinafter Pritchard & Thompson, *Securities Law in the Sixties*]; A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841 (2009) [hereinafter Pritchard & Thompson, *New Deal Justices*]; and A.C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841 (2003) [hereinafter Pritchard, *Powell and the Counter-Revolution*].

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Justices to the Court, many of them warriors in the legislative and judicial battle to assert “social control of finance.” Their appointments led to a seismic change in the Court’s approach to federal legislation. The Court’s prior hostility toward economic regulation that interfered with freedom of contract—the hallmark of the “classical” tradition—dissolved, seemingly overnight. The new attitude reflected deference to the fledgling SEC.

After a period of relative neglect in the 1950s, the securities cases of the 1960s unleashed a dramatic change in the Court’s role, if not its direction. Moving beyond mere deference to the SEC’s expertise, the Court took the lead in shifting insider trading from a clunky statutory regime to one built on judicially defined rules. The Court also implied private causes of action for fraud under federal securities law. Those newfound causes of action paved the way for securities fraud class actions to overshadow the public enforcement regime passed by Congress in the 1930s.

The Court’s newfound activism would be short lived, and not repeated. For most of the 1970s and 80s, the Court’s securities decisions were as restrictive as the earlier periods had been expansive, with the SEC repeatedly rebuffed. That counterrevolution reflected the impact of one Justice in particular: Lewis Powell.

After Powell’s retirement in 1987, the Court’s path in securities law took yet another direction or, perhaps more accurately, became directionless. The Court’s decisions were neither consistently expansive nor restrictive. The pattern might be described as equipoise or, less charitably, indifference.

These distinct shifts illustrate four approaches by the Court in dealing with securities law. Such patterns, in turn, can help frame predictions for the future. Will history repeat itself? We acknowledge, and indeed have emphasized in our prior work, the specific features of each period that shaped the Court’s jurisprudence during those eras. Those features may well not be replicated going forward. Add the impact of constant evolution in the markets, and the predictive enterprise becomes still more fraught. Past results are no guarantee of future performance.

At the same time, as our elephant metaphor suggests, the Supreme Court's docket is a small slice of the universe of securities law. The Court's cases have skewed toward certain topics, although the topics have varied with each era. For example, the Public Utility Holding Company Act (PUHCA),<sup>2</sup> the New Deal statute that dominated the Court's securities docket in the 1930s and 40s, quickly lost pertinence. Rule 10b-5,<sup>3</sup> promulgated by the SEC in 1942 but not addressed by the Court until 1969,<sup>4</sup> has repeatedly captured the Court's attention in the time since. Other broad areas, no less important in the practice of securities law, have drawn little attention from the Court. For example, issues under the Securities Act,<sup>5</sup> such as registration, exemptions, and resales, have been the subject of few Court decisions. The Court's lack of attention to these areas, notwithstanding their enormous economic significance, is likely inevitable, reflecting the vagaries of litigation and the certiorari process. Nonetheless, that process results in the Court addressing only a narrow sub-sample of securities law issues. The Court's limited focus is likely to persist.

With these caveats in mind, we look to the history of securities law in the Supreme Court to offer some predictions about its future. Part II describes the prior eras and the distinctive judicial approaches visible in the Supreme Court's securities cases. Part III evaluates the predictive power of the previous four dominant Supreme Court approaches in

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<sup>2</sup> Public Utility Holding Company Act (PUHCA), Pub. L. No. 74-333, 49 Stat. 803 (1935), *repealed by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

<sup>3</sup> Prohibition of Fraud by Any Person in Connection with the Purchase or Sale of Securities, 7 Fed. Reg. 3,804 (May 22, 1942) (codified as amended at 17 C.F.R. § 240.10b-5 (2020)).

<sup>4</sup> SEC v. Nat'l Sec., Inc., 393 U.S. 453 (1969). More than a decade prior, in *Black v. Amen*, the Court was prepared to remand to the lower court to consider if Rule 10b-5 carries with it a private cause of action, *see* Letter of Felix Frankfurter, Just., U.S. Sup. Ct., to Earl Warren, Chief Just., U.S. Sup. Ct. (Nov. 20, 1957) (on file with the Felix Frankfurter Collection pt. 3, reel 4, Harvard Law School), but the case settled before the Court's order was issued. 355 U.S. 600 (1958).

<sup>5</sup> Securities Act of 1933 (Securities Act), Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77mm (2019)).

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explaining the current environment for securities law at the high court. We also speculate about some issues that may become prominent in the Court's docket down the road.

## II. THE SUPREME COURT'S EVOLUTION IN FEDERAL SECURITIES LAW 1933–2021

The federal securities laws and their administrator, the SEC, were born at a time when the constitutional framework of American government was being fundamentally rethought. The widespread economic distress of the Great Depression brought calls for reform, captured by the phrase “social control of finance.”<sup>6</sup> As part of that process, the Supreme Court was challenged to reconsider its role in enforcing constitutional limits on the federal government. In less than a decade, the Court abandoned its “classical” approach, reflecting hostility toward regulation that interfered with “freedom of contract” or businesses that had only an “indirect” effect on interstate commerce. The Court essentially abandoned the limits it had enforced, more or less rigorously, over the prior half century. The Court's new trajectory—directed by a wave of Roosevelt appointees—enthusiastically embraced the New Deal agenda of social control of finance. This radical transformation was the first of four very visible shifts in how the Court has approached securities law.

### A. From Restrictive Oversight of Regulation to Broad Support of Agency Expertise

The Supreme Court's first federal securities law decision, *Jones v. SEC* in 1936, was a shocking rebuke to the Roosevelt administration, then beginning its fourth year.<sup>7</sup> The Court overturned an administrative action brought by the still nascent SEC. The question before the Court was a narrow one of a registrant's right to withdraw a registration statement. The agency had sought to rein in the behavior of a promoter of oil

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<sup>6</sup> See Pritchard & Thompson, *New Deal Justices*, *supra* note 1, at 846–72.

<sup>7</sup> *Jones v. SEC*, 298 U.S. 1 (1936).

and gas securities, and the promoter had sought to evade the agency's regulatory reach by abandoning his offering. The Court's language was caustic, impugning the dogged efforts of the SEC as threatening civil liberties. Justice George Sutherland, the intellectual leader of the "classical" tradition on the Court, wrote for the majority, going so far as to compare the fledgling agency's procedures with the infamous Star Chamber of sixteenth-century England.<sup>8</sup> Despite the narrow question decided (the agency had no authority over Jones after he withdrew his offering), the Court's rhetoric did not bode well for the judicial prospects of the other securities statutes that had been enacted by Congress during Franklin Roosevelt's first term, which were making their way up the judicial ladder toward the Supreme Court.

Sutherland's rhetoric in *Jones* was shrill, but his approach proved to be the last gasp of the *ancien régime* that had prevailed for decades. The following term, the Court embraced a more accommodating approach to the regulatory statutes of the New Deal.<sup>9</sup> By the end of that term, Willis Van Devanter, one of the "Four Horsemen" resisting the constitutional revolution, had retired.<sup>10</sup> His retirement, encouraged by Congress providing more generous retirement pay for the Justices,<sup>11</sup> was quickly followed by others. Those departures opened the

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<sup>8</sup> *Id.* at 28.

<sup>9</sup> The change is usually marked by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding Washington's state minimum wage act). See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937) (upholding the National Labor Relations Act); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 598 (1937) (upholding Social Security tax).

<sup>10</sup> Letter from Willis Van Devanter, Just., U.S. Sup. Ct., to Franklin Roosevelt, President, United States (May 18, 1937), [http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1937\\_0518\\_VanDevanterRetirement.pdf](http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1937_0518_VanDevanterRetirement.pdf) [<https://perma.cc/EGA6-KGYC>].

<sup>11</sup> See Judge Glock, *Unpacking the Supreme Court: Judicial Retirement and the Road to the 1937 Court Battle*, 106 J. AM HIST. 47, 49 n.6 (2019).

door for Roosevelt to appoint eight Justices in just over five-and-a-half years.<sup>12</sup>

Roosevelt's appointees came to the Court with backgrounds that substantially differed from their predecessors'. Almost all his picks had gained front-line experience across the legislative, executive or judicial processes in (1) the battle to enact the securities and other regulatory statutes of the New Deal, (2) shaping the initial policies of the agencies that oversaw an increased regulatory oversight of the economy, or (3) defending the new laws against a hostile judiciary during Roosevelt's first term. Felix Frankfurter, for example, while serving as a Harvard law professor was a key advisor to the Roosevelt administration in its efforts to draft the Securities Act of 1933 and the Securities Exchange Act of 1934,<sup>13</sup> which empowered the SEC to oversee the stock exchanges and impose disclosure requirements on public corporations. He also lobbied for PUHCA in 1935, playing a critical role in midwifing its notorious "death sentence" provision intended to dismantle the public utility conglomerates of the day.<sup>14</sup> Hugo Black, Roosevelt's first appointee to the Court, also played a key role in enacting PUHCA, leading the battle in the Senate against public utility lobbying.<sup>15</sup> Stanley Reed had been Solicitor General, among other key legal posts in the Roosevelt administration, and he argued the first regulatory cases that went to the Supreme Court.<sup>16</sup> His successor as Solicitor General, Robert Jackson, had worked his way to that post in part by playing a key role defending the new securities laws in court.<sup>17</sup> Jackson left his role as the government's top advocate

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<sup>12</sup> Those appointed were Hugo Black, Stanley Reed, William Douglas, Felix Frankfurter, Frank Murphy, Robert Jackson, James Byrnes, and Judge Wiley Rutledge. Roosevelt also appointed Associate Justice Harlan Fiske Stone as Chief Justice when Charles Evans Hughes retired in 1941.

<sup>13</sup> Securities Exchange Act of 1934 (Securities Exchange Act), 73 Pub. L. No. 291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78qq (2019)).

<sup>14</sup> Pritchard & Thompson, *New Deal Justices*, *supra* note 1, at 862–68.

<sup>15</sup> *See id.* at 867.

<sup>16</sup> *Id.* at 879.

<sup>17</sup> *See id.*



to replace Frank Murphy as Attorney General when Roosevelt appointed Murphy to the Court. William O. Douglas, like Jackson a close confidant of Roosevelt's,<sup>18</sup> was the third chair of the SEC. In that role, he pushed the agency to displace the traditional power brokers of the New York Stock Exchange and began the process of dismantling the public utility conglomerates.<sup>19</sup>

The new securities laws reflected a fundamental shift in the role of government and administrative agencies. Social control of finance called for a new kind of government relying on agency expertise. The securities laws, and the SEC in particular, were at the center of this political movement.<sup>20</sup> Roosevelt's transformation of the Court laid the groundwork for the SEC to enjoy an almost unbroken winning streak in the Supreme Court for the first four decades after the agency's creation in 1934. During that time, the Court consistently deferred to the SEC's financial expertise. Moreover, the Court seldom departed from an expansive interpretation of the securities laws.

#### B. A Purposivist Court Further Extends the Reach of the Securities Laws

After a somewhat fallow period for securities law generally in the 1950s, the 1960s brought the second shift in the Supreme Court's approach to securities. This decade is better known to lawyers and historians for the Warren Court's expansion of constitutional rights in multiple areas. The securities decisions that expanded the reach of federal law were of a piece with the Court's dominant jurisprudence of this era, if not as well known. The phrase "federal corporate law" was coined to capture the trend.<sup>21</sup>

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<sup>18</sup> L.A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371, 405 (1974).

<sup>19</sup> Pritchard & Thompson, *New Deal Justices*, *supra* note 1, at 926.

<sup>20</sup> *See id.* at 872.

<sup>21</sup> *See* Arthur Fleischer, Jr., "Federal Corporation Law": An Assessment, 78 HARV. L. REV. 1146, 1146 & n.2 (1965) (noting the rise of the similar phrase "federal law of corporations").

During that decade, the Court not only continued the expansive approach to interpreting the securities statutes that it had begun in the 1930s<sup>22</sup> but went beyond the text of those statutes to find new remedies for investors. This judicial legislation to create remedies beyond those Congress had expressly written into the securities laws was done in the name of extending those laws' purpose, namely investor protection. This aggressive judicial expansion was primarily evident in two areas of the law—insider trading and the extension of implied private rights of action. The lower courts had relied on Rule 10b-5, promulgated by the SEC in 1942, to tackle many fiduciary breaches that were traditionally the province of state corporate law. The Supreme Court validated those broadly remedial interpretations in the 1960s and early 1970s, giving a green light to the lower courts to push still further in the name of investor protection.<sup>23</sup>

Congress had addressed insider trading in 1934, but only via the clunky, mechanistic remedy in section 16(b) of the Exchange Act.<sup>24</sup> That provision targeted manipulation by insiders more than trading on informational advantages, leaving many abuses unaddressed. By the end of the 1960s, the SEC had persuaded the Second Circuit to deploy the antifraud provisions of the Exchange Act to regulate insider trading,<sup>25</sup> relying on an earlier Supreme Court decision in that decade embracing a broad reach for a similar provision of the Investment

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<sup>22</sup> On the rise of this approach in that era, see William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1737–40 (1993).

<sup>23</sup> See *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (“While th[e] language [of section 14(a) of the Exchange Act] makes no specific reference to a private right of action, among its chief purposes is ‘the protection of investors,’ which certainly implies the availability of judicial relief where necessary to achieve that result.”).

<sup>24</sup> Securities Exchange Act of 1934 (Securities Exchange Act), 73 Pub. L. No. 291, § 16(b), 48 Stat. 881, 896 (codified as amended at 15 U.S.C. § 78p(b) (2019)).

<sup>25</sup> See generally *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc).

Advisers Act.<sup>26</sup> This move to attack insider trading had seemed impossible in 1934 and for decades thereafter,<sup>27</sup> but the Second Circuit was emboldened by the Supreme Court's purposivist approach.

Similarly, the lower courts, and eventually the Supreme Court,<sup>28</sup> extended the reach of Rule 10b-5's prohibition against fraud in connection with the purchase or sale of a security to give shareholders new remedies. These implied rights of action for shareholders allowed them to pursue mismanagement claims against corporate directors, traditionally the province of fiduciary duty litigation under state corporate law.<sup>29</sup> In *Bankers Life*, Justice William O. Douglas, writing for a unanimous Court, painted with a broad brush, linking traditional securities regulation and fiduciary breaches by managers as all part of "a single seamless web" and therefore actionable under federal securities laws.<sup>30</sup> "Federal corporate law," developed by the judiciary under the ostensible authority of the securities statutes, appeared poised to occupy the field.

### C. A Strict Constructionist Approach

Until it didn't. Securities law at the Supreme Court took a dramatic turn beginning in 1972. As with the two earlier shifts discussed above, the change reflected a broader trend afoot at the Court. Once again, securities cases were at the leading edge. Richard Nixon had run for the presidency in 1968, calling for the Supreme Court to follow "strict

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<sup>26</sup> See *id.* at 855 (citing *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 195 (1963)).

<sup>27</sup> See WILLIAM H. PAINTER, *THE FEDERAL SECURITIES CODE AND CORPORATE DISCLOSURE* 221-23 (1979) (discussing the traditional approach to fraud that did not extend to nondisclosure in trading in anonymous markets).

<sup>28</sup> *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971).

<sup>29</sup> See generally Arthur Fleischer, Jr., *Federal Regulation of Internal Corporate Affairs*, 29 *BUS. LAW.* 179 (1974).

<sup>30</sup> *Bankers Life*, 404 U.S. at 11-12 (attempting to distinguish, however, mere "internal corporate mismanagement").

construction” in construing the Constitution.<sup>31</sup> Nixon’s campaign, and subsequent appointments, were directed more toward criminal procedure, and produced some incremental change in that space.<sup>32</sup> By contrast, the change was considerably more pronounced in the field of securities law.

Nixon had made two appointments to the Court in his first two years—Chief Justice Warren Burger and Justice Harry Blackmun—but neither altered the path of securities law set in the 1960s. Indeed, Burger and Blackmun joined the most expansive of the securities decisions, including Douglas’s *Bankers Life* “seamless web” decision, the apogee of the purposivist approach.<sup>33</sup> But the arrival of Lewis Powell and William Rehnquist on the same day in January 1972 marked a 180 degree turn in the Court’s approach to securities law. The SEC’s winning streak at the Court ended; the Court’s next twenty-five securities decisions would be uniformly restrictive, with opinions emphasizing statutory text.<sup>34</sup> It is difficult to imagine a sharper turnabout of a dominant trend on any topic regularly addressed by the Supreme Court.

This sea change was driven by the influence of one Justice: Lewis Powell.<sup>35</sup> Powell had practiced corporate and securities law for three decades prior to joining the Court.<sup>36</sup> When he donned the black robe, Powell did not leave his interest in securities law behind. More particularly, he viewed the Court’s free-wheeling approach of the 1960s as a disaster.<sup>37</sup> Powell’s influence, backed by experience and expertise, not only

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<sup>31</sup> See Keith E. Whittington, *Taking what They Give Us: Explaining the Court’s Federalism Offensive*, 51 DUKE L.J. 477, 505 (2001).

<sup>32</sup> See *id.*

<sup>33</sup> The other notably broad decision is Blackmun’s opinion for the Court in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152–53 (1972) (adopting a presumption of reliance for fraudulent omissions).

<sup>34</sup> See E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1584 & fig.1, 1629 app. A (2004) (showing a nearly-unbroken stretch of “restrictive” securities decisions in the period after 1972).

<sup>35</sup> See generally Pritchard, *Powell and the Counter-Revolution*, *supra* note 1.

<sup>36</sup> *Id.* at 847–48.

<sup>37</sup> See *id.* at 863–65.

pushed the Court toward more restrictive decisions, but also to take more securities cases. The result was a spike in the Court's securities docket and a counterrevolution in the results. Powell would be in the majority in thirty-nine of the forty securities decisions in which he participated during his tenure and would write eleven of the opinions, far more than any other Justice.<sup>38</sup> The implied private rights of action that the Court had announced over the previous decade were restricted.<sup>39</sup> Barriers were erected to the implication of any new implied claims.<sup>40</sup> The deference that the SEC had traditionally enjoyed at the Court gave way to a much more skeptical view from the majority.<sup>41</sup> Powell's dominance of securities law during his fifteen years on the Court illustrates how one Justice can influence the Court's docket and direction.

#### D. Equipose or Indifference

Powell's influence can be seen not only in the Court's holdings during his time on the bench—he wrote more majority opinions for the Court in securities cases than any other Justice since the adoption of the securities laws<sup>42</sup>—but also in the change in the Court's securities decisions once he retired. The restrictive view of the prior fifteen terms gave way to what

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<sup>38</sup> See *id.* at 858 tbl.1 (tallying that Justice Powell was in the majority of forty of forty-one securities decisions during his tenure, of which he wrote twelve). We are now of the view that there were forty securities decisions during Justice Powell's tenure, and that Justice Powell wrote eleven of those opinions. *Id.* at 858 tbl.1 categorized *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) as a securities decision. However, that case actually concerns an antitrust claim involving securities brokers where the Court decided the correct interpretation of Fed. R. Civ. P. 23. *Eisen*, 417 U.S. at 159. As such, while it is an important decision for securities law, it is not a securities decision per se.

<sup>39</sup> See *id.* at 866–73.

<sup>40</sup> See *id.* at 885–91.

<sup>41</sup> *Id.* at 947.

<sup>42</sup> See *id.* at 858 tbl.1 (tallying cases during Justice Powell's tenure); John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 8 tbl.2 (2015) (extending tally of securities law cases through 2014); Sullivan & Thompson, *supra* note 34, at 1629 app.A (collecting securities cases from 1936 onward).

has been essentially a fifty-fifty split between expansive and restrictive outcomes during the more than thirty years since Powell's retirement.<sup>43</sup> Moreover, the number of securities cases taken by the Court, which jumped dramatically when Powell arrived, dropped back to its pre-Powell level upon his retirement.<sup>44</sup> In addition to that numerical decline, the issues resolved have seemed less important to the practice of securities law.<sup>45</sup> In the absence of the frontline experience of the New Deal Justices, the purposivist resolve of the 1960s Court, or the dominance of Powell, securities law has lost its bellwether status in illustrating the larger movement of the Court. This most recent period thus offers a fourth pattern, with the Court's decisions perpetually meandering. Securities law does not generate issues at the top of the country's political agenda, as it did in the 1930s, and the Court has not had a Justice with a particular interest in the topic since Powell retired.<sup>46</sup> The resulting path of securities law in the Supreme Court now looks more like a random walk.

### III. WHAT THE PAST MAY TELL US ABOUT THE FUTURE

What does the past tell us about the future of the Supreme Court in the field of securities law? We begin in Section III.A by examining the likelihood that any of the four patterns identified in Part II will recur. We then turn in Section III.B to consider issues that could alter the path of the Court's decisions in securities.

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<sup>43</sup> See Coates, *supra* note 42, at 20.

<sup>44</sup> See *id.* at 7, 8 & tbl.2.

<sup>45</sup> For example, the Court now seems obsessed with statute of limitations issues in securities law. See, e.g., *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 646–48 (2010) (interpreting statute of limitations for Rule 10b-5 claims).

<sup>46</sup> See Coates, *supra* note 42, at 26 (“[N]o transactional lawyer—corporate or securities from a nonlitigation perspective—has served on the Supreme Court since Justice Powell.”). Coates's observation remains true in 2021.

### A. The Likelihood of the Reappearance of the Drivers of the 1930s, 60s, or 70s

The first shift described in Part II was principally a response to the Great Depression, but it also reflected a rethinking of the constitutional status of federalism. State securities law was deemed inadequate to the task of investor protection, and federal law was introduced to shore up that weakness. Historical limits on Congress's power under the Commerce Clause were swept away.<sup>47</sup> The role of federalism would reemerge in each of the shifts of the Sixties and Seventies, albeit in opposite directions. The aggressive purposivism of the Sixties was driven in part by dissatisfaction with the role of state courts in enforcing fiduciary standards.<sup>48</sup> The Seventies represented a sharp repudiation of that trend and an affirmation of the states' role in corporate law.<sup>49</sup> Looking to the immediate future, however, we see little chance of another fundamental shift of authority between the state and federal governments in the fields of corporate and securities laws.

The Court's first dramatic shift in securities law was the product of the devastating economic dislocation of the Great Depression. Both elites and the public had lost faith in the status quo given the breadth and depth of the economic pain of the era; the *laissez faire* of the classical legal tradition seemed repudiated by events on the ground. Franklin Delano Roosevelt's Commonwealth Club speech during the 1932 presidential campaign presaged dramatic developments ahead.<sup>50</sup>

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<sup>47</sup> *West Coast Hotel Co. v. Parrish* gets much of the attention. 300 U.S. 379 (1937). *United States v. Carolene Products Co.* reflects the broader trend. 304 U.S. 144, 152 & n.4 (1938) (describing rational basis review).

<sup>48</sup> See e.g., *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 11–12 (1971) (federal securities claims part of “a single seamless web” with state fiduciary duty claims).

<sup>49</sup> See, e.g., *Santa Fe Indus. v. Green*, 430 U.S. 462, 473–74, 478–79 (1977).

<sup>50</sup> Franklin Delano Roosevelt, Commonwealth Club Address (Sept. 23, 1932), <https://www.americanrhetoric.com/speeches/fdrcommonwealth.htm> [<https://perma.cc/8FME-QN6F>] (“Our task now is not discovery or exploitation of natural resources, or necessarily producing more goods. It is the soberer, less dramatic business of administering resources and plants already

Felix Frankfurter, who played a role in the drafting of the first three securities acts during Roosevelt's first term,<sup>51</sup> had already identified the need for a new approach to government in his Dodge Lectures at Yale in 1930. He set out the government's failings and the skills that expert administrative agencies could bring in responding to economic crises.<sup>52</sup> A similar fundamental change was visible—although slow to gain momentum—in the Supreme Court's approach to constitutional law and statutory interpretation. Over a fairly short period in the later 1930s and early 1940s, the Court abandoned the classical approach that had dominated its early-twentieth century jurisprudence.<sup>53</sup> The Court, rapidly transformed by Roosevelt's second-term appointments, embraced a much broader role for the federal government and expert agencies in addressing the country's economic problems.

The second and third shifts discussed in the previous Part saw a yo-yoing of authority between the state and federal governments. The free-wheeling interpretive approach of the Sixties was propelled by a dominant liberal majority on the Court and dissatisfaction with the deficiencies of state law in addressing fiduciary breaches to tame corporate mismanagement.<sup>54</sup> Federal securities law—"federal corporation law"—threatened to displace state corporate law in governing the

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in hand, of seeking to reestablish foreign markets for our surplus production, of meeting the problem of under consumption, of adjusting production to consumption, of distributing wealth and products more equitably, of adapting existing economic organizations to the service of the people. The day of enlightened administration has come.").

<sup>51</sup> Pritchard & Thompson, *New Deal Justices*, supra note 1, at 842 (describing how Frankfurter helped choose the drafters of the SEC's founding statutes).

<sup>52</sup> FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 72–73 (1930).

<sup>53</sup> The Court had struck down more than twenty Congressional laws between 1920 and 1932. See ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 455 (1st ed. 1960).

<sup>54</sup> See Louis Loss, Remarks at the Conference on Codification of the Federal Securities Laws (1966), in 22 *BUS. LAW.* 917, 918 (1967) ("[W]hat we have from 10b-5 was overdue . . . The common law was strangely lag-gard in appreciating the fiduciary obligations of directors and other insiders to shareholders.").



relationship between management and shareholders.<sup>55</sup> The pushback of the 1970s and 1980s, in turn, was a response to the perceived overreaching of the judiciary in promoting federal corporate law on the basis of limited statutory authority.<sup>56</sup> A more conservative Court shifted course to preserve the traditional views of limited federal government and the role of the states in corporate governance.<sup>57</sup>

We are skeptical that any of those shifts are likely to recur soon. The nation has experienced subsequent economic challenges, with the Great Recession that began in 2007/2008 standing out as the most serious financial crisis since the 1930s.<sup>58</sup> The lead-up to Great Recession exhibited some of the same greed and unconstrained market excesses that had marked the 1920s.<sup>59</sup> The problems were exacerbated by the failure of regulators—including the SEC—to anticipate the rising dangers.<sup>60</sup> The bailouts of key financial players and

<sup>55</sup> Fleischer, *supra* note 21, at 1148 (“It is the thesis of this article that the growth of federal law in the corporate area is sound and consistent with the scope and purposes of the securities laws and that the critics’ attacks are misdirected.”).

<sup>56</sup> See Pritchard & Thompson, *Securities Law in the Sixties*, *supra* note 1, at 430.

<sup>57</sup> See *Santa Fe Indus. v. Green*, 430 U.S. 462, 473–74, 478–79 (1977).

<sup>58</sup> See, e.g., *Chart Book: The Legacy of the Great Recession*, CTR. ON BUDGET & POL’Y PRIORITIES (June 6, 2019), <https://www.cbpp.org/research/economy/the-legacy-of-the-great-recession> [<https://perma.cc/45JR-TWBK>] (describing the Great Recession as the worst economic downturn in the United States since the Great Depression).

<sup>59</sup> See, e.g., *Systemic Risk: Examining Regulators’ Ability To Respond to Threats to the Financial System: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 12–13 (2007) (statement of Robert Kuttner, Editor, Am. Prospect) (“Although the particulars [of the Great Depression and the Great Recession] are different . . . , financial history suggests that the risks and abuses are enduring. They are variations on a few hearty perennials: Excess leverage, conflicts of interest, nontransparency, misrepresentation, and engineered euphoria.”).

<sup>60</sup> See, e.g., Stephen Labaton, *S.E.C. Concedes Oversight Flaws Fueled Collapse*, N.Y. TIMES (Sept. 26, 2008), <https://www.ny-times.com/2008/09/27/business/27sec.html> [<https://perma.cc/Z75E-YAJ3>] (describing an Inspector General’s report that concluded “that the S.E.C. division that oversees trading and markets had failed to update the rules of

enhanced financial reforms such as the Volcker Rule<sup>61</sup> and the creation of the Financial Stability Oversight Council (FSOC)<sup>62</sup> were the most dramatic regulatory changes in finance since the New Deal. But it was scarcely the regulatory tsunami of the 1930s. These new regulatory interventions were overlaid over the plethora of regulatory bodies that had grown up since 1929. The Great Recession did not fuel a political movement to displace the SEC and other regulators, although Congress did lay on additional responsibilities.<sup>63</sup>

In the 1930s, the SEC had been the fair-haired child of regulatory reform, perhaps because the agency was starting from a blank slate, unencumbered by pre-New Deal political compromises. Moreover, the new agency was not populated with carry-overs from prior administrations, but instead became a magnet for enthusiastic New Dealers, many of them new to Washington.<sup>64</sup> It was no surprise, then, that the Roosevelt administration assigned the SEC the central role when the government took on the daunting task of reorganizing the holding companies that controlled electrical power production and gas distribution across the country.<sup>65</sup> Three years later, the

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the [voluntary supervision] program and was ‘not fulfilling its obligations.’”).

<sup>61</sup> See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 619, 124 Stat. 1620–31 (2010) (codified as amended at 12 U.S.C. 1851 (2019)).

<sup>62</sup> See *id.* § 113 (codified at 12 U.S.C. § 5323).

<sup>63</sup> The Dodd-Frank Act in 2010 did add one new regulatory agency, the Consumer Financial Protection Bureau (CFPB). *Id.* § 1011 (codified at 12 U.S.C. § 5491). But the CFPB was limited in its impact by the Trump administration’s hostility including the pursuit of a Supreme Court challenge in which the Court declared the statute’s “for cause” limitation of the President’s removal power over the Bureau’s single director unconstitutional. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020).

<sup>64</sup> James Landis, a Harvard faculty member whom Felix Frankfurter brought to Washington to help draft the 1933 Act (along with two other Frankfurter protégés, Thomas Corcoran and Ben Cohen) became the second chair of the SEC. See Pritchard & Thompson, *New Deal Justices*, *supra* note 1, at 850, 870. William O. Douglas from the Yale faculty joined the staff of the new SEC and became its third chair. See *id.* at 852, 870.

<sup>65</sup> See generally Public Utility Holding Company Act (PUHCA), Pub. L. No. 74-333, 49 Stat. 803 (1935) (entrusting administration of the statute to

Chandler Act gave the SEC a critical role in business reorganizations generally.<sup>66</sup> In between, the agency, under the hard-driving leadership of William O. Douglas, a future Supreme Court Justice, had seized the lead in regulating the stock markets. In his more ambitious moments, Douglas flirted not only with federal incorporation, but also with a government takeover of investment banking.<sup>67</sup> The SEC was the New Deal's "go to" agency for regulating business.

By 2008, the SEC seemed a much smaller cog in a much larger federal regulatory system, with the Treasury, the Federal Reserve, and other agencies thought to be more significant. Moreover, the agency had utterly failed in its role of overseeing the risk management practices of the investment banks that played an outsize role in the unraveling of the financial markets.<sup>68</sup> The implementation of the Volcker Rule, intended to limit that risk, was shared among five agencies.<sup>69</sup> The SEC is one of nine agencies whose chairs serve on the FSOC under the Secretary of the Treasury.<sup>70</sup> The SEC increasingly appears to be a small voice in a larger chorus.

The financial crisis leading to the Great Recession demonstrated that the country remains susceptible to existential

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the SEC), *repealed by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

<sup>66</sup> See Chandler Act, Pub. L. No. 75-696, ch. 10, 52 Stat. 840, 883-905 (1938), *repealed by* Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

<sup>67</sup> Letter from William O. Douglas, Professor, Yale L. Sch., to Felix Frankfurter, Professor, Harvard L. Sch. 2 (Feb. 19, 1934); Letter from William O. Douglas, Chairman, U.S. Sec. & Exch. Comm'n, to Henry A. Wallace, Sec'y, U.S. Dep't of Agric. 3-4 (Apr. 11, 1938) (on file with the William O. Douglas Collection, Library of Congress) (advocating a system of government investment banking).

<sup>68</sup> See, e.g., Labaton, *supra* note 60.

<sup>69</sup> *Volcker Rule*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., <https://www.federalreserve.gov/supervisionreg/volcker-rule.htm> [<https://perma.cc/R5LF-FBP6>] (last updated Jan. 30, 2020); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 619, 124 Stat. 1376, 1620-31 (2010) (codified as amended at 12 U.S.C. 1851 (2019)).

<sup>70</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act § 111(b)(1) (codified at 12 U.S.C. 5321(b)(1)).

crises of the sort seen in 1929. But the threats that loom largest today—climate change and pandemics, for example—are more environmental than financial. They seem removed from the core of securities law, although politicians will endeavor to squeeze them in, as with conflict minerals.<sup>71</sup> It seems unlikely that finance will prove the key battleground for working out larger issues of government anytime soon, as it did in the Thirties and Forties. The enactment of PUHCA in 1935,<sup>72</sup> and the *Chenery* cases in the 1940s,<sup>73</sup> were major steps forward in bold experiments in government. So, too, albeit in a different space, were the implied private rights of action cases decided by the Court in the 1960s.<sup>74</sup> Those cases gave rise to the concept of the “private attorney general,” revolutionary in its day.<sup>75</sup> Today, the securities cases that do reach the Court do not seem important even for the securities field itself, much less for any other area of the law or government.

The run of Democratic control of both the White House and Congress that paved the way for the federal securities laws in the Thirties has given way to frequently divided government and regular trading of control of the White House and the two chambers of Congress.<sup>76</sup> That alternating hold on power has

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<sup>71</sup> Requirement of Report Regarding Disclosure of Registrant’s Supply Chain Information Regarding Conflict Minerals, 17 C.F.R. § 240.13p-1 (2020) (reporting requirements for registered companies that need conflict minerals for “the functionality or production of a product manufactured” by the company).

<sup>72</sup> Public Utility Holding Company Act (PUHCA), Pub. L. No. 74-333, 49 Stat. 803 (1935), *repealed by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

<sup>73</sup> SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943); SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194 (1947).

<sup>74</sup> See, e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426, 430–31 (1964) (recognizing a private cause of action under Rule 14a-9 of the Securities Exchange Act).

<sup>75</sup> See, e.g., *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 61 & n.13 (1977) (Stevens, J. dissenting) (describing and defending private attorney general enforcement of securities, antitrust, and civil rights law).

<sup>76</sup> From 1933 until 1947, Democrats controlled the Presidency, the House, and the Senate. One political party has not had a unified government for more than four years in a row since 1969. See *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF

generated little legislation to drive the Court's caseload in securities, as PUHCA did in the Forties. Tender offer regulation, which generated a brief run of cases after Congress enacted the Williams Act in 1968, no longer gets any attention from the Court.<sup>77</sup> Proxy regulation has infrequently returned to the Court since the lightning bolt of *J. I. Case Co. v. Borak* in 1964 gave rise to implied rights of action.<sup>78</sup> The spike in the Court's securities docket during Powell's time can mainly be attributed to his influence;<sup>79</sup> Congress did next to nothing in the field of securities law during Powell's era to provoke a judicial response. The two biggest deregulatory acts in the history of federal securities law, the Private Securities Litigation Reform Act of 1995 (PSLRA)<sup>80</sup> and the Jumpstart Our Business Startups (JOBS) Act of 2012,<sup>81</sup> both passed during times of divided government,<sup>82</sup> have not generated Supreme Court cases that changed the direction of securities law, much less the law more generally. The key PSLRA issues were largely resolved by Congress, leaving the Court to resolve residual

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REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [<https://perma.cc/4KWH-ZSGP>] (last visited Mar. 3, 2021); *Party Division*, U.S. SENATE, <https://www.senate.gov/history/party-div.htm> [<https://perma.cc/39FL-QJCK>] (last visited Mar. 3, 2021); *Presidents*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/> [<https://perma.cc/A3GT-S67A>] (last visited Mar. 3, 2021).

<sup>77</sup> See, e.g., *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975). The most recent Supreme Court case interpreting the Williams Act was decided in 1997. See *United States v. O'Hagan*, 521 U.S. 642 (1997).

<sup>78</sup> *Borak*, 377 U.S. at 430–31.

<sup>79</sup> See *supra* Section II.D.

<sup>80</sup> Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

<sup>81</sup> See Jumpstart Our Business Startups Act (JOBS Act), Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified as amended in scattered sections of 15 U.S.C.).

<sup>82</sup> Republicans controlled one or both houses of Congress, while Democrats were in the White House for both. See *Party Divisions of the House of Representatives, 1789 to Present*, *supra* note 76; *Party Division*, *supra* note 76; *Presidents*, *supra* note 76. Congress adopted the PSLRA over President Bill Clinton's veto. MITCHEL A. SOLLENBERGER, CONG. RSCH. SERV., 98-147, PRESIDENT CLINTON'S VETOES 2 tbl.1 (2004).

ambiguity, a routine task of statutory interpretation.<sup>83</sup> We have not seen a return to the wholesale judicial legislation of the 1960s, with the Court filling in gaps in securities laws after two decades of Congressional neglect. The issues raised by the JOBS Act—new regulatory exemptions for Reg A+ or private offerings or resales,<sup>84</sup> or broader ways to avoid public company status<sup>85</sup>—have yet to generate any litigation for the Court and seem unlikely to do so. The important issues will be resolved by the SEC with minimal judicial intervention.

Another key factor that has historically pushed securities law to the fore of the work of the Supreme Court—the presence of Justices with experience or interest in the field—has also disappeared. We do not anticipate the return of a Justice with a deep personal knowledge of the regulatory context of securities law, a key feature of all three periods discussed above. There has been no Justice with knowledge or experience in the field of securities since Powell retired in 1987. If anything, that gulf is wider than even the long passage of time suggests. Except for Chief Justice John Roberts, the Justices who have joined the Court since Powell left have had no sustained experience working as attorneys for private entities.<sup>86</sup> Former academics and government lawyers now dominate the Court. All but one Justice—Justice Elena Kagan, who had been Solicitor General after a career as an academic—came to the Court from one of the federal appellate courts.<sup>87</sup> Roosevelt's appointees, by contrast, had cut their teeth in drafting the securities statutes, litigating the constitutional

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<sup>83</sup> See, e.g., A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 108–09 (2011).

<sup>84</sup> See JOBS Act sec. 401, § 3(b) (codified at 15 U.S.C. § 77c(b) (2019)).

<sup>85</sup> See, e.g., JOBS Act § 501 (codified at 15 U.S.C. § 78l(g)(1)(A)).

<sup>86</sup> See Coates, *supra* note 42, at 26. John Roberts served as an appellate lawyer at a law firm for nearly fifteen years. See Aaron M. Houck, *John G. Roberts, Jr.*, BRITANNICA, <https://www.britannica.com/biography/John-G-Roberts-Jr> (on file with the Columbia Business Law Review) (last updated Jan. 23, 2021). However, he spent about as much of his career practicing in the public sector as in the private sector, and his work as an appellate lawyer at a Washington law firm traded on his government experience. See *id.*

<sup>87</sup> *Current Members*, SUP. CT., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/98KT-ZPJQ>] (last visited Mar. 3, 2021).

status of those statutes, or running the SEC.<sup>88</sup> Given the current state of the nomination process, the likelihood that another Justice Powell is nominated to renew the Supreme Court's interest in securities law seems vanishingly small.

Where does that leave the Court in the field of securities law? The obvious answer is the continuance of the current norm, which has persisted since Powell left the Court in 1987. The Court takes far fewer securities cases, and its opinions bounce back and forth between those that expand the reach of regulation and those that cut it back. Rarely does a Supreme Court opinion make much of a difference at all to the practice of securities law. *Basic Inc v. Levinson* is the exception that proves the rule, and even that decision stands out for its failure to grapple with the enormous economic consequences it engendered.<sup>89</sup> The Court, presented with an opportunity to rein in the class action juggernaut it had released, took a pass in *Halliburton II*, going out of its way to disclaim any judicial role in reforming securities class actions notwithstanding the judiciary's role in creating that cottage industry.<sup>90</sup> The Court instead left it to Congress to develop any reforms. Given that hands off approach, underscored by the meandering path that the Court has followed for thirty years—a third of the Supreme Court's history with the federal securities law—we cannot discount the likelihood that the Court will continue to wander in the field of securities law.

## B. New Sources of Securities Litigation before the Supreme Court

The random walk is the most obvious prospect, but not all that interesting. The theme of this Symposium calls on us to speculate, so we will. What could change the Court's direction

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<sup>88</sup> See *supra* Section II.A.

<sup>89</sup> *Basic Inc. v. Levinson*, 485 U.S. 224, 246–47 (1987) (permitting class action plaintiffs in a private securities fraud action under Rule 10b-5 to invoke a rebuttable presumption of reliance, opening the way for broader set of 10b-5 claims against public companies).

<sup>90</sup> *Halliburton Co. v. Erica P. John Fund (Halliburton II)*, 573 U.S. 258, 277 (2014) (“These concerns are more appropriately left to Congress[.]”).

in securities law? One possibility is the impact of rapidly advancing technology and international competition on securities markets. It also seems possible that administrative law will return to the fore, this time driven by *Chevron* concerns. The latter possibility may be prompted by new federal regulatory interventions to expand federal rules for public corporations.

### 1. Technology Advances and Market Innovations

Technology has disrupted securities markets in the twenty-first century more than either politics or any financial crisis. Consider, for example, the strict regulatory approach of the Securities Act with regards to new issues of securities.<sup>91</sup> The Securities Act provoked controversy almost immediately upon its enactment.<sup>92</sup> The intrusive regulatory approach of the initial act, with its draconian liability standards, survived an immediate effort to water it down during the first year after its passage.<sup>93</sup> In the decades that followed, the Act maintained a strongly pro-regulatory approach. Wall Street made an uneasy peace with the regime developed by the SEC, perhaps because the industry profited from its anti-competitive aspects.<sup>94</sup> Nonetheless, the Act's rigorous disclosure requirements and liability provisions have pushed market intermediaries to develop technologically-driven alternatives. As a result, the economic footprint of the Act has been limited.

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<sup>91</sup> See 15 U.S.C. § 77e (2019).

<sup>92</sup> See Pritchard & Thompson, *New Deal Justices*, *supra* note 1, at 856–57.

<sup>93</sup> See *id.*

<sup>94</sup> Cf. Letter from Thomas Corcoran to Felix Frankfurter, Professor, Harvard L. Sch. 1 (May 11, 1934), [http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1934\\_05\\_11\\_Corcoran\\_to\\_Frank.pdf](http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1934_05_11_Corcoran_to_Frank.pdf) [https://perma.cc/7AV6-EYVN] (“If Ray [Moley] is any barometer of what’s going on in the White House mind, the plan of battle is to avoid any further attempt at reforms that might bring down more criticism during the present Congress, arrange a ‘truce of God’, reorganize the machinery down here to help along business recovery this summer, and in every other way postpone all other considerations to the necessarily primary objective of winning the Congressional elections.”).



Direct listing has now transformed from a seldom used means of accessing public trading markets into an attractive option.<sup>95</sup> Companies following that route can raise new capital without jumping through the traditional hoops of extensive disclosure, SEC staff review, and market intermediaries whose potential liability has provided a restraining influence on issuer overreach.<sup>96</sup>

Special Purpose Acquisition Companies (SPACs), have gained an even larger presence as an alternative way to go public, essentially splitting the IPO process in two and bypassing some of the traditional scrutiny IPOs receive.<sup>97</sup> Public investors are invited to buy shares in an empty shell company (i.e., a non-operating company) backed by a sponsor, often a celebrity.<sup>98</sup> Only after the SPAC has gone public does the sponsor focus on a suitable, privately-held acquisition candidate; a merger leaves the operating company as the surviving entity—now with publicly traded shares. The key difference is that the price of the operating company is not set, as in a traditional IPO by an investment banker’s “book building” to see what price public investors are willing to pay for the shares, but rather by the sponsor negotiating the price with the private company’s managers.<sup>99</sup> This alternative process has

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<sup>95</sup> The SEC approved new and broadened NYSE rules for direct listing in December 2020 as consistent with the Exchange Act. *See* Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, To Amend Chapter One of the Listed Company Manual To Modify the Provisions Relating to Direct Listings, 85 Fed. Reg. 85,807, 85,807–10 (Dec. 29, 2020).

<sup>96</sup> *See* Donald C. Langevoort & Robert B. Thompson, “Publicness” in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 338–39 (2013) (discussing attempts to avoid these obligations).

<sup>97</sup> Amrith Ramkumar & Maureen Farrell, *When SPACs Attack! A New Force Is Invading Wall Street*, WALL ST. J. (Jan. 23, 2021, 12:00 AM) (on file with the Columbia Business Law Review), <https://www.wsj.com/articles/when-spacs-attack-a-new-force-is-invading-wall-street-11611378007>.

<sup>98</sup> *See* *Celebrities Involvement with SPACS—Investor Alert*, U.S. SEC. & EXCH. COMM’N (Mar. 10, 2021), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/celebrity-involvement-spacs-investor-alert> [<https://perma.cc/R5HW-GJ8V>].

<sup>99</sup> *See* Ramkuma & Farrell, *supra* note 97 (describing several such arrangements).

allowed more ordinary investors to participate in IPOs, albeit in a more volatile market that has been more susceptible to short selling.<sup>100</sup>

Apart from these lightly-regulated ways to go public, the dramatic changes in availability of private capital have made it possible for startup companies to fund their capital needs for a much longer time without going to the public markets.<sup>101</sup> The growth of private equity and venture capital have made the public markets optional for many growth companies. Such deep pools of finance were unavailable for most of the twentieth century. Regulatory changes have also facilitated the trend of staying private longer or even indefinitely. The JOBS Act raised the threshold for the number of shareholders that a company can have before triggering public company status, which carries with it the disclosure and governance requirements of the Exchange Act.<sup>102</sup>

None of these market innovations affecting the regulatory footprint of securities laws have yet to find their way to the Supreme Court. The greater reliance on private finance and markets has left a greater share of securities transactions outside the space from which the Supreme Court has traditionally drawn its securities docket.

One of the most prominent examples in the innovative space known as FinTech has been bitcoin and other cryptocurrencies. In the initial period of bitcoin use, it regularly

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<sup>100</sup> See Matt Wirz & Juliet Chung, *Short Sellers Boost Bets Against SPACs*, WALL ST. J. (Mar. 14, 2021, 5:30 AM) (on file with the Columbia Business Law Review), <https://www.wsj.com/articles/short-sellers-boost-bets-against-spacs-11615714200>.

<sup>101</sup> See Robert B. Thompson & Donald C. Langevoort, *Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising*, 98 CORNELL L. REV. 1573, 1604–24 (2013) (tracing changes in the regulatory environment and noting that startup companies have “[a]n alternative . . . to bypass [the securities] regulatory systems by staying *indefinitely* in the private, accredited-only markets” and that such an alternative is a “threat to public markets like NASDAQ and NYSE”).

<sup>102</sup> Jumpstart Our Business Startups Act (JOBS Act), Pub. L. No. 112-106, sec. 501, § 12(g)(1)(A), 126 Stat. 306, 326 (2012) (codified at 15 U.S.C. § 78l(g)(1)(A) (2019)).

generated the question whether the bitcoin itself was a security.<sup>103</sup> The definition of a security is a question that has come before the Court more often than any other issue since 1933.<sup>104</sup> The SEC initially took a cautious approach with cryptocurrency, suggesting it could be a security, but not launching widespread enforcement.<sup>105</sup> More recently, cryptocurrency issues have moved away from the definition of a security. Instead, the debate around digital currencies addresses broader questions of payment systems and foreign exchange. Central bank digital currencies and Digital Dollars pose complex questions regarding public and private developments of crypto money as innovative digital forms of currency.<sup>106</sup> The move toward a cashless society has accelerated in recent years. These developments could remake the business of companies focused on payment systems. International issues likely will be recurring questions given the potential to transform foreign exchange transactions and the potential effects on the money supply affecting both domestic economies and international economies. These questions could come to the Supreme Court, but it is unlikely they will put securities law at center stage.

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<sup>103</sup> See, e.g., generally, Jeffrey E. Alberts & Bertrand Fry, *Is Bitcoin a Security?*, 21 B.U. J. Sci. & Tech. L. 1 (2015).

<sup>104</sup> See, e.g., generally, SEC v. W. J. Howey Co., 328 U.S. 293 (1946); Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985); Reves v. Ernst & Young, 494 U.S. 56 (1990); SEC v. Edwards, 540 U.S. 389 (2004).

<sup>105</sup> See Kevin Helms, *SEC Chairman Jay Clayton Explains US Crypto Regulation, Calls Bitcoin a Store of Value*, BITCOIN: NEWS (Nov. 23, 2020), <https://news.bitcoin.com/us-cryptocurrency-regulation-sec-chairman-jay-clayton-bitcoin/> [<https://perma.cc/2UUX-ZG2J>] (reporting SEC Chairman Jay Clayton's statement that "we are going to see more regulation around the payment space" (internal quotation marks omitted)).

<sup>106</sup> See, e.g., generally John Crawford, Lev Menand & Morgan Ricks, *FedAccounts: Digital Dollars*, 89 GEO. WASH. L. REV. 113 (2021); Paul Wong & Jesse Leigh Maniff, *Comparing Means of Payment: What Role for a Central Bank Digital Currency?*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., <https://doi.org/10.17016/2380-7172.2739> [<https://perma.cc/5HD5-MQF2>] (last updated Apr. 12, 2021).

## 2. *Chevron* Questions

One area that could take the Court's work in securities law back to its origins is the *Chevron* doctrine. The doctrine takes its name from the Court's unanimous 1984 decision upholding an Environmental Protection Agency regulation interpreting multiple pollution devices as a single statutory source under the Clean Air Act,<sup>107</sup> but it has become the central focus of administrative law more generally. The case arose under environmental statutes, but the underlying issue harkens back to the Court's earliest interactions with the securities laws. In particular, the Court's 1940s securities decisions frequently sounded more in administrative law generally, rather than the specifics of securities law. The central question in many of the Court's decisions that decade—most prominently in *Chenery I* and *II*—turned on how to interpret statutory silence. How much deference would the Court afford the SEC in filling in gaps in legislation? (The answer then was quite a lot).<sup>108</sup> The Court held in *Chevron*, generally consistent with the views of the Court in *Chenery II*, that where Congress has not directly spoken on the precise question at issue, the agency determination is entitled to deference if it is a “reasonable accommodation of . . . competing interests.”<sup>109</sup>

The Court's *Chevron* holding found a booster in Justice Antonin Scalia, even though he did not join the Court until two years after the decision. Soon after coming to the Court, Scalia devoted a law school lecture to *Chevron*'s defense.<sup>110</sup> More recent conservative Justices have been more skeptical, most notably Justice Clarence Thomas, who has specifically urged the Court to reexamine the doctrine.<sup>111</sup> Justices Samuel Alito,

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<sup>107</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>108</sup> *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 92 (1943); *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 201–03 (1947).

<sup>109</sup> *Chevron*, 467 U.S. at 865.

<sup>110</sup> See generally Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

<sup>111</sup> See *Michigan v. EPA*, 576 U.S. 743, 761–64 (2015) (Thomas, J., concurring).

Neil Gorsuch, and Brett Kavanaugh have expressed skepticism, if not hostility, toward the doctrine.<sup>112</sup> The challenge has been described as a desire to turn away from a system of bureaucratic rule that “has its root[s] in . . . the Progressive Era.”<sup>113</sup> Those “roots” got room to grow from the New Deal Justices who played such an important role in enacting and defending the fledgling securities laws in the 1930s. Skepticism of *Chevron* strikes at the heart of the Progressive faith in expert decisionmaking that drove the creation of the SEC.

The issue of deference to administrative agencies might well come to the fore during a time in which the presidency and the agencies are in the hands of one party, but legislative initiatives remain difficult with Congress closely divided. The current political environment, with a clear majority of the Court having been appointed by Republican Presidents and a Democrat in the White House working with thin majorities in both houses of Congress, may set the stage for a sequel to the confrontations of the 1930s. If such a disagreement arose in the field of securities law, a likely setting might be SEC rulemaking relating to climate change disclosure or political contributions by public companies, current lightning rods on the SEC’s potential regulatory agenda.

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<sup>112</sup> See Jonathan H. Adler, *Shunting Aside Chevron Deference*, THE REGUL. REV. (Aug. 7, 2018), <https://www.theregreview.org/2018/08/07/adler-shunting-aside-chevron-deference/> [<https://perma.cc/99BB-BT6N>]; Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Judge Kavanaugh, Chevron Deference, and the Supreme Court*, THE REGUL. REV. (Sept. 3, 2018), <https://www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/> [<https://perma.cc/RW96-Q3WE>] (recounting Justice Kavanaugh’s doubts about *Chevron*); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152–58 (2016) (Gorsuch, J., concurring).

<sup>113</sup> *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 129 n.6 (2015) (Thomas, J., concurring in the judgment); see also *Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 3 (2015) (statement of Charles J. Cooper, Founding Partner and Chairman, Cooper & Kirk, PLLC) (“This vision of expansive bureaucratic power took hold in the Supreme Court’s jurisprudence in the early twentieth century, particularly during the New Deal.”).

### 3. Federal Corporate Law as a Possible Twenty-First Century Setting

Corporate governance rules have long been the province of state law. Dissatisfaction with the perceived management bias in such rules has generated recurring efforts to displace the state system with federal incorporation. The initial push for federal incorporation during the Progressive period at the turn of the twentieth century garnered the most attention, with three consecutive Presidents—Theodore Roosevelt, William Howard Taft, and Woodrow Wilson—supporting the move but no bill ever clearing Congress.<sup>114</sup> During the New Deal, key players such as Adolf Berle and William O. Douglas supported federal incorporation,<sup>115</sup> but they never persuaded Franklin Delano Roosevelt, who had other political priorities. Instead, the federal securities legislation of the 1930s—with the notable exceptions of PUHCA and the Chandler Act—focused on disclosure to help make effective the corporate governance rights conferred by state law on shareholders. William Cary, who personified the reinvigoration of securities regulation as Chair of the SEC during the 1960s, triggered a boomlet for federal corporate law with his insider trading decision for the SEC in 1961 in *Cady Roberts*.<sup>116</sup> After his return to Columbia Law, Cary wrote an important law review article in the 1970s calling for federal minimum standards for corporations.<sup>117</sup> No broad legislation followed, however, as

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<sup>114</sup> See generally Camden Hutchinson, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, 2017 COLUM. BUS. L. REV. 1017 (discussing the Progressive Era history of federal incorporation, the presidential support for it, and its loss of momentum during the Wilson administration).

<sup>115</sup> Letter from William O. Douglas, Professor, Yale L. Sch., to A.A. Berle, Jr., Professor, Columbia L. Sch. (Jan. 3, 1934) (on file with the William O. Douglas Collection, Library of Congress) (“You can count on me to pull an oar on federal incorporation . . . [P]erhaps we can begin to get at the really fundamental problem of the increment of power and profit inherent in our present forms of organization[.]”).

<sup>116</sup> See generally *Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).

<sup>117</sup> William L. Cary, *Federalism and Corporate Law, Reflections upon Delaware*, 83 YALE L.J. 663, 700 (1974).

Congress was distracted by more salient political questions in the post-Watergate era. The only legislation was the Foreign Corrupt Practices Act of 1977<sup>118</sup> targeting foreign bribery by U.S. companies, which fit awkwardly in the pattern of the federal securities laws.

Instead, one-off pieces of legislation provided repeated, if never comprehensive, federal requirements for public corporations. For example, the two most significant securities statutes of the twenty-first century, Sarbanes–Oxley in 2002<sup>119</sup> and Dodd–Frank in 2010,<sup>120</sup> for the first time provided federal rules as to the required composition of boards of directors, requiring that the audit and compensation committees be comprised of independent directors.<sup>121</sup> State laws, by contrast, say nothing about requirements for directors. Federal law has also increased the items on which shareholders must vote, including requiring their approval of executive compensation, albeit only in an advisory role.<sup>122</sup> The SEC, too, continues to use its existing powers to create broader disclosure requirements and to expand shareholder rights. SEC rules have expanded disclosure in multiple areas to regulate the substance of corporate governance indirectly through “comply or explain” disclosure requirements.<sup>123</sup> The agency was requiring disclosure to put a thumb on the scale, not issuing mandates.

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<sup>118</sup> Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3).

<sup>119</sup> Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775–77 (codified at 15 U.S.C. § 78j-1(m) (2019)) (directing the SEC to refuse to list issuers without an audit committee that is entirely independent).

<sup>120</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 952, 124 Stat. 1376, 1900–03 (2010) (codified at 15 U.S.C. § 78j-3) (directing the SEC to decline to list issuers without an independent compensation committee).

<sup>121</sup> Principal executive officers must certify that they have reported to the independent committees. 17 C.F.R. § 240.13a-14(b)(5) (2020).

<sup>122</sup> 15 U.S.C. §§ 78n(i), 78n-1.

<sup>123</sup> See, e.g., 17 C.F.R. § 229.407(c)(1) (2020) (“If the registrant does not have a standing nominating committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a committee and identify

The D.C. Circuit—the most common court for reviews of regulatory challenges—has on occasion struck down SEC rulemaking efforts, particularly if new rules strayed beyond disclosure. For example, the appellate court struck down SEC rulemaking in 1990 that effectively banned dual class shares, a management entrenchment device which long had been permitted by state laws.<sup>124</sup> The court reasoned that the rule would establish a federal corporate law which exceeded the agency's statutory authority.<sup>125</sup> Twenty years later, another D.C. Circuit panel struck down an SEC rule that expanded shareholder powers to use the company's proxy to nominate candidates for election to the board of directors.<sup>126</sup> That challenge could have been based on federalism, as was the one to dual class rulemaking just discussed. During the SEC rulemaking process, however, Congress in the Dodd–Frank Act included a specific section authorizing the agency to adopt such a rule,<sup>127</sup> so the appellate court instead rejected the rule as arbitrary and capricious for failing the cost-benefit requirements for SEC rulemaking imposed by the Exchange Act.<sup>128</sup>

Neither of these decisions were reviewed by the Supreme Court. But if a securities case were to be the basis for a *Chevron* decision, it likely would be one grounded in corporate governance rulemaking or a disclosure mandate relating to corporate social responsibility. Proposals for federal incorporation resurfaced during the Democratic presidential primaries in 2020 but failed to gain much traction.<sup>129</sup> Proposals relating to corporate social responsibility have become

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each director who participates in the consideration of director nominees.”); Sarbanes-Oxley Act of 2002 § 406(a) (codified at 15 U.S.C. § 7264(a)) (requiring companies to adopt a code of ethics or explain why they have not).

<sup>124</sup> *Bus. Roundtable v. SEC*, 905 F.2d 406, 407, 417 (D.C. Cir. 1990).

<sup>125</sup> *Id.* at 412.

<sup>126</sup> *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir. 2011).

<sup>127</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 971(a), § 14(a), 124 Stat. 1376, 1915 (2010) (codified at 15 U.S.C. § 78n(a)(2)).

<sup>128</sup> *Business Roundtable*, 647 F.3d at 1148.

<sup>129</sup> See, e.g., *Empowering Workers Through Accountable Capitalism*, WARREN DEMOCRATS, <https://elizabethwarren.com/plans/accountable-capitalism> [<https://perma.cc/Z4AL-YBRD>].



a prominent part of progressives' political agenda for public corporations.<sup>130</sup> If one or more became part of the SEC's agenda, a challenge in the D.C. Circuit—which retains a majority of Democratic appointees—would be likely. It is not difficult to imagine that such a challenge to agency rulemaking on *Chevron* grounds might attract the Supreme Court's attention.

#### IV. CONCLUSION

The securities context that so captured the New Deal Court's embrace of agency deference—in the *Chenery* cases and others—might well provide a twenty-first century Supreme Court revisit of that almost century-old switch. Absent such a combination, securities are likely to be something of a backwater for some time to come, with meandering results. The pathbreaking role that securities law played during the New Deal and the Sixties and Seventies remains a remote possibility for the Supreme Court as currently configured.

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<sup>130</sup> See, e.g., BUS. ROUNDTABLE, STATEMENT ON THE PURPOSE OF A CORPORATION 1 (2021), <https://system.businessroundtable.org/app/uploads/sites/5/2021/02/BRT-Statement-on-the-Purpose-of-a-Corporation-February-2021-compressed.pdf> [<https://perma.cc/D9CD-4NQB>]. The Business Roundtable released its statement in 2019, but it continues to collect signatures. *Id.*