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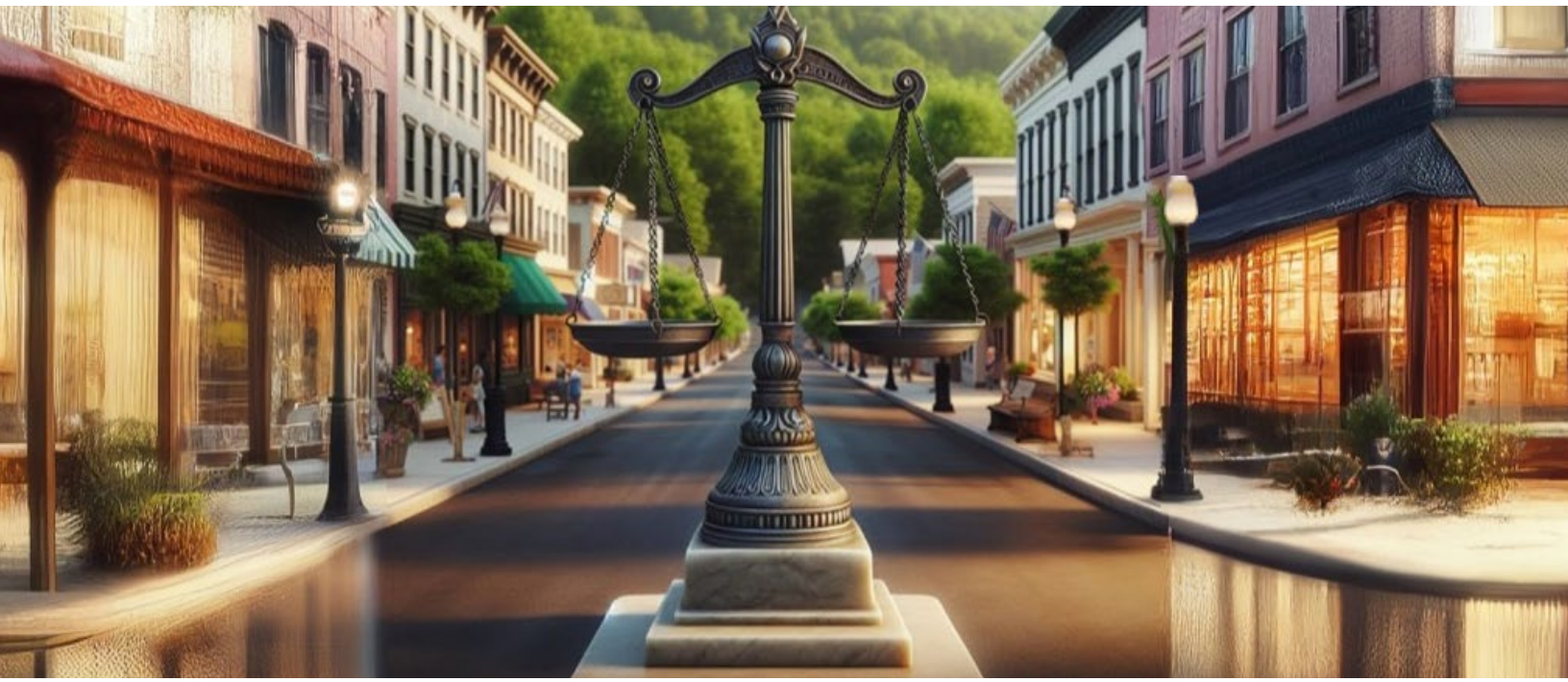
SPECIAL REPORT

Recent Supreme Court Decisions and Their Harmful Impact on Main Street Americans



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Overview

The Supreme Court ended its 2023-2024 term with three exceptionally damaging decisions that will undermine, for years to come, the ability of the government's regulatory agencies to protect the public from a wide range of threats to their health, safety, welfare, and financial well-being. The Federalist Society, Wall Street, and Corporate America are undoubtedly celebrating these decisions because they represent victories in their misguided war on regulation—their attack on what they call the "administrative state." Described as "blockbusters," "seismic," "far-reaching," "breathtaking," "existential threat," and more, the scope of the impact of these decisions is indeed likely going to be historic. But the sad reality is that the lives and livelihoods of virtually all Americans are going to be seriously impacted, and harmed, by these decisions.

The *Loper Bright* decision overruling the *Chevron* case and ending judicial deference to the expertise of the regulatory agencies has been getting most of the attention. However, that was only one of several important cases the Court recently decided. Another one was *Jarkesy*, which greatly limited SEC administrative enforcement proceedings and will impact administrative enforcement authority at other agencies as well. A third case was *Corner Post*, which in effect eliminated the six-year time limitation to file a case in court to have a rule thrown out, creating an avenue to challenge almost any rule no matter how old.

Viewed together, these cases form a mosaic of related Supreme Court decisions that will synergistically interact to put virtually all Americans at greater risk from the powerful, wealthy, and well-connected.

As important as each of these cases are, they should not be thought of in isolation. They are part of a number of decisions that may seem unrelated but in fact are not. Viewed together, these cases form a mosaic of related Supreme Court decisions that will synergistically interact to put virtually all Americans at greater risk from the powerful, wealthy, and well-connected.

For example, the Court in a 2022 decision (*West Virginia v. EPA*) fully and finally enshrined what it has called the "major questions doctrine," holding that rules courts determine to be of "vast economic and political significance" require very explicit Congressional authorization. Compounding the impact of these regulatory cases, the Court has also issued a series of decisions over the last several years limiting prosecutors' ability to convict corrupt government officials (*Snyder*, *McDonnell*) and reducing options to hold lawbreaking corporate officers accountable (*Axon Enterprises*, *Slack Technologies*). The Court's decisions have also been forcing Americans into biased, nonpublic arbitration proceedings with little accountability and where corporations almost always win (*Schein*, *Coinbase*).[1] Of course, all this is made much worse by the Court's decisions allowing corporations and billionaires to spend virtually unlimited amounts of often dark money on campaigns and in elections (*McCutcheon*, *Citizens United*).

The bottom line is that it will be easier for the powerful, wealthy, and well-connected to influence—and even, in effect, to bribe—government officials and harder to hold corporations and their officers

[1] Not satisfied with forcing injured Americans into unfavorable, one-sided arbitration forums where corporations almost always win, some are seeking to change state laws that will make it much more likely that those injured will not be able to find a lawyer to represent them at all, even in court lawsuits. *See*, *e.g.*, Jessica Silver-Greenberg, *Uber, Facing Sexual-Assault Litigation, Pushes Plan That May Curb Suits*, N.Y. Times (Aug. 12, 2024), https://www.nytimes.com/2024/08/12/business/uber-nevada-referendum.html?searchResultPosition=1.

liable for lawbreaking. At the same time, agencies' authority to protect financial consumers, investors, markets, the financial system, and the economy from predators, lawbreakers, and criminals, has been limited.

None of this is surprising. This is why these six so-called "conservative" Justices were put on the Court. This was the intended result of the corporate and right-wing projects launched as far back as 1971 in a memo from Lewis Powell to the Chamber of Commerce entitled "Attack on American Free Enterprise System." That ignited what became a coordinated, multifaceted, and extremely well-funded multi-decade campaign to reverse many of the advances of FDR's New Deal, with the so-called administrative state in the bullseye.

Regardless of origin, the importance of the recent three cases will not be limited to their specific holdings, as damaging as they are. The 6-3 conservative majority is also sending a broader message: the Court is serious about dismantling the administrative state. They are saying that the courts alone will decide what a statute means and what the Congress can and cannot delegate. They are saying that they are going to aggressively police statutes and the separation of powers, which does not include an administrative state, and that the lower courts must do so as well. (And, the Justices aren't just saying this in court decisions. They are also speaking out publicly about what they are doing. For example, Justice Gorsuch, who is on a promotion tour to pump up sales of his new book subtitled "The Human Toll of Too Much Law," just made it clear that he thinks there are too many rules, unmistakably signaling he is looking to go after even more.)

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The result is likely going to be a very significant reordering of the relationship among the executive, legislative, and judicial branches of government as well as the American people. The ability of the government to protect Americans by limiting and policing predatory, illegal, and anti-social conduct wherever it occurs (i.e., health care, environment, food and product safety, tech, education, or the financial sector) will likely be severely circumscribed. Although the cases were focused on rulemaking (or agency enforcement), the message, signal, and direction of the Court are not.

The likely result is a new *Lochner* era, which started in the late 1800s-early 1900s when the Supreme Court struck down innumerable health, safety, and welfare laws, largely based on claimed constitutional contract rights that prohibited such statutes. That lasted for decades until President Roosevelt's proposal to expand the Court precipitated approval of the New Deal, which ushered in the administrative state that this Court is determined to dismantle. The result is going to be a disempowered executive and legislative branch and an empowered judicial branch.

That means those working only in the regulatory arena will be handicapped. From now on, the precise language of every law governing an agency's actions, along with the legislative history, will take on outsized importance. And, even where those provisions actually favor an agency's position, the many ideologically biased federal judges at and below the Supreme Court will almost certainly still be inclined to rule in an outcome-oriented way to strike down rules they oppose. The Fifth Circuit is the most extreme example. It is looking more and more like a kangaroo court that just rubber stamps whatever Wall Street and Corporate America puts before it, blithely disregarding facts, law, precedent, and policy.

Case Discussion

With that as background, the discussion in the remainder of this memo is limited to a review of the Court's three most recent decisions, which have —

(1) prohibited courts from deferring to an agency's interpretation of what courts determine to be an ambiguous statute that Congress entrusted the agency to implement and enforce (Loper Bright), giving courts much more power to strike down agency rules – this power-shift will result in judges substituting their opinions for agencies' far greater substantive expertise[2];

(2) eliminated the general time limit (called a "statute of limitations") within which agency rules can be challenged in court under the APA (Corner Post), in effect allowing rules that have been final and in effect for many years if not decades to be challenged at any time; and

(3) struck down the SEC's ability to seek civil penalties from lawbreakers through in-house administrative enforcement proceedings, requiring all claims for such monetary relief to be brought in federal court and before a jury (Jarkesy), a much more time-intensive and costly enforcement process.

All three of these decisions were poorly reasoned, showed a glaring lack of respect for prior decisions that would normally lead the Court to different outcomes, and they displayed a general hostility to regulatory agencies responsible for protecting the public.

Because of these cases, more agency rules will be challenged in court, including older rules that have long been regarded as settled and beyond challenge. Once in court, rules are significantly more likely to be struck down, because courts will not defer to an agency's reading of ambiguous statutory provisions. The result will decidedly favor corporations due to the biased and asymmetrical standing requirements that virtually always open the courthouse doors to them while slamming the doors in the face of individuals and the public interest. And finally, even where rules survive, the process of enforcing them will become slower and more resource-intensive, at the SEC and potentially at many other similarly situated agencies that rely heavily on administrative enforcement proceedings.

The negative impact of these cases is further magnified by another Supreme Court decision mentioned above, *West Virginia v. EPA*, 597 U.S. 697 (2022). There the Court held that when an agency seeks to adopt rules that a court decides have major economic or political significance, the agency must be able to identify especially clear Congressional authorization for the rule. The Court is imposing that requirement even where agencies are responding to rapidly evolving new challenges and even where the applicable statute provides ample general rulemaking authority. The case thus provides courts with yet another justification—lacking any persuasive legal basis—for nullifying agency actions that a court deems overly ambitious, no matter how valuable they may be in protecting the public.

[2] Justice Kagan pointedly demonstrated this in her dissent, including making the observation that, "[i]n one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar." There's little doubt that the agencies have much greater expertise in their respective substantive areas than the Justices who are experts in few if any of the often complex and technical issues confronting agencies. Echoing the example used by Justice Kagan in her dissent of "an alpha amino acid polymer," the Court proved this in a widely publicized recent example in the majority opinion in *Ohio v. EPA*, wherein the chemical nitrous oxide (laughing gas) was mixed up with nitrogen oxides. No one identified the mistake, which should surprise no one: the Justices aren't experts in the subject matter. *See also*, Michael Hiltzik, *With its 'Chevron' ruling, the Supreme Court claims to be smarter than scientific expert*, Los Angeles Times (July 2, 2024), https://www.latimes.com/business/story/2024-07-02/with-its-chevron-ruling-the-supreme-court-shows-that-it-thinks-its-smarter-than-scientific-experts.

As more agency rules succumb to judicial review under these holdings, so will the protections they provide to the American public. For our purposes, that means investors and financial consumers will suffer more fraud, abuse, and discrimination; banks will have more leeway to undertake predatory and systemically risky practices; and ultimately, our financial system and economy will be less stable, fair, transparent, and accountable. Americans will suffer in real financial terms, and the next financial crisis is likely to arrive sooner and be more severe.

There are a number of remedial steps that can be taken to reverse or at least mitigate some of the harmful impact of these decisions (to be discussed in greater detail elsewhere). One action being discussed is shifting attention from the federal regulatory arena to the states. However, while that might work in some areas, in many it will likely be unsuccessful given the preemption doctrine whereby federal law supersedes state law. Another often discussed step is to try to persuade Congress to correct at least some of these holdings through legislation. However, that remedy is not available where the Court's decision is based on what it claims is a Constitutional requirement—the Court is the final arbiter of constitutional provisions and applications. For example, the Court in *Jarkesy* based its ruling on the Seventh Amendment right to trial by jury. While Congress might mitigate the harm in some ways, it cannot overrule the core holding in the case. Similarly, while *Loper Bright* was based on an interpretation of Section 706 of the Administrative Procedures Act (APA), which Congress could change, the opinion suggests that the holding of Chevron conflicts with the constitutionally required separation of powers (which Justice Thomas explicitly detailed in his concurrence). Thus, although a legislative fix is available in *Corner Post*, no one should be surprised to see an industry challenge to such a law—and a successful outcome in the increasingly ideological and anti-regulatory courts.

Killing *Chevron* Deference

***Loper Bright Enterprises v. Raimondo, Secretary of Commerce* (and companion case *Relentless, Inc. v. Department of Commerce*)**
(decided June 28, 2024)

Decision. In this case, members of the fishing industry challenged a rule requiring certain fishing vessels to pay for onboard observers responsible for monitoring compliance with limits on overfishing. In an opinion from Justice Roberts, the Court held that federal courts may no longer defer to an agency's interpretation of an ambiguous statutory provision. The Court based its decision on a provision of the APA providing that ***courts must decide "all relevant questions of law" that arise when an agency rule is challenged in court***. 5 U.S.C. § 706. The decision expressly ***overruled the so-called Chevron doctrine***, which since 1984 has required judges to respect and defer to the experts at administrative agencies who are best equipped to make technical judgments when implementing the general provisions of a regulatory framework. It did note that agency interpretations represent informed judgments that may be worthy of respect from a court—but emphasized that the agencies are no longer entitled to judicial deference.

Because the lower courts relied upon *Chevron* to uphold the rule at issue in this case, the Court vacated the judgment and sent the case back for further proceedings. The Court, in an apparent attempt to soften the impact of the holding somewhat, observed that it did not intend to call into question the 18,000 decisions over the prior 40 years that cited the *Chevron* decision. However, in the six weeks since the decision was announced, the Court itself remanded nine cases for reconsideration and countless cases have been filed, or rehearings sought, based on the decision.

Dissent. Justice Kagan, joined by Justices Sotomayor and Jackson (as to the *Relentless* case) , issued a scathing dissent. She explained that Chevron deference is based on the sensible presumption that Congress would want agencies to apply their expertise as they fill in statutory gaps that are inevitable; to take into account the interplay between complex regulatory schemes; and to make important policy choices, since agencies are more politically accountable than courts. She also pointed out that allowing deference does not actually conflict with Section 706 of the APA, since courts still must make the final decision as to whether the agency's interpretation of the law is at least within broadly permissible bounds. And she explained that the majority had failed to justify its departure from the long-standing *Chevron* precedent, thus offending the hallowed doctrine of *stare decisis*, which requires courts to respect precedent and to adhere to prior holdings absent compelling reasons—a bedrock principle to which each of the six conservative justices pledged fidelity to during the nomination and Senate confirmation process.

Justice Kagan's dissent also included strong warnings about the significance of the decision:

> "A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power. . . . It gives courts the power to make all manner of scientific and technical judgments. It gives courts the power to make all manner of policy calls, including about how to weigh competing goods and values. . . . It puts courts at the apex of the administrative process as to every conceivable subject—because there are always gaps and ambiguities in regulatory statutes, and often of great import . . . . And it is impossible to pretend that today's decision is a one-off, in either its treatment of agencies or its treatment of precedent. As to the first, this very Term presents yet another example of the Court's resolve to roll back agency authority, despite congressional direction to the contrary." [*Loper Bright Enterprises*, 144 S. Ct. at 2295, 2311]

In other words, reinterpreting then-Supreme Court nominee Judge Roberts' reassuring claim about the role of a Supreme Court Justice, the Court is not just calling "balls and strikes" like a disinterested umpire. By this decision, the Court has substituted the 9 Supreme Court justices for the 9 players on the regulatory baseball field.

Allowing Unlimited Lawsuits Over Rules

Corner Post, Inc. v. Board of Governors of the Federal Reserve System
(decided July 1, 2024)

Decision. In this case, an industry group and a truck stop challenged a Federal Reserve rule placing limits on the amount of fees that merchants must pay when their customers use debit cards. They claimed that the rule allowed fees in higher amounts than the statute permitted. In an opinion written by Justice Barrett, the Court allowed the rule challenge to go forward, even though the rule was finalized in 2011. The Court held that the general six-year statute of limitations governing civil actions against the United States, 28 U.S.C. § 2401, does not begin to run until a claim "accrues," and a claim does not accrue, in the Court's view, until the plaintiff has suffered injury under the rule. Since the petitioner, Corner Post, did not exist until 2018—seven years ***after*** the rule was finalized—it did not suffer any adverse impact from the rule until then, placing its complaints about the rule within the six-year statute of limitations period. The Court rejected the more common and intuitive interpretation that limitations periods run from the time the agency's rule becomes final.

Dissent. Justice Jackson, joined by Justices Sotomayor and Kagan, issued a strong dissent exposing the flawed logic in the majority's opinion. She explained that the meaning of the word "accrue" depends on the context and the nature of the claim, and that a facial challenge to a rule, as in this case, has nothing to do with a specific plaintiff's claims, circumstances, or injuries. The "accrual" of the claim therefore arises when the rule is final, not when the challenger happens to suffer injury. The dissent also explained that the majority's ruling defeats the core purpose of a statute of limitations, which is to promote finality, repose, and a definitive end to stale claims. Dozens of statutes, she observed, mark the beginning of a limitations period from final agency action.

Impact. The decision in effect allows challenges to agency rules under the APA forever. Those who seek to nullify rules can simply form a new entity at any point in time and then claim that it is affected by the rule, thus starting the clock on the six-year statute of limitations. Industry challengers to rules are already using a similar tactic to ensure that they can file their lawsuits in the court of their choosing: They create new associations or chapters of existing groups in the appropriate friendly state to facilitate forum shopping, which so far has been almost exclusively within the Fifth Circuit, the most hostile court in the country to agency rules. There can be no doubt that this strategy will now be used to facilitate a new wave of challenges to old rules. And as Justice Jackson noted in her dissent, the harm will be magnified because of the Court's elimination of Chevron deference, giving those who do get into court with now timely claims another advantage in the war on agency rules.

Killing Powerful Remedies in Agency Administrative Proceedings

SEC v. Jarkesy
(decided June 27, 2024)

Decision. The SEC brought an enforcement action against a hedge fund manager, Jarkesy, not in court but before one of the SEC's administrative law judges ("ALJ'"). The SEC alleged Jarkesy had violated the antifraud provisions of the securities laws. The ALJ found against Jarkesy, imposed a civil penalty of $300,000 against him, and barred him from the industry. The SEC affirmed but to no one's surprise, the Fifth Circuit reversed. The Supreme Court, in an opinion from Justice Roberts, held that the Seventh Amendment to the U.S. Constitution entitles a defendant to a jury trial in court when the SEC seeks civil penalties against him for securities fraud. By its text, the Seventh Amendment guarantees that in "[s]uits at common law, . . . the right of trial by jury shall be preserved." *SEC v. Jarkesy*, 144 S. Ct. at 2157. The majority rested on the notion that while the claim was clearly based on the securities statutes, ***not the common law***, the claims of fraud and the remedy of damages were nevertheless essentially common law in nature, so they ruled that the Seventh Amendment right to a jury applied. The majority also rejected the argument that the case clearly fell under the "public rights" exception to the jury trial requirement, focusing on the substance of the claim and the relief sought, not the fact that it was brought by the government under a statutory provision to protect the public.

Dissent. Justice Sotomayor, joined by Justices Kagan and Jackson, issued a strong dissent. She explained that the majority was upsetting decades of precedent that established the public rights exception to the jury trial requirement. She said that "[t]hroughout our Nation's history, Congress has authorized agency adjudicators to find violations of statutory obligations and award civil penalties to the Government as an injured sovereign." *Id.* at 2155. Moreover, Justice Sotomayor wrote, "[w]hen a claim belongs to the Government as sovereign, the Constitution permits Congress to enact new statutory obligations, prescribe consequences for the breach of those obligations, and then empower federal agencies to adjudicate such violations." *Id.*

Justice Sotomayor also highlighted the daunting practical implications of the majority's holding. "Congress has enacted countless new statutes in the past 50 years that have empowered federal agencies to impose civil penalties for statutory violations. . . . Similarly, there are, at the very least, more than two dozen agencies that can impose civil penalties in administrative proceedings" (including the SEC and other financial regulators), an authority now in doubt. Id. at 2173. She concluded with an ominous warning about the profound impact of the decision:

> "Today's decision is a massive sea change. Litigants seeking further dismantling of the 'administrative state' have reason to rejoice in their win . . . . Make no mistake: Today's decision is a power grab. Once again, 'the majority arrogates Congress's policymaking role to itself.'" *Id.* at 2174–75.

Impact. As a result of the decision, the SEC will have to scale back its reliance on administrative enforcement actions and bring claims for civil penalties solely in federal courts and before juries. That will further drain the agency's budget because court actions consume considerably more time and more resources, rendering SEC enforcement less efficient and potentially less effective overall. Moreover, the decision casts a serious cloud over the authority of many other agencies to continue relying on ALJs and administrative enforcement proceedings, including the CFTC, Treasury, CFPB, and HUD. And some of the potentially affected agencies do not have legislative authority to bring enforcement actions in federal court, further intensifying the negative impact with respect to those agencies.

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