

The Right-Wing Plan To Bring Down The Regulators Reaches The Supreme Court

A warped view of agency power has been winning over conservative judges.

By Sarah Posner | November 4, 2022 10:20 a.m.



On Monday, the Supreme Court will hear arguments in a *SEC v. Cochran*, a case in which the conservative majority could further erode the ability of the Securities and Exchange Commission to regulate financial markets —

powerful blow to other agencies' ability to carry out their regulatory and enforcement mandates as well.

At issue in the case is whether Michelle Cochran, a certified public accountant, can challenge the constitutionality of the administrative law judge who presided over a proceeding the SEC brought against her for allegedly violating accounting standards of the Public Company Accounting Oversight Board. Congress created the PCAOB in a 2002 law to protect investors by ensuring accurate audits of publicly traded companies.

That may sound like an in-the-weeds dispute of interest only to financial services professionals and the federal officials Congress has tasked with regulating them. But far from being an exercise in legal minutiae, the case exemplifies a right-wing push to destroy what conservatives derisively call “the administrative state,” or the federal government agencies that protect the environment, food safety, financial markets, public health, and much more.

A deeper look inside the Cochran litigation shows how right-wing ideologues are succeeding in shaping negative judicial — and, along the way, public — assessments of federal government agencies as unconstitutional perpetrators of infringements on civil liberties. They do this not only by bringing cases that challenge the agencies' constitutionality, but by injecting those cases with extra-legal arguments intended to portray the federal bureaucracy in the worst possible light, as an anti-democratic, tyrannical behemoth bent on stripping Americans of their freedom. These arguments

stacked with judges hand-picked by conservative activists during the Trump era, who are similarly steeped in this ideology.

The *Cochran* case represents just one line of attack on federal agencies, in particular the SEC's authority to regulate financial services professionals. "Professionals getting in trouble with their licensing regulators for violating professional conduct rules — and then complaining about having professional licensing consequences for those violations — is what we're talking about," said James Tierney, a professor at the Nebraska College of Law who previously worked at the SEC. "That's the consequence of being in a licensed profession," Tierney said. But, he added, "There are judges and litigants who think professional occupational licensing is the most foul intervention into civil liberties that we've ever seen."

Rewriting history

Cochran is represented by the New Civil Liberties Alliance, a non-profit legal firm launched in 2017 in "to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights," according to its online mission statement. NCLA was founded by Philip Hamburger, a Columbia law school professor and author of the 2014 tome, *Is The Administrative State Unlawful?*, which argues that federal agencies are distinctly un-American.

This argument has become key to the conservative assault on agencies, and holds that they mimic the raw exercise of nonrepresentative, executive

It also traces their origin to 19th century German bureaucrats. Due to these roots, Hamburger argues, such agencies are both anti-democratic and unconstitutional.

He also advances the discredited argument that Woodrow Wilson, a proponent of the 20th century American administrative state, was deeply influenced by the philosopher Georg Wilhelm Friedrich Hegel and other German thinkers. Because of this German influence on Wilson, Hamburger contends, the entire administrative law project is tainted, imbued with Wilson's "ethnic and racial fears" and "Germanic distaste for democracy."

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Hamburger's claims about the nefarious influence of German thinkers on Wilson have been discredited by legal scholars who have documented the extensive use of legislatively authorized administrative law mechanisms

his premise that this anti-democratic behemoth sprang from an un-American source. “The claims about the grounding of the administrative state in Woodrow Wilson’s approach to governance, combined with an attempt to cross-taint it with reference to Woodrow Wilson’s racism, makes me want to throw my laptop against the wall. It doesn’t hold up to serious scrutiny,” said Julian Mortenson, a professor at the University of Michigan Law School and the co-author of an [extensive article](#) documenting myriad uses of administrative law functions in early America.

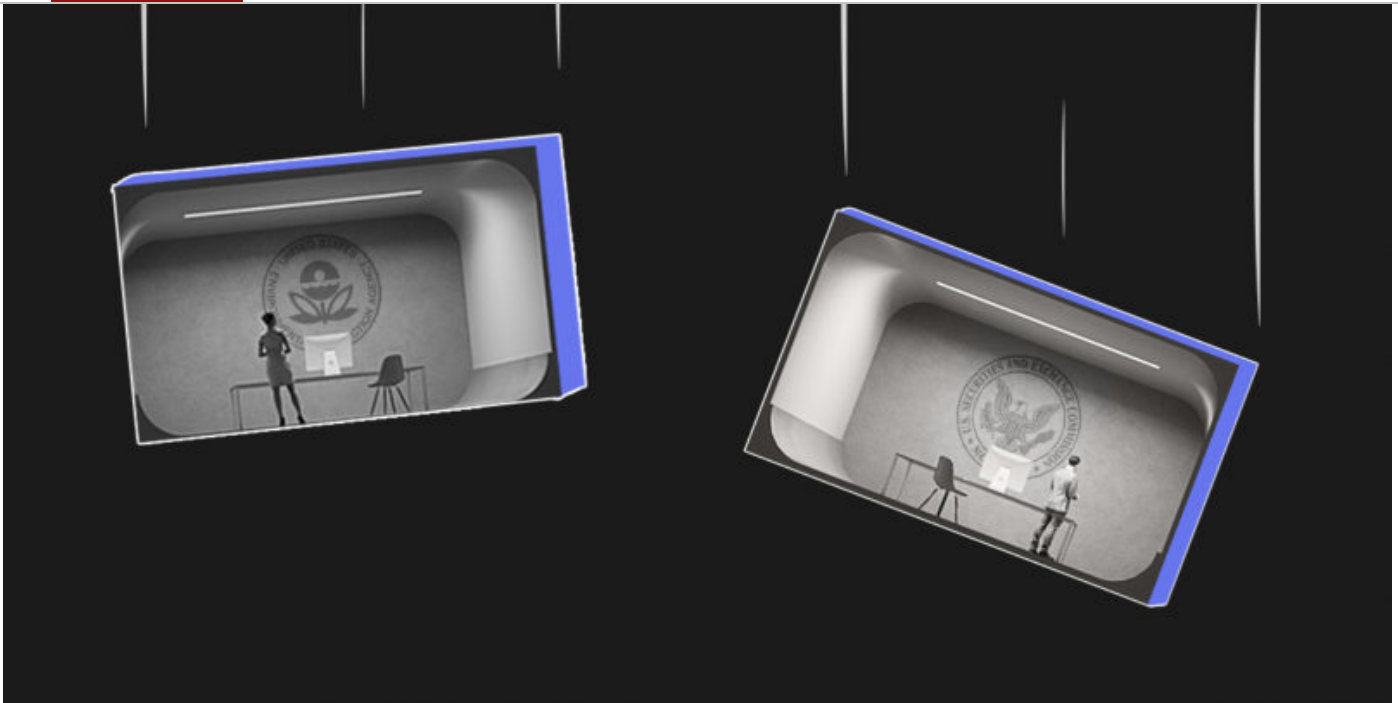
“The question is whether or not administrative governance has been with us since the founding era, and indeed before, the answer is unequivocally yes,” Mortenson told TPM. “Incredibly broad delegations of government authority to executive actors” existed in the British Empire, the North American colonies, the states newly independent from Great Britain, under the Articles of Confederation, and under the Constitution after it was ratified in 1789. “It’s just ahistorical to claim otherwise,” he said.

Despite the scorn the conservative legal establishment heaps on the congressional delegation of authority to executive branch administrative officials, Mortenson and other legal experts say managing a rapidly evolving economy and society would have been impossible without it, both in colonial times and now. Core to the idea of administrative agencies is that Congress is ill-equipped to spell out the minutiae of how laws should be implemented, through rules and regulations, in the legislation that creates an agency, which will be staffed by experts in relevant fields. “The legislature knows so well that it can’t make all the decisions that are

it hands those decisions off, over and over again, to agencies and executive actors to figure out,” he said.

While the system may be imperfect, said Eric Segall, a constitutional law scholar at Georgia State University College of Law, that doesn’t mean the whole thing should be tossed out. “In any organization that big there are going to be abuses. The answer is to stop the abuses and not to destroy the agency,” said Segall. He noted that unregulated financial transactions led to the 2008 financial crisis, and the way for the federal government to avoid another one “is by delegating power to administrative agencies because Congress can’t do it. There’s no way Congress has the time, energy, or expertise, to stop another economic cataclysm like 2008,” he said. “Any sane person knows that Congress can’t do it on its own.”

The question, said Segall, is not whether the system is constructed ideally from any particular person’s perspective. “The question is does it somehow violate the Constitution. And the answer’s clearly no.”



A generous gift at a party

The claim that Wilson is to blame for America’s supposedly anti-democratic reliance on administrative functions has significant currency on the legal right — including with appellate judges who ruled on the *Cochran* case as it was on its way to the Supreme Court, and with Supreme Court Justice Clarence Thomas. In a conurrence in a 2015 case, Thomas wrote that Wilson’s “deep disdain for the theory of popular sovereignty” accounted for the Progressive Era’s “move from the individualism that had long characterized American society to the concept of a society organized for collective action.”

But Hamburger has his conservative detractors, too, exposing a rift on the right over whether the administrative state should be eradicated or used to advance right-wing governance. Adrian Vermeule, an anti-liberal

review, arguing that it was “masquerading as legal theory, and should instead be understood as a different genre altogether — something like dystopian constitutional fiction” that misapprehended the history and was “lite on knowledge of administrative law, fatally so.”

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In the years following the publication of Hamburger’s book, and despite Vermeule’s scathing review, money began to pour in for a Hamburger-led project to dismantle the administrative state. By Hamburger’s own telling at the NCLA’s fifth anniversary gala held earlier this year, a man at a New York party offered him \$75,000, and, later, “another gentleman” who “happened to care about this stuff” offered a sum “much, much” larger, to start the organization.

The same year that NCLA was founded, Hamburger penned an op-ed in the *New York Times* supporting Trump’s nomination of Neil Gorsuch, well-known for his enthusiasm for gutting the regulatory power of federal agencies, to the Supreme Court. Hamburger argued that the jurist should not be “berated” but rather “congratulated” for his antipathy to the established legal doctrine of judicial deference to administrative decision-making.

restrictions and vaccine requirements, taking the side of landlords against the Covid eviction moratorium, and litigating an unsuccessful effort to repeal a Bureau of Alcohol, Tobacco, Firearms and Explosives ban on bump stocks, the devices that allow a shooter to fire a semi-automatic rifle continuously, issued following the 2017 mass shooting in Las Vegas that killed 58 people. In 2021, it hired Jeffrey Clark, the former DOJ official now under investigation for his role in helping former President Trump attempt to force Congress to accept fake slates of electors in order to overturn the 2020 election. In a press release announcing the hire, the NCLA said Clark would “help orchestrate the firm’s strategic litigation efforts.”

NCLA’s spokesperson declined an interview request for Hamburger, but made the organization’s president and general counsel, Mark Chenoweth, available to answer emailed questions. Chenoweth said Clark no longer had any affiliation with NCLA.

As of 2020, according to data collected by the Center for Media and Democracy, the organization has received \$3,023,077 from the Charles Koch Foundation, \$1,008,000 from the Charles Koch Institute, and \$1,000,000 from the 85 Fund, one of the dark money groups tied to right-wing judicial activist Leonard Leo, among other conservative donations. On its website, the Charles Koch Foundation lauded NCLA as one of its “partners,” focused on “work to protect civil liberties and facilitate dialogue that leads to social progress,” likening it to the ACLU. In his email, Chenoweth wrote, “NCLA agrees that protecting civil liberties includes defending the rights of unpopular people to express ideas that the majority deems unworthy or

that naturally acquired immunity to Covid-19 is at least as effective as vaccination at least a year before the federal government finally admitted that fact and stopped branding it as ‘misinformation.’” (While the CDC has recognized that prior infection with Covid-19 confers some immunity, it still recommends that “completion of a primary vaccine series, especially with mRNA vaccines, typically leads to a more consistent and higher-titer initial antibody response.”)

As part of the festivities, the organization named the worst abuser of civil liberties for 2021: the federal government’s top infectious disease specialist Anthony Fauci, described by Chenoweth as a “stethoscope-wearing bureaucrat” who “fancied himself a monarch.

The NCLA enlists former executive branch officials to assail the administrative state that once employed them. At the gala, former Trump CIA director, secretary of state, and GOP congressman Mike Pompeo delivered a short keynote address. Pompeo recounted how he had met Chenoweth when the latter was working for Koch Industries, and subsequently hired him to work in his congressional office. Although he devoted his remarks to a takedown of the administrative state, he seemed disinterested in the details and more keen on talking points. A graduate of

of two agencies, and an aspirant to the White House, Pompeo admitted he did not understand the federal Administrative Procedure Act. He joked that he had promised in his speech not to mention *Chevron*, referring to the landmark 1984 Supreme Court case that laid out the terms of judicial deference to administrative agency judgments, and which is the scourge, to the right, of federal administrative law. He then inveighed against faceless bureaucrats. “The truth is, we all know where the nation has gotten to in respect to denying basic rights through tyranny of a set of unelected officials,” he said, as if it were so well understood that federal agencies are tyrannical entities violating citizens’ liberties that spelling out any particular evidence was not even necessary.

To the gala crowd, Hamburger described the administrative state as a “beast” that is the “most sweeping threat to our constitutional rights that we have.” The NCLA, he said, is “engaged in a new type of litigation against administrative power.” As part of the festivities, the organization named the worst abuser of civil liberties for 2021: the federal government’s top infectious disease specialist Anthony Fauci, described by Chenoweth as a “stethoscope-wearing bureaucrat” who “fancied himself a monarch.”



Allies on the bench

The Cochran case arrived at the Supreme Court via the Fifth Circuit Court of Appeals, a court that was conservative even before Trump, adopting Leo's recommended list, stacked it with an additional six far-right judges. In an en banc decision (decided by the entire panel of judges) a nine-judge majority ruled for Cochran, concluding that the SEC's authorizing statute did not bar her ability to contest the constitutionality of her ALJ, coming to the opposite conclusion of five other appellate courts to consider the question. But for six of the judges who signed onto the majority opinion, it did not go far enough. A concurring opinion, authored by Andrew Oldham, a former clerk to Supreme Court Justice Samuel Alito, argued that while the text of the Securities Exchange Act of 1934 speaks for itself, what "lurks behind" the statutory words "is profoundly disturbing." Oldham proceeded to spend 39 pages laying out the supposedly "profoundly disturbing" history of

Hamburger's book — without noting that Hamburger's firm is representing Cochran — and also relied heavily on the work of Ronald Pestritto, a professor at the far-right Hillsdale College, who has also published extensively on the claim that Wilson was the driving force behind the administrative state, and because of his connections to German historicism, and his racism, the administrative state should be deemed un-American and unconstitutional. Pestritto did not respond to a request for comment. Chenoweth wrote via email, “It is always gratifying for NCLA when federal judges recognize Professor Hamburger's influential scholarship.”

In an exasperated dissent, seven Fifth Circuit judges argued that the case “is not a referendum on the Presidencies of Woodrow Wilson and Franklin Roosevelt.” And the majority opinion would, if adopted by the Supreme Court, upend 80 years of practice under the Securities Exchange Act, and will be “inefficient for courts and agencies” by inviting federal court litigation while administrative proceedings are underway, rather than, as envisioned by the statute, only after the administrative matter is resolved.

For Cochran's lawyers at the NCLA, Oldham's concurrence proved a boon for their Supreme Court brief. “Judge Oldham, joined by five other judges, issued a concurring opinion detailing the relevant history of the SEC and its scheme for administrative review, describing the tremendous burdens imposed by that scheme on SEC targets,” they wrote, adding that the “compelling concurrence describing the origins of the administrative state, and the SEC in particular, develops several historical and practical points” that further support their position.

dismantle an administrative practice,” part of a larger effort to find a receptive audience in Federalist Society-aligned judges. “If the court accepts these arguments, it will not be a nail in the coffin,” for federal agencies, he said. “But it would be a really big sign that moving forward, the courts are going to be pretty deeply skeptical of the way administrative law has been historically carried out.” As Hamburger made clear in his remarks at the gala, NCLA’s goal is not to attack any agency in particular, but to bring down the “administrative state” as a whole. And step by step, it plans to convince the high court to view it, as he does, as “the greatest threat to our civil liberties in our era.”



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Sarah Posner Sarah Posner is a journalist and author of the book “Unholy: How White Christian Nationalists Powered the Trump Presidency and the Devastating Legacy They Left Behind.” She is currently a reporting fellow with Type Investigations and a journalism fellow at Recovering Truth.

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epicurus

4 Nov

This is the “end game” for dark money. Because completely unregulated capitalism worked out so well in the past. Please make it stop.

[1 reply](#)



rubegreenhorn

4 Nov

Thank you—very helpful breakdown. And it’s pretty fucking rich for them to argue



“ethnic and racial fears” and “Germanic distaste for democracy.” The constitution was imbued with racial fears and a distinctly American distaste for democracy, so...all the laws are illegitimate? Shameless.

3 replies



ClutchCargo

4 Nov

So:
Eliminate regulations
Eliminate professional licensing
Eliminate litigation of torts

What could possibly go wrong?

If these assholes want a libertarian paradise, they should all move to Somalia, and become pirates

2 replies



theod

4 Nov

As shoddy and leaky that SEC oversight has proven to be, getting rid of it would be a complete ripoff of the consumer, who would be at the mercy of the same rogues who tore a big hole in the 2008 economy. They would ravage the financial economy, crash it thoroughly for their own short-term profits, then get ANOTHER government handout to recover themselves for the next round. Welcome to Financial Kakistocracy...

1 reply



theod

▶ rubegreenhorn 4 Nov

This is what Rogue Academics do: make up stuff and try to ride the wave into notoriety and importance by impressing a deluded billionaire or two. Then on to the Supreme Court for political blessing by the robed rogues.



kovie Prime member

4 NOV

Given the dark, reactionary, fascistic direction the country is taking, the good news, for me at least, is that I have dual citizenship and can escape if things get really out of hand. The bad news is that it's Israel, which if anything appears to be taking and even more extreme turn to the far right. Then again, apparently I can also get a Spanish passport, and perhaps even a Bulgarian one too, and both are supposed to be good places to live and not veering towards the far right. But seriously, is this what many of us will have to resort to? The more people leave, the more right wing the country gets, since those who leave will be mostly soft right to center-left, giving the MAGA Nuts a near outright majority. Is the world just experiencing a periodic swing to the right and eventually it'll swing back, or is this for good? They sure are trying to lock in that swing.

[1 reply](#)

isakindamagic

4 Nov

They love the deregulation. All they have to do is wait until the people that suffered from the catastrophe die, then they can imagine no rule should have ever been there in the first place.

For a regulation to get passed in this country somebody has to die. Likely thousands. Shoot - you can be prescribed opioids *today*.



isakindamagic

[▶ kovie](#) 4 Nov

I went to my other country during the Trump administration. I did it for my liver health watching the guy hijack the GOP church=vote machine.



with a few rubles backing, or the born-rich hard-ons of Queens and Wichita write a death sentence for America on the back of the ace of spades and play on with a new deck (Auden).

My father and grandfather would rise from the grave. They both fought Nazis

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