Confronting the Administrative State

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The Supreme Court’s 2014-15 term will undoubtedly be remembered as one of the most significant of the Roberts Court. From the definition of marriage to the legality of Obamacare’s implementation, the Court issued several landmark decisions that grabbed headlines and consumed commentators.

Less noticed, however, were four opinions authored by Justice Clarence Thomas that call into question the constitutionality of the massive and largely unaccountable bureaucracy that we commonly refer to as the administrative state. In bold and clear prose, Justice Thomas explained how the basic principles of our Constitution’s separation of powers are incompatible with the system of bureaucratic rule that took root in the Progressive era and now reaches into virtually every realm of American life.

In Department of Transportation v. Association of American Railroads, Justice Thomas described the violence done to the structure of our constitutional system when Congress delegates its lawmaking powers to administrative agencies. In B&B Hardware v. Hargis Industries, he stressed that agencies may not, consistent with Article III of the Constitution, usurp the federal courts’ judicial power. And in Perez v. Mortgage Bankers Association and Michigan v. Environmental Protection Agency, he argued that federal courts shirk their constitutional duty when they defer to an agency’s interpretation of federal law. Together, the principles...
articulated by Justice Thomas in these opinions attack the very existence of the modern administrative state.

It is fitting that we refer to the administrative state as a “state,” for it has become a sovereign power unto itself, an imperium in imperio regulating virtually every dimension of our lives. Its nearly 450 agencies are manned by legions of bureaucrats, now numbering almost 2.7 million. In 2013 alone, 3,639 final rules were issued, adding 26,417 pages to the Federal Register. All told, the Code of Federal Regulations contained 175,496 pages of regulations spread out over 235 volumes as of 2013. That represents a 7.4% increase in the number of pages in the CFR since President Obama assumed office — and that figure does not include 2014 or 2015.

The domain of the administrative state is vast, ranging from the most trivial to the most significant matters of public and private life. With the votes of three FCC commissioners, it declares the internet a public utility and seizes control over our nation’s web-based economy. With the issuance of an environmental rule, it commands once-sovereign states to re-order their electricity markets or face crippling blackouts. Its legions regulate our health care and our children’s dolls, our national banking system and our neighborhood stop signs. As Chief Justice John Roberts recently stated: “The Framers could hardly have envisioned… the authority administrative agencies now hold over our economic, social, and political activities.”

Although the framers could not have envisioned the modern administrative state, they certainly envisioned the danger to liberty posed by the accumulation of government powers in the hands of federal officials. Indeed, it was to protect against this hazard that they separated the great powers of government.

Our constitutional system, and specifically its separation of powers, was premised on the founders’ conception of the nature of man, and it was the Progressive movement’s rejection of this conception of man that led to the rise of the administrative state that now rules over us. The Progressive understanding of man and government will continue its logical unfolding — and the administrative state’s rule will grow ever-more expansive and oppressive — until the people strip it of the power it has accumulated.

COMPETING ANTHROPOLOGIES

Justice Thomas observed in Association of American Railroads that “[t]he Constitution does not vest the Federal Government with an
undifferentiated ‘governmental power.’ Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government. These grants are exclusive.” The structural protection of this system of separated powers, as Madison put it in Federalist No. 51, was “admitted on all hands to be essential to the preservation of liberty.”

The constitutional vision of the founders is rooted in their conception of the flawed nature of man and his capacity to rule. The Federalist Papers routinely recur to this theme in explaining why the Constitutional Convention established our system of checks and balances, rather than simply trusting “parchment barriers against the encroaching spirit of power.” For instance, in Federalist No. 73, Hamilton justifies the decision to give the president a qualified veto power over legislation. He begins by disclaiming any rationale based on the notion of a “superior wisdom or virtue in the Executive”; rather, the veto is necessary because “the love of power may sometimes betray [Congress]…[or] pervert its deliberations.”

But just as the founders knew that Congress would seek to draw “all power into its impetuous vortex,” they knew that the president would do the same. In Federalist No. 75, Hamilton defended the Senate’s role in ratifying treaties, arguing that “[t]he history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind…to the sole disposal of…a President of the United States.”

In both of these examples (and there are many more) we see that the motivation for the checks and balances of our constitutional system is to protect liberty against man’s lust for power — and his propensity to abuse it. In Federalist No. 51, Madison famously captured these themes in explaining why the Convention allocated powers as it did:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others…. Ambition must be made to counteract ambition.

As Madison further explained: “It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.
But what is government itself, but the greatest of all reflections on human nature?” Madison understood that, just as man is corrupted by power, government will be corrupted as well. Thus, Madison concluded, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” But men are not angels, and so the founders supplied “opposite and rival interests” to each branch of the federal government to make up for “the defect of better motives.”

We can see, then, that there was a close causal connection between the founders’ understanding of man’s nature and the constitutional system of checks and balances that they crafted to preserve the separation of powers. But if one has a different view of man, one is likely to have a different view of the need for the separation of powers.

As Justice Thomas noted in his Perez concurrence, the philosophy of the administrative state “has its root[s] in . . . the Progressive Era.” Woodrow Wilson was one of the key thinkers behind the rise of the Progressive movement beginning in the late 19th century. His 1887 essay, “The Study of Administration,” could be considered a sort of Federalist Papers for the administrative state — an explication of its political philosophy. And Wilson’s philosophy was, at its core, motivated by impatience with the compromises and inefficiencies — that is, the checks and balances — deliberately built into our constitutional system.

Wilson began his essay by marginalizing the principles of the founding. Quoting Hegel, he argued that those principles are not timeless truths about the nature of man and government but, instead, are “nothing but the spirit of that time expressed in abstract thought.” Wilson asserted that modern life is simply too complex for our founding principles, and that the modern era demands a government possessing “the utmost possible efficiency.”

To achieve this goal, Wilson insisted that we must “discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials,” providing them with “large powers and unhampered discretion.” The concentration of “unhampered” power in the hands of “experts,” then, was for the Progressives the essence of efficiency and therefore the genius of the administrative state. And since the most efficient form of government is one in which all power can be exercised immediately and without obstacles, it is not surprising that Wilson pointed to Napoleon’s government as an exemplar of good
administration. After all, what better way to streamline the use of power than to appoint oneself emperor?

Just as the separation of powers is rooted in a particular view of man, the concentration of power has a specific anthropology. Whereas the founders were wary of the threat to liberty posed by those wielding government power, Wilson exhorted his readers that “trust is strength in all relations of life” and that “[t]here is no danger in power, if only it be not irresponsible.” In Wilson’s view, “the greater [an administrator’s] power the less likely is he to abuse it.”

Wilson, however, did not think that all men are worthy of such trust. Instead, Wilson wrote with evident disdain, “[t]he bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes.” In sharp contrast to the framers, who believed that “[a] dependence on the people is . . . the primary control on the government,” Wilson saw the rule of the people as the greatest obstacle to efficient governing. He dismissed the masses as “selfish, ignorant, timid, stubborn, or foolish.” But out of the masses, he said, “there are hundreds who are wise.” It was upon these wise few — these angels among us — that Wilson would confer power. As Wilson put it, “The cook[s] must be trusted with a large discretion as to the management of the fires and the ovens.” The rest of us should be content to eat what they serve us.

The Rise of the Administrative State

Wilson’s vision of man — and his trust in consolidating power in the hands of “experts” — became the intellectual framework for the rise of the administrative state in the first half of the 20th century. Its premises gradually became accepted and engrained in the legal culture of the day and soon became evident in the jurisprudence of the Supreme Court. Piece by piece, the Constitution’s separation of powers was dismantled by the justices.

The Court’s first victim was Article II of the Constitution, which provides, simply enough, that “the executive Power shall be vested in a President.” As Justice Antonin Scalia correctly observed in his Morrison v. Olson dissent, “[T]his does not mean some of the executive power, but all of the executive power.” And, if that principle is to have any force, it requires that the president have the authority to remove — for any reason — those who exercise executive power. That is because, again in Justice Scalia’s words, “once an officer is appointed, ‘it is only the
authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.”

The Supreme Court abandoned this principle in the 1935 case Humphrey’s Executor v. United States, which held that Congress has the power to restrict the president’s authority to remove executive-branch officers who are empowered to exercise, in the words of the Court, “quasi-legislative and quasi-judicial” power. Despite being authored by Justice Sutherland—who is often portrayed as one of the conservative villains of the New Deal—Humphrey’s Executor rests on Wilsonian premises. If there is one word that summarizes the reasoning of that decision, it is “expertise.” The opinion stresses that the Federal Trade Commission was “called upon to exercise the trained judgment of a body of experts,” and that it “must be free from executive control” in order to preserve “the independence of [the] commission.” Humphrey’s Executor enshrines in law the Wilsonian view that “administration lies outside the proper sphere of politics.” It is rather the domain of “experts,” the angels among us.

Having gutted Article II, the Progressive vision soon made short work of Article I as well. Article I says: “All legislative Powers herein granted shall be vested in a Congress of the United States.” In the 1935 case A.L.A. Schechter Poultry Corp. v. United States—which invalidated the National Industrial Recovery Act—the Court read these words to mean what they say: “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.” Schechter Poultry was the last gasp of the so-called “non-delegation doctrine”; the Court no longer enforces the principle that Congress’s legislative power cannot be delegated to any other body. The Court’s failure to enforce the non-delegation doctrine effectively permits Congress to cede the power of making laws to the same “expert” bureaucrats whom Humphrey’s Executor freed from presidential control.

Ostensibly, Congress must, in the delegating statute, cabin the agency’s discretion by including a guiding “intelligible principle,” but the Court has permitted completely open-ended, standardless principles to satisfy this requirement. In the 2001 case Whitman v. American Trucking Associations, Inc., for instance, the Court, in an opinion by Justice Scalia, upheld the Clean Air Act’s delegation to the EPA of the power to set ambient air-quality standards “requisite to protect the public health.”
The Court, quoting a dissent from *Mistretta v. United States*, noted that it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” As Justice Thomas observed in *Association of American Railroads*, “[T]he Court has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power.”

Finally, Article III vests “the judicial Power of the United States” in “one supreme Court” and in congressionally established inferior federal courts, but that did not stop the Court, in the 1932 case *Crowell v. Benson*, from ceding major elements of this authority to executive agencies. In *Crowell*, the Court likened administrative agencies (which have no judicial fact-finding power under the Constitution) to juries (which are specifically invested with such power under Article III and the Seventh Amendment). Based on this flawed analogy, the Court held that agencies, instead of courts, can decide disputed issues of fact, so long as their factual findings receive minimal judicial oversight and their interpretations of the governing law are subject to plenary judicial review. Given *Crowell’s* emphasis on “prompt, continuous, expert, and inexpensive” adjudication, it is hardly surprising that the eminent legal scholar Paul Bator called *Crowell* “the greatest of the cases validating administrative adjudication.”

The Court thus united the judicial, legislative, and executive powers in the “expert” hands of the administrative state, heedless of Madison’s famous warning in Federalist No. 47 that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”

**Chevron and Its Progeny**

As it gradually dismantled the separation of powers, the Court reassured the people that it—the Court—could be trusted to safeguard liberty. The administrative state could be permitted to wield legislative power because the Court would insist that administrative lawmaking comport with “intelligible principle[s]” set forth by Congress in the agencies’ legislative mandates. The administrative state could be permitted to exercise judicial power because the courts would review any administrative conclusions of law. And the administrative state could be permitted to exercise executive power, independent of presidential control, whenever the courts determined that presidential oversight was unnecessary.
What emerged from this period was an implicit bargain: The Court would permit Congress to delegate—and the administrative state to exercise—legislative, executive, and judicial power, but it would review administrative exercises of such power to prevent lawlessness and abuse. Judicial review, then, was substituted for the Constitution's checks and balances as the principal safeguard against the administrative state's becoming despotic.

But the justices reneged on the deal in the 1984 case *Chevron v. Natural Resources Defense Council*. *Chevron* held that a court’s review of an agency’s statutory interpretation proceeds in two steps. First, if the language of the statute is unambiguous, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” But, if the statute is “silent or ambiguous with respect to the specific issue,” the agency’s interpretation will be upheld if it is “based on a permissible construction of the statute,” even if it is not the construction that the court, using “traditional tools of statutory construction,” would adopt. The Court, in true Wilsonian fashion, justified deferring to agency statutory interpretations on the ground that “[j]udges are not experts in the field,” whereas agencies can take account of “views of wise policy” in determining the meaning of the statute.

As Chief Justice Roberts recognized in his dissent in *City of Arlington v. FCC*, “When it applies, *Chevron* is a powerful weapon in an agency’s regulatory arsenal. Congressional delegations to agencies are often ambiguous—expressing ‘a mood rather than a message.’” Such ambiguity is endemic in the U.S. Code, since Congress often prefers to set a politically uncontroversial goal and leave it to the agencies to figure out the politically controversial means of achieving that goal. Indeed, a number of agencies have been given a regulatory carte blanche—authorization to regulate, for example, in the “public interest”—and the Supreme Court has uniformly upheld such boundless delegations of legislative authority.

The *Chevron* decision has been followed by cases in which the Court has delegated still more judicial power to the administrative state. Expanding on an obscure 1945 case called *Bowles v. Seminole Rock & Sand Co.*, the Court held in *Auer v. Robbins* in 1997 that an agency’s interpretation of its own regulations is itself entitled to deference, thereby compounding the agency’s insulation from meaningful judicial review. Call it *Chevron* squared. The Court even held, in the 2005 *Brand X* case,
that an agency’s interpretation of an ambiguous statute prevails over a court’s prior contrary interpretation. In other words, in interpreting the meaning of an ambiguous statute, the agencies can overrule the courts, including the Supreme Court. And, most recently, in *City of Arlington* the Court extended *Chevron* to questions of agency jurisdiction, holding that, when a statute is ambiguous on whether the relevant agency has authority to interpret it, courts must defer to the agency’s determination that it has such authority.

The bottom line is that our constitutional order has been subverted, perhaps irreversibly: First, the administrative state is free to exercise legislative power, delegated by Congress, over virtually every aspect of life, and Congress need not provide even so much as an “intelligible principle” to constrain its regulatory discretion. Second, the administrative state has the last word, binding even on the Supreme Court, on what ambiguous statutory provisions mean, including on the jurisdictional question of whether Congress actually authorized it to interpret the statute in the first place. And, finally, the administrative state has executive power to enforce its laws, as it alone has interpreted them, liberated from any meaningful review by the courts and often from any meaningful control by the president. It can truly be said that, in the main pursuits of everyday life, we are ruled by a one-branch government. And the “experts” who run it are accountable to no one: They are not elected, nor are they controlled by those who are elected. And they certainly are not angels.

**Questioning the Administrative State**

Restoring the federal government’s accountability to the people would require nothing short of a wholesale overhaul of the Court’s separation-of-powers jurisprudence: the overruling of *Humphrey’s Executor*, the revival of the non-delegation doctrine, and the enforcement of Article III’s requirement that courts, rather than bureaucrats, adjudicate private disputes and determine the last word on (in Chief Justice John Marshall’s words) “what the law is.” In recent cases, there have been some glimmers of hope in this regard. The Court’s 2011 decision in *Stern v. Marshall* suggests some resistance by the Court to adjudication outside of Article III, and the Court refused to extend *Humphrey’s Executor* in *Free Enterprise Fund v. Public Company Accounting Oversight Board* in 2010. But the truth is that these recent victories for the separation of powers are marginal at best, for neither case questions the fundamental
Progressive premises of the administrative state. Only Justice Thomas has consistently questioned the constitutionality of the modern administrative state, and, as noted earlier, he expressed his doubts anew in four powerful concurring opinions this past term.

When the Court in 2001 essentially interred the non-delegation doctrine in *Whitman v. American Trucking Associations*, Justice Thomas authored a short concurrence noting that, although the opinion faithfully applied existing precedent: “On a future day… I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.” That day arrived in *Association of American Railroads*, which held that Amtrak is a government entity for purposes of analyzing the constitutionality of Congress’s delegation to it of regulatory power.

Although Justice Thomas concurred in the Court’s ruling, he took the occasion to call for a revival of the non-delegation doctrine. The founders’ “devotion to the separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it.” Justice Thomas addressed head-on the Court’s implication in *American Trucking* that it is impossibly difficult for courts to enforce the non-delegation doctrine because doing so entails a task beyond their ability — determining the boundary between legislative and executive powers: “[C]lassifying governmental power is an elusive venture. But it is no less important for its difficulty.” Justice Thomas concluded his concurring opinion with these words:

> We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.

Justice Thomas applied these principles to Article III in his *B&b Hardware* dissent. The Court held that an agency’s adjudication of a trademark issue
precluded a federal court from coming to a different conclusion on the same issue, applying a doctrine known as “issue preclusion” or “collateral estoppel.” Noting that the Court’s holding “raises serious constitutional concerns,” Justice Thomas began by observing, “Under our Constitution, the ‘judicial power’ belongs to Article III courts and cannot be shared with the Legislature or the Executive.” Given “some historical evidence suggesting” that the adjudication of rights such as the one at issue in B&B Hardware “is a function that can be performed only by Article III courts,” the Court’s decision “may effect a transfer of a core attribute of the judicial power to an executive agency.”

Justice Thomas did not believe that the Court had to reach these constitutional questions, and so he couched his arguments in less-than-definitive language. Yet, even these tentative conclusions, with their focus on basic separation-of-powers principles, are radically opposed to the carefree delegation of judicial power to administrative agencies that characterizes Chevron and its progeny.

Justice Thomas again turned to the meaning of Article III in his Perez concurrence, in which he criticized the doctrine set forth in Auer and Seminole Rock requiring courts to defer to an agency’s interpretation of its own regulations. Drawing on the recent scholarship of Professor Philip Hamburger, Justice Thomas emphasized that “the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.” But when a court adopts an agency’s interpretation rather than its own best judgment regarding the meaning of a regulation, the court transfers the “exercise of interpretive judgment to the agency.”

“When courts refuse even to decide what the best interpretation is under the law,” Thomas continued, “they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against.” And the danger inherent in ceding judicial power to the administrative state cannot be justified by the need for “expertise”: “This defense of Seminole Rock deference misidentifies the relevant inquiry. The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means.” Nor can judicial deference to agency interpretations be justified on the ground that Congress has delegated to agencies power to issue judicially binding interpretations of agency regulations: “Lacking the power itself, it cannot delegate that power to an agency.”
Justice Thomas’s constitutional arguments against *Seminole Rock* deference applied no less forcefully to *Chevron* itself. Indeed, consider this passage:

[D]eference amounts to a transfer of the judge’s exercise of interpretive judgment to the agency. But the agency, as part of the Executive Branch, lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of Article III. Because the agency is thus not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns.

So too with *Chevron*. It should have come as no surprise, then, that Justice Thomas called into question *Chevron*’s constitutionality in his *Michigan v. EPA* concurrence later in the term.

Drawing on his three earlier opinions, he argued that *Chevron* deference is constitutionally untenable whether agencies are understood to be exercising delegated judicial power (in violation of Article III) or delegated legislative power (in violation of Article I). To the extent that *Chevron* is based on a congressional delegation of power to agencies to interpret federal statutes, *Chevron* “wrests from Courts the ultimate interpretative authority to ‘say what the law is’ and hands it over to the Executive.” That, as Thomas pointed out, “is in tension with Article III’s Vesting Clause.” But if, instead, *Chevron* is based on a congressional delegation of lawmaking power to agencies to “fill in [the] gaps based on policy judgments,” *Chevron* “might…escape the jaws of Article III’s Vesting Clause” only to run “headlong into the teeth of Article I’s.”

Justice Thomas concluded his *Michigan* concurrence by urging the Court to re-examine *Chevron*’s constitutional bona fides:

As in other areas of our jurisprudence concerning administrative agencies, we seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency “interpretations” of federal statutes.
Indeed, not only should the Court do so; fidelity to the Constitution’s separation of powers demands nothing less.

**DECONSTRUCTING THE ADMINISTRATIVE STATE**

Justice Thomas’s four separation-of-powers opinions this past term compellingly demonstrate the extent to which we no longer have a three-branch federal government. But Justice Thomas’s views do not command a majority of the Court—or anywhere close to a majority. And it is highly unlikely, unfortunately, that the Court will ever be composed of five originalists like Thomas. Thus, far from being cause for optimism, Justice Thomas’s lonely opinions underscore that the Court is unlikely to restore the founders’ understanding of our constitutional structure in the foreseeable future.

The only other way to correct the Court’s constitutional mistakes is for the people to do it themselves. The Constitution provides a procedure for the American people—“the only legitimate fountain of power,” as Madison emphasized in Federalist No. 49—to rein in an out-of-control federal bureaucracy, even in the face of congressional opposition. That procedure is the Article V convention process, by which two-thirds of the states can call a convention “for proposing amendments,” subject to ratification by three-fourths of the states.

The difficulty of convening a constitutional convention under Article V is demonstrated by the fact that it has never happened in our nation’s history. Still, it is noteworthy that there is substantial and growing support among some conservatives for a convention. They are in good company. Thomas Jefferson, in his *Notes on the State of Virginia*, proposed a procedure for calling a state constitutional convention to remedy violations of the separation of powers. Such remedies may be necessary, to quote Madison, “whenever any one of the departments may commit encroachments on the chartered authorities of the others.”

At this juncture, we are far past the point of mere encroachments by each branch of government on the constitutional domains of the others: We essentially have a one-branch government, run by unelected, unaccountable, bureaucratic “angels.” Every available method of restoring the separation of powers must therefore be at least considered, for not only does the modern administrative state pose an unacceptable threat to individual liberty, it cannot even make the trains run on time.