PROVOCATIONS #9

Ronald J. Pestritto

GOVERNMENT BY THE UNELECTED

How It Happened, and How It Might Be Tamed

CLAREMONT INSTITUTE
CENTER FOR THE AMERICAN WAY OF LIFE

AMERICA'S 250TH ANNIVERSARY

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FOREWORD

In rising escalation against her royal subjects, the British Parliament passed the Declaratory Act of 1766, declaring not only the right to tax but, with an army to enforce her will, the right to legislate and bind the colonists "in all cases whatsoever." 250 years later, it has not silently passed over the American people that the administrative state, with her army of bureaucrats, has tried to bind the American people in all cases whatsoever. And, to the same beat, the American people have responded with revolution.

The Center for the American Way of Life has published our provocations to engage the highest levels of Congress and the Executive on ways we can reclaim and save the American way of life. As Americans begin celebrating our country's great achievements, we are excited to introduce a special edition series of Provocations, advising the current administration of the most important objec-

tives and targets that will shape the next 250 years of our country and beyond.

We are honored to open this special series with the excellent and profound scholarship of Dr. RJ Pestritto, who has tirelessly investigated the operation of the administrative state, detailed the progressives' assault against the pillars of American self-government, and has taught and met with many of those in the fight to restore the American constitutional republic.

We hope this provocation will continue the legacy of guiding those in the highest ranks of our government, and we hope this edition will inspire a new generation of Americans to begin where our American founders began—by affirming our natural right and sacred duty to resist those who wish to govern us without our consent.

Annalyssa Rogers

Acting Executive Director,
Center for the American Way of Life

GOVERNMENT BY THE UNELECTED

How It Happened, and How It Might Be Tamed

Celebrating the 250th year of American independence provides a fitting context for assessing where our government stands in relation to the vision and principles of those who founded it. If a further justification were needed for this assessment beyond the arrival of the anniversary, Americans were treated in September to the deep thoughts of Senator Tim Kaine, who asserted in a Senate hearing that he found the notion of natural rights "very, very troubling," because that notion suggests our most fundamental rights come from God and not from government. A rather embarrassed Senator Ted Cruz, sitting in the same hearing, had to point out that Kaine had just denounced the words written by his fellow Virginian, Thomas Jefferson, in the Declaration of Independence, expressing the very purpose of the American Revolution and the most basic argument for the establishment of the American national

government.[1]

That a sitting senator, and former candidate for the vice presidency of the United States, saw no problem with thinking that our rights as human beings are simply a matter of whatever our government wishes them to be at any given time, says much about the state of the founders' republicanism. But sadly, there is nothing novel in this state of affairs, since the assault on the Declaration's bedrock principles of natural rights and government by consent of the governed began over a century ago, when America's original Progressives questioned just about every important aspect of the country's founding political ideas. Like Kaine, leading Progressive academic Frank J. Goodnow complained in 1916 about the founders' understanding of rights, and urged that we adopt the view then current among the regimes of Europe, where "the rights which [the individual] possesses are, it is believed, conferred upon him, not by his Creator, but rather by the society to which he belongs. What they are is to be determined by the legislative authority in view of the needs of that society." You have whatever fundamental rights the government, at any given time, deems it convenient for you to have: "Social expediency, rather than natural right, is thus to determine the sphere of individual freedom of action."[2]

That original Progressive assault on the core ideas and institutions of American government proceeded on a variety of paths over the ensuing century, and this essay addresses itself to one of the most consequential: government by consent of the governed, based on the very God-given rights celebrated in the Declaration and then denounced by the likes of Goodnow and Kaine, has gradually diminished over the course of the twentieth and now twenty-first century, and been replaced by the government of a permanent, unelected, and allegedly expert class. The latest installments of this mode of government came in the

Obama and Biden administrations, which relied mostly on rule by bureaucratic decree to implement major policies that were not popular enough to earn enactment by the people's elected representatives: immigration amnesty, climate-change mandates, vaccine mandates, student loan forgiveness, eviction moratoria, biological males in schoolgirls' bathrooms, and the like. Assessing the current state of the republic thus requires a serious look at how deeply the bureaucracy has come to be involved in making highly consequential policy decisions and how removed our government has become from the Declaration's principle of consent. It also requires coming to grips with the reality that disputes over these bureaucratic policies almost always play out in the federal courts—which are not exactly the most democratic of our institutions.

An effort is now under way to see if some semblance of government by consent of the governed can be restored—to see if some power for governing can be recovered from the unelected bureaucrats and judges, and reclaimed by the elected branches, especially by the elected president. The second Trump administration appears to be much more serious and systematic about this effort than was the first; from almost the first day of the president's second term, the administration has been at work in the most extensive project since the New Deal to recapture for the elected branches what has been given away over many decades to the permanent bureaucratic class. This essay will look both at how we got ourselves into this mess and at the current prospects for getting ourselves out of it. Specifically, we'll proceed by addressing the following: (1) how the Progressive Era featured a revolutionary assault on the founders' republican and constitutional vision; (2) how the courts enabled the forward march of this revolution in both the constitutional and administrative law emanating from the 1930s and subsequent decades; and 3) how the early

months of the second Trump administration have shown a serious effort to reverse this decades-long trend and to restore some measure of our original constitutional and republican logic—and an assessment of the prospects for ultimate success.

1

The Progressive Revolution Against the Founders' Republicanism and Constitutionalism

The vision for today's administrative state was articulated in the American Progressive Movement of the late nineteenth and early twentieth centuries. In light of the many social and economic changes in the country since the establishment of the American Constitution, Progressive reformers contended that the original conception of American government—with separation of powers as its core structural feature—was no longer fit for the task of running a modern nation-state. This contention was at the heart of the Progressives' deep and principled criticism of the Constitution of the United States and their call for empowering a national administrative state. The Progressive Era was the first major period in American political development to feature, as a primary characteristic, the open and direct criticism of the Constitution. While criticism of the Constitution could be found during any period of American history, the Progressive Era was unique in that such criticism formed the backbone of the entire movement. Progressive-era criticism of the Constitution came not from a few fringe figures, but from the most prominent thinkers and politicians of that time. The Progressives understood the intention and structure of the Constitution very well; they knew that it established a framework for limiting the national government, and that these limits were to be upheld by a variety of institutional restraints

and checks. They also knew that the limits placed on the national government by the Constitution represented major obstacles to implementing the progressive policy agenda. Progressives had in mind a variety of legislative programs aimed at regulating significant portions of the American economy and society, and at redistributing private property in the name of social justice.[3] The Constitution, if interpreted and applied faithfully, stood in the way of this agenda.

The Constitution, however, was only a means to an end. It was crafted and adopted for the sake of achieving the natural-rights principles that the Americans had proclaimed in their Declaration of Independence. The Progressives understood this very clearly, which is why many of the more theoretical works written by Progressives feature sharp attacks on social compact theory and on the notion that the fundamental purpose of government is to secure the individual natural rights of citizens. While most of the founders and nearly all ordinary Americans did not subscribe to the radical epistemology of the social compact theorists, they did believe, contra Senator Kaine, that men as individuals possessed rights by nature—rights that any just government was bound to uphold and which stood as inherent limits to the authority of government over individual liberty and property.[4] This meant that the regulatory aims of the progressive policy agenda were on a collision course with the political theory of the founding.

This basic fact makes understandable the admonition of Woodrow Wilson—a pioneering progressive intellectual long before he entered public life—that "if you want to understand the real Declaration of Independence, do not repeat the preface."[5] Do not, in other words, repeat that part of the Declaration which enshrines natural law and natural rights as the focal point of American government. Taking Wilson's advice here would turn our at-

tention away from the timelessness of the Declaration's conception of government, and would focus us instead on the litany of grievances made against George III; it would show, in other words, the Declaration as a merely practical document, to be understood as a specific, time-bound response to a set of specific historical circumstances. Once the circumstances change, so too must our conception of government.

Wilson, along with other progressives like Goodnow, championed historical contingency against the Declaration's talk of the permanent principles of just government. The natural-rights understanding of government may have been appropriate, they conceded, as a response to the prevailing tyranny of that day, but, they argued, all government must be understood as a product of its particular historical context. The great sin committed by the founding generation was not so much in its adherence to the doctrine of natural rights, but rather in its notion that that doctrine was meant to transcend the particular circumstances of that day. By contrast, it was this very facet of the founders' thinking that Abraham Lincoln recognized, and praised, in 1859 when he wrote of the Declaration and its primary author: "All honor to Jefferson—to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times."[6]

Recognizing the very same characteristic of the founders' thought, the philosopher John Dewey—arguably the most prominent promoter of progressive ideas in the first half of the twentieth century—complained, by contrast, that the founding generation "lacked historic sense and interest," and that it had a "disregard of history." As if speaking directly to Lincoln's praise of the founding, Dew-

ey endorsed, instead, the doctrine of historical contingency. Natural-rights theory, Dewey argued, "blinded the eyes of liberals to the fact that their own special interpretations of liberty, individuality and intelligence were themselves historically conditioned, and were relevant only to their own time. They put forward their ideas as immutable truths good at all times and places; they had no idea of historic relativity."[7] The idea of liberty was not frozen in time, Dewey argued, but had instead a history of evolving meaning. The history of liberalism, about which Dewey wrote in *Liberalism and Social Action*, was progressive—it told a story of the move from more primitive to more mature conceptions of liberty. Modern liberalism, therefore, represented a vast improvement over classical (or what Dewey called "early") liberalism.

This general progressive philosophy of modern liberalism had clear implications for the administrative power of the nation-state. As Wilson conceded, Progressives had a political philosophy nearly identical to that of socialists. While they often opposed one another in the political disputes of the day, Wilson understood that progressives and socialists shared the ambition for a state where "all idea of a limitation of public authority by individual rights be put out of view," and where "no line can be drawn between private and public affairs which the State may not cross at will."[8] For Wilson, an all-powerful centralized state was merely the logical extension of genuine democratic theory. It gives all power to the people, in their collective capacity, to carry out their will through the exercise of governmental power, unlimited by any undemocratic idea like individual rights. He elaborated:

> In fundamental theory socialism and democracy are almost if not quite one and the same. They both rest at bottom upon the absolute right of the community to determine its own destiny and that of its members. Limits of wisdom

> and convenience to the public control there may be: limits of principle there are, upon strict analysis, none.[9]

For our topic in this essay, the important point of this concept is the vision of centralized national administration that it generated in Wilson and his fellow Progressives. Progressives and socialists differed on practical politics, Wilson explained, because Progressives saw that national government was not at that time capable of handling the vast new tasks that both Progressives and socialists wanted it to take up. While socialists wanted the immediate and radical transformation of government, Progressives understood that the scope and structure of national administration first had to be changed. As Wilson explained to a hypothetical socialist in his 1887 essay "Socialism and Democracy":

> You know it is my principle, no less than yours, that every man shall have an equal chance with every other man: if I saw my way to it as a practical politician, I should be willing to go farther and superintend every man's use of his chance. But the means? The question with me is not whether the community has power to act as it may please in these matters, but how it can act with practical advantage—a question of *policy*. A question of policy primarily, but also a question of organization, that is to say of *administration*.[10]

It is no coincidence that Wilson's major work at this time was on developing a new science of national administration. His groundbreaking 1886 essay—"A Study of Administration"—helped to launch the discipline of public administration in the United States on the principle that national administrative power could no longer be understood within the context of the decentralized forms of the American constitution.

Wilson had a strong apprehension about the influence

of politics on administration. He insisted that if Progressives wanted to centralize a significantly increased supervision of private business and property in the national government, they could not do so until they had found a way for expert administrators to make decisions on the basis of objectivity and science as opposed to political considerations. He thus advocated, in the "Study of Administration," discretion for administrative policymaking and the separation of administrative governance from politics.[11] In so advocating, Wilson was extending the line of reasoning from an even earlier essay—"Government By Debate" (written in 1882)—where he had contended that large parts of national administration could be immunized from political control because the nature of the policies they made were matters of science as opposed to matters of political contention. The administrative departments, wrote Wilson, "should be organized in strict accordance with recognized business principles. The greater part of their affairs is altogether outside of politics."[12] As a young man Wilson frequently expressed disgust with the dominance of politics by narrow, special interests. He said repeatedly that a career in politics was no longer a respectable or worthy goal for an educated young man who was interested in public service. He envisioned that the young and educated could, instead, form the foundation of a new, apolitical class of expert policymakers for the national government, trained in the emerging social sciences for service in a national government with greatly expanded responsibilities. "An intelligent nation cannot be led or ruled save by thoroughly-trained and completely-educated men," Wilson explained. "Only comprehensive information and entire mastery of principles and details can qualify for command." He championed the power of expertise—of "special knowledge, and its importance to those who would lead."[13]

While Wilson's novel approach to national administration was initially offered for consideration among fellow academics, Theodore Roosevelt brought the idea squarely into national politics with his New Nationalism campaign for recapturing the presidency in 1912. Roosevelt took the theme for his campaign from a speech he had given on the New Nationalism in 1910. It was in that speech that Roosevelt forthrightly made his call for an entirely new order of national economic regulation empowered by a new national bureaucracy.[14] He acknowledged that his was "a policy of a far more active governmental interference with social and economic conditions in this country than we have yet had, but I think we have got to face the fact that such an increase in governmental control is now necessary."[15] Centralized regulation was to be the principal means for this stepped up level of governmental control, and Roosevelt's speech called for a host of new federal agencies to take on the task.

Roosevelt, like Wilson, understood that the newly empowered federal bureaucracy could not coexist with the original constitutional vision of federalism or of separation of powers.[16] While the framework of the Constitution rested on each branch of government maintaining firm control over its own jurisdiction[17] and kept administration subservient to an elected executive,[18] this framework was inadequate for the scope and efficiency needed for modern administration. Thus, the fathers of the administrative state envisioned a congressional delegation of regulatory power to an enlarged national administrative apparatus, which they believed would be more capable of managing the intricacies of a modern, complex economy because of its expertise and its ability to specialize. And because of the complexities involved with regulating a modern economy, they also believed it would be more efficient for a single agency, with its expertise, to be made responsible

within its area of competence for setting specific policies, investigating violations of those policies, and adjudicating disputes. The fulfillment of the Progressives' administrative vision thus required the evisceration of the core constitutional principle of "non-delegation"—of the idea that the Constitution's separation-of-powers structure could not be maintained if one branch were permitted to give its powers to another. Instead, Progressives looked to combine previously distinct functions within single agencies. Moreover, they believed that administrative agencies would never be up to the mission they had in mind if those agencies remained subservient to the Constitution's traditional branches of government. Since modern regulation was to be based upon expertise—which was, its founders argued, objective and politically neutral—administrators should be freed from political influence.[19] Thus the constitutional placement of administration within the executive and under the control of the elected president was a problem, as Progressives looked to insulate administrators not only from the chief executive but from political accountability altogether.

2

The Courts as Progressive Enablers

As the administrative state went from the idea stage in the Progressive Era to the implementation stage in the New Deal,[20] it became necessary for courts to find ways to fit the newly robust administrative apparatus of national government into a constitutional framework that seems, on paper, to have little room for it. To this end, the Supreme Court ceased applying the non-delegation principle after 1935, and allowed to stand a whole body of statutes whereby Congress delegates significant policy-making power to administrative agencies.[21] These statutes,

to varying degrees, lay out Congress' broad policy aims in vague and undefined terms, and delegate to administrative agencies the task of coming up with specific rules and regulations giving them real meaning. And federal agencies are now regularly permitted to exercise all three powers of government—legislative, executive, and judicial. The legal scholar Gary Lawson offers this remarkable but accurate account of how the American Federal Trade Commission (FTC) works:

> The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. The Commission adjudication can either take place before the full Commission or before a semi-autonomous administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission.[22]

The courts have also permitted the weakening of the political accountability of administrators and the shielding of a large subset of agencies from most political controls. While the independence of so-called "independent regulatory commissions" and other "neutral" agencies is not as clearly established as delegation and combination of functions, the federal courts have certainly recognized the power of Congress to create agencies that are presumably part of the executive but are nonetheless shielded from direct presidential control. Normally, this shielding is ac-

complished by limiting the president's freedom to remove agency personnel.

As constitutional restraints on the national administrative state were eroded, federal courts came to rely on a growing body of administrative law to govern the scope of national administrative power. This body of law is grounded in the Administrative Procedure Act (APA) of 1946[23] and the precedents that have been established as courts have applied that law (along with the specific, "organic" statutes that give life to individual agencies) during the growth of the administrative state over the last eighty years. Initially intended to rein in national administrative power after the courts had loosened the constitutional restraints on it in the 1930s, the manner in which the APA has been interpreted has led, notwithstanding some important exceptions, to even greater insulation from political accountability for national bureaucracies, in both procedure and substance.

Procedural Administrative Law

On procedural questions, the APA was originally thought to be a check on the discretion of agencies by means of the many trial-like steps it imposed for formal agency rulemaking (when an agency acts like a legislature) and adjudication (when an agency acts like a court).[24] Affected parties are given in these steps, known as "formal" rulemaking and adjudication, significant rights to participate in the decision-making process and to present their own evidence and cross examine witnesses, among other things.[25]

The application of this procedural law in the decades following its enactment has undergone a few distinct and even contradictory trends. The first of these consisted of a weakening of the restraints placed on agencies by the APA. In several landmark cases from the 1970s, the Supreme

Court greatly narrowed the category of administrative actions to which formal administrative procedures apply. In the case of *United States v. Florida East Coast Railway* from 1973, the Court construed the triggering language for formal procedures so narrowly as to virtually eliminate formal rulemaking as a viable category of administrative law—in this case, ruling that formal procedures did not apply to a major rate-setting action of the Interstate Commerce Commission (ICC).[26] This interpretation stood in contrast to the near universal assumption at the enactment of the APA that formal rulemaking procedures were largely written for the express purpose of applying to agency rate-setting. And in 1978, the Court strictly limited the procedural restraints that could be imposed on agencies engaged in informal rulemaking in the case of *Vermont Yankee v. Natural Resources Defense Council*, thereby reducing the ability of affected parties to challenge agency decision-making in independent, Article III federal courts.[27] As Lawson has pointed out, this move from formal to informal as the standard process to be used in agency rulemaking came just at the time when agencies—due to Lyndon B. Johnson's Great Society legislation—were coming to rely more on rulemaking as a favored means of making the policies with which Congress had charged them in legislation such as the Clean Air Act.[28]

Following this move away from formal procedural requirements on agencies, it is true that courts in subsequent decades sometimes changed their approach, involving themselves much more deeply in the less formal categories of agency procedure. But this has often come at the very moments when Republican presidents have attempted to extend greater control over agencies and to roll back regulatory burdens. The upshot of the history on procedural law is that courts in the decades following the New Deal worked hard to liberate the bureaucracy from legal

restraint, thus facilitating its growth into what we now call the administrative state. Once that robust administrative state was established, courts and interest groups re-engaged, turning to procedural law as a means of protecting the "accomplishments" of the administrative state from presidents who thought they had been elected to rein in or even roll back regulation.

Substantive Administrative Law

As these precedents developed on the procedural side, judicial deference to national administrative power on substantive questions came to be even greater, though this is a somewhat more recent development. In one respect, such deference seems perfectly consistent with the basic tenets of the administrative state: national bureaucracies were created because the national government was taking on many of the police powers that had previously been handled at the state and local level, and it needed the expertise of administrative agencies to accomplish the task. The federal courts concluded, not unreasonably, that the administrators in the bureaucracy were the experts on the substance of the policies that they had been created to implement, and that judges should not substitute their own, amateur understanding of policy for substantive decisions made by national administrators. Courts thus adopted a sharply deferential posture to the substance of agency decision-making.

The difficulty with this principle, however, comes in the fact that much of the substance of what agencies do involves interpreting the laws they are charged with implementing; and interpretation of law is, of course, supposed to be the province of the independent judiciary. The Clean Air Act, for example, places certain requirements for expensive pollution-control equipment on "stationary sources" of pollution; but the Act does not define "stationary

source."[29] Is a single factory—which may contain a number of different emitting devices—a single "stationary source," or is each discrete emitting device within a single factory its own "stationary source," thus requiring the factory to make a potentially crippling investment in a multitude of diverse control devices? This seems like an obscure question (as administrative cases often are), but it has major policy and economic consequences. And since Congress did not clearly address this question in the legislation, did it intend for the agency to step in and, effectively, make the law on the question? How much latitude do agencies get to fill in the gaps left by legislation, much of which, in our time, has become broad and vague? In the question posed by the example, which was at issue in the 1984 case of Chevron v. Natural Resources Defense Council,[30] the Supreme Court concluded that gaps in the law should be filled in by the agency charged with its implementation—that when Congress does not directly address a question in the statute, that lack of clarity can in itself be a kind of express intent that the agency should have the power to do so, and that courts reviewing agency action are to grant significant deference to the agency's interpretation of the law.[31] That conclusion established what is known as the "Chevron Doctrine," which became until very recently the most important principle in American administrative law. With it, we moved from the old, constitutional understanding—that for executive agencies to implement policy the legislature must first enact law giving them warrant to do so—to the understanding of national administration that had prevailed until the Supreme Court began a gradual re-evaluation over the last few years—that when Congress fails to enact a policy, that failure or void is itself a warrant for national administrators to make policy on the basis of their own expertise. Until very recently much of administrative law—and, thus, much of our understanding of the power of the administrative state—came from court

decisions applying the Chevron Doctrine to a wide variety of administrative action.

One of the most interesting developments with this growth of discretion for national administrative bodies is that it came in defiance of the traditional ideological divide in the federal courts. Judges commonly known as "liberals" were to be found on both sides of the issues pertaining to Chevron, as were those commonly known as "conservatives." In fact, the principal architects of the judicial precedents I've described here—those integral to the expansion of national administrative power—were former Supreme Court Justice Antonin Scalia and former Chief Justice William Rehnquist. Rehnquist authored the authoritative opinions in both Florida East Coast Railway and Vermont Yankee. And while Scalia was still an appellate court judge when Chevron was decided, he became a forceful advocate for the most expansive application of that case when he joined the Supreme Court—in fact, he often drew the opposition of Justice John Paul Stevens on this expansive view, who was himself the author of the Chevron opinion.[32]

While it may seem strange that these "conservative" judges were the principal advocates of a doctrine which eventually gave the Obama and Biden administrations the power they needed to govern through administrative agencies, the historical context helps to explain it. Both Rehnquist and Scalia came into national government at a time when the executive branch seemed the only likely place for their party to have any influence on policy; Congress and the courts were seen as the sole province of the Left in the 1970s. As lawyers and then judges, both men would have been particularly concerned about the rise of judicial activism in the federal courts during the so-called "Warren Court" era, where most conservatives were alarmed by a federal judiciary that appeared to be

wading ever more deeply into policymaking on behalf of progressive causes.[33] It is entirely natural, in this context, for jurists like Rehnquist and Scalia to want to carve out as much freedom from judicial oversight for policymaking by executive agencies as they possibly could, as both had worked as lawyers for Republican administrations and the executive seemed to be the one area where Republicans could be influential in national government.

This embrace of deference, even by some of the most well known conservative jurists, arguably reached its zenith with the Court's 2013 decision in City of Arlington, Texas v. FCC.[34] This case brought out one of the most troubling aspects of Chevron deference, bearing in mind that the power of an administrative agency is defined in and limited by the statute that creates it. If under Chevron courts were to give deference to agencies in interpreting the laws they administer, would this not suggest that courts must defer to agencies in defining their own jurisdiction and interpreting the limits on their own powers? In other words, unless Congress has been specific about what an agency may not do, the Chevron Doctrine suggested that the agencies themselves are the principal experts on the question of how much power they do and do not have. As farfetched as that proposition may sound, it was affirmed by the Court in City of Arlington, where the Federal Communications Commission (FCC) had interpreted federal law as giving the Commission the power to place limits on the land-use decisions of state and local governments.[35] Among other arguments, local governments contended that the courts should not take a deferential posture to agency legal interpretations like this because they are jurisdictional questions and deference in such cases would mean that federal agencies effectively define the limits of their own powers.[36] But the Court's majority rejected the contention that courts should increase scrutiny of agencies

when they are defining the extent of their own jurisdiction. As Justice Scalia wrote for the Court: "Those who assert that applying Chevron to 'jurisdictional' interpretations 'leaves the fox in charge of the henhouse' overlook the reality that a separate category of 'jurisdictional' interpretations does not exist."[37]

I say that the City of Arlington case may have been a turning point, because it sparked alarm by other conservative justices—even Chief Justice Roberts[38]—and what followed in the decade or so after City of Arlington were several decisions narrowing Chevron, leading up to the Court's decision to overturn it altogether in 2024, as we will discuss below.

3

The Present Attempt at Restoration

Thus far we have laid out the Progressives' assault on the republicanism and constitutionalism of the founders, and have explained how the courts aided and abetted the practical implementation of much of the progressive vision for American institutions. As remarkable as the Obama and Biden administrations were for their reliance on extra-constitutional modes of governing, these modes had been in the making for many decades, often with the involvement of both sides of the partisan divide. This is why the present efforts within the Trump administration to push back on government by the unelected class are truly jarring; they are the first efforts in living memory to counter, fundamentally, the political culture that has gripped the country—and both major parties—since the Progressive Era and New Deal. But given the long history of that culture, and its entrenchment in legal thinking and practice, what kind of genuine restoration is possible? What progress is being made in the Trump admin-

istration's efforts, and what major hurdles have yet to be overcome? The answers to these questions largely hinge on three specific initiatives: (a) the effort to restore republican control over national administration, by means of making the bureaucracy more accountable to the elected president; (b) the effort to get the federal courts to reverse their decades-long acquiescence to government by the administrative state over government by consent of the governed; and (c) the attempt to prod Congress into asserting more of its own Article I powers—especially a more active role in regulating the power of the purse. This section will focus on the first two initiatives.

(A) Making the Unelected Bureaucracy Accountable to the Elected President

The early Trump-administration efforts to exert greater presidential control over the bureaucracy came in the form of DOGE—the Department of Governmental Efficiency. This venture drew intense media and public attention, due to the involvement of the idiosyncratic Elon Musk and the light shone by him and his staff on some truly outrageous examples of federal spending.[39] But DOGE was about more than reining in wasteful spending; it was the beginning of the administration's broader effort to rein in an unaccountable bureaucracy.[40] Understanding that effort requires understanding what DOGE was and what it wasn't, and how it has set up the broader project of bureaucratic reform now underway in other parts of the Executive Office of the President. Even though the DOGE moniker stands for "Department of Government Efficiency," it's not actually a "department" of government at all. Departments of the government—actual parts of the executive branch that execute the law—are themselves created by law. They are not created by executive order, as DOGE was. Departments or agencies—like the State De-

partment, or Veterans Affairs, or any of the innumerable other agencies in the federal bureaucracy—only exist and exercise power because Congress creates them, empowers them, and funds them.

The original belief was that DOGE, very much in contrast to a government "department," was going to be totally outside of the government. The president, after all, is perfectly entitled to take advice from any group of private persons, and he may rely on that advice to propose policy changes in government—either by using his own executive powers or by working with Congress to get legislation passed. At the most, the expectation was that DOGE might take the form of a "federal advisory committee," much like the Grace Commission had functioned in the Reagan administration, which is still an outside body, but has a kind of status in federal law that governs how it can operate. Bearing in mind that these kinds of special commissions have not been the sole province of the political Right, another model might have been the "Simpson-Bowles" Commission established by President Obama in 2010. This commission was actually housed in the president's own Executive Office of the President, and while not identical to the Grace Commission, the basic idea was the same—that the ordinary institutions of government are not capable of self-discipline, the spending and apparatus of the government need to be reformed, and only some outside entity might have the objectivity to come up with a truly effective set of recommendations.

To the surprise of many, President Trump went about as far as he could go to make DOGE a formal part of the government, short of going to Congress for legislation creating it as a formal department or agency. His DOGE executive order made it part of the Executive Office of the President, which is very much part of the formal apparatus of government—it is the part that works directly

for the president, and is much more under his immediate authority than the traditional cabinet departments or independent agencies.[41] Ironically, the Executive Office came out of FDR's presidency, where President Roosevelt became increasingly alarmed at how far the progressives in his own administration had gone in distancing the bureaucracy from the president's political control. FDR's Brownlow Commission was formed for the purpose of attempting to reclaim some of the authority that his own progressive aides had doled out to the bureaucracy, and the Commission's work became the foundation for the formal establishment of the Executive Office of the President.[42] In the Trump administration, in order to get DOGE implemented right away, the president did not seek to create some brand-new part of the Executive Office; instead, he took the vessel of an existing entity in the Executive Office, and temporarily re-purposed and transformed it into DOGE. This is how an obscure and nearly defunct entity in the Executive Office called the "United States Digital Service"—which had been created by an Obama executive order—became the "United States DOGE Service."

While much attention was paid to DOGE's efforts on federal spending in the early months of the Trump administration, the deeper—but quieter—mission has now been taken up by the more traditional parts of the president's Executive Office: by the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs (OIRA). This deeper effort aims at rolling back the extensive regulatory activity of the Biden and Obama administrations, and at the tightening of presidential control over agencies that is essential if such a rollback is to be successful. The DOGE efforts on spending were very important in terms of focusing the public's attention on that problem, but were always going to be fairly limited in terms of what could actually be taken on in the gigantic

federal budget. Congress alone legislates on spending, and so real spending reform has to be done by Congress.

The Trump administration's deeper project to rein in the bureaucracy has proceeded on two primary fronts: (1) a widescale reconsideration of regulations implemented during the Obama and Biden administrations; and (2) making bureaucratic entities fall in line with the president's agenda through a robust assertion of the president's power to remove agency commissioners and other top officials.

REGULATORY ROLLBACK

With respect to the first project—the reconsideration and, increasingly, reversal of its predecessors' regulatory activity—the key to understanding the Trump administration's efforts is that the approach is very different than the one taken in the president's first term. Trump administration officials learned the hard way that effective, longer-lasting regulatory reform takes time; there is a process established in law and in legal precedent, which the president's team often disregarded in his first term. This is one major reason why they took it on the chin in court during the first term, and why the regulatory reform effort was largely ineffective.[43] This time around, the effort is very different. There was clearly a careful assessment, during the time that Trump was out of office, of what had to be done to get it right, should the opportunity present itself again. And the early executive orders of Trump's second term set in motion a more deliberate reconsideration of his predecessors' regulatory regime—one that uses the established processes of notice and comment where necessary, and pays more attention to the norms of administrative law. In fact, many of the regulatory initiatives read as if they were taken directly from recent Supreme Court pronouncements on various doctrines in administrative law.[44] This

is why—initial defeats due to forum shopping for district judges notwithstanding—Trump's ongoing regulatory reform efforts seem more likely to be upheld at the higher levels of the judicial ladder.

One major example of this more deliberate approach to regulatory reform is the announcement made by the EPA in July that it is proposing the revocation of the so-called "endangerment finding" that originated in the Obama administration.[45] While it remains to be seen if this revocation will be "the largest deregulatory action in the history of America," as EPA Administrator Lee Zeldin has proclaimed, there is no question that it would be hugely significant.[46] This is because the finding itself was the requisite precursor to the more specific and onerous regulations, emanating from the Clean Air Act, that were issued by the Obama and Biden administrations as part of their agenda to fight "climate change." The finding is the legal instrument without which a host of subsequent regulatory mandates could not exist—on motor vehicles, power plants, etc. Instead of making a quick attempt to reverse those specific mandates, the Trump administration has instead targeted their core regulatory foundation—and it is doing so through the appropriate notice and comment process. While this kind of attention to procedural detail will certainly improve the rule's chances of surviving the inevitable litigation, it remains a heavy lift given how severely it proposes to disrupt the current regulatory regime. Other important repeal efforts—on prior rules pertaining to public lands and to national forests, to name just two examples[47]—seem even more likely to succeed, given the administration's second-term attentiveness to the regulatory repeal process.

This more attentive approach is evidence that the parts of Trump's Executive Office that are most critical to reining in the bureaucracy—OMB and OIRA—are more

effectively managing the president's de-regulatory agenda and are, thus far, coordinating those efforts with the relevant agencies. And they now have a very important tool to aid in this coordination, which has flown mostly under the radar since it was announced in the early days of the administration. The regulatory entities within the executive branch come in several different types: some, like the EPA, are more accountable to the president because they have a single administrator subject to presidential appointment and removal. But many others—the so-called "independent regulatory commissions" such as the SEC, FTC, FCC, and the like—were purposely insulated from presidential control in spite of their very significant regulatory powers. And up until the current administration, these agencies—even though they are part of the executive branch (where else, constitutionally, could they be?)—were free to regulate without the president's supervision or involvement. In fact, they have been allowed to assert interpretations of law that diverge from those of the president and that govern other parts of the executive branch. This has meant, for instance, that an "independent" agency could maintain a legal position that a law gives it certain powers, even if the president and the Department of Justice hold that it does not. This state of affairs, which defied the Constitution's grant of all executive power to the president, was put to an end by a Trump executive order shortly after he was inaugurated.[48] That executive order overturned an order promulgated by President Clinton,[49] and it now requires that all regulatory activity—including activity from the "independent" agencies—undergo the OIRA review process. The point of this process is to ensure that the regulatory activity of the executive branch actually conforms to the regulatory views and policies of the elected president. Those views and policies are represented in OIRA. This same executive order also forbids any agency—including "independent" agencies—from

maintaining an interpretation of law contrary to that held by the president. If adhered to, this reform would mark a very significant diminishment in the ability of the bureaucracy to make governing decisions contrary to the will of voters, whose sole representative in the executive branch is the president they have elected.

PRESIDENTIAL REMOVAL POWER

The second prong of the Trump administration's effort to restore presidential—and thus republican—control over the administrative state has been the wielding of the president's power to remove agency personnel in a manner not seen since at least the 1930s. Its critics have decried this effort as an assault on the independent, politically neutral, non-partisan character of our regulatory agencies, much as that description of the administrative state is difficult to maintain with a straight face.[50] More importantly, the constitutional logic of Trump's effort is perfectly straightforward. Constitutionally, all of these agencies are in the executive branch—they are manifestly neither in the legislative branch nor in the judicial branch, and since the people grant national governing authority only through the three branches of government, there is no place for them to be other than in the executive. And constitutionally, the only entity granted any executive power—"The executive power," as the language of Article II has it—is the president. So again, constitutionally, how can there be agencies exercising power from the executive branch that are somehow independent of the president's direction?

Not only is this a straightforward exercise of constitutional logic, but of republican logic as well. We are supposed to be living in a republic, not in an aristocracy or technocracy. Expertise or an elite education are not what grants individuals a right to govern; in a republic, power may be exercised only by the people's consent. How can

republican government be maintained, if we have a large swath of our administrative agencies making highly consequential policy decisions while they are insulated from accountability to the only elected official in their branch of government? Yet Congress, since the Progressive Era, has frequently walled off major parts of the bureaucracy from presidential control, by way of limiting the president's power to remove top agency officials who might be executing the law in ways contrary to his views—and thus contrary to the views of the voters who elected him. As with any public or private organization, the principal way a chief executive ensures that his subordinates do their jobs in the manner he wishes is through the ability to fire them if they do not. How could the chief executive of a corporation do the job for which his board of directors has hired him, without the ability to control his subordinates? Likewise, how can a president be expected to do the job for which the voters have elected him, without the ability to hire and fire his subordinates in the executive branch of government? Yet in the laws establishing many of our regulatory agencies, Congress has stipulated that their top officials cannot be removed by the president—or, that they can only be removed "for cause" and not "at will."

The clear strategy of the Trump administration has been to force federal courts—and the Supreme Court specifically—to take a fresh look at this republican and constitutional contradiction. As previously explained, the Supreme Court itself has been a principal culprit, through decades of precedent beginning in the 1930s, in allowing Congress to pull off this constitutionally dubious insulation of the administrative state. Yet it has also given indications in recent years that the time may be ripe for a reconsideration.

We should first say more about the removal power itself, and its connection to the original conception of the presi-

dency in Article II of the Constitution. While the Constitution is rather specific on how executive branch officials are to be appointed, it is silent on the mechanism for their removal, and thus there was a serious debate about that in the First Congress, when under the leadership of James Madison one of the very first orders of business was to establish the major executive departments.[51] What emerged from that early consideration was an understanding based largely on the constitutional logic explained above: that control over the hiring and firing of executive branch subordinates is an inherent part of the president's having been granted all of the executive power in Article II, and thus that in the absence of specifically stated exceptions for the purpose of checks and balances (i.e. the requirement for the Senate's advice and consent on appointments), the default rule must be that executive appointees are accountable to, and thus removable by, the president.

This understanding held, notwithstanding some notable controversies in the Jackson and Johnson administrations, from the early republic into the twentieth century, when the Supreme Court first had opportunity to address it squarely in the 1926 case of *Myers v. United States*.[52] Chief Justice Taft wrote a weighty opinion in that case, drawing heavily on Madison and the constitutional logic of the First Congress, and affirming the president's unchecked removal power over executive branch officials as a core component of his Article II powers. Yet this holding was upended less than a decade later, when the Court overturned the president's removal of an FTC commissioner, employing some revolutionary legal reasoning that continues to be a linchpin of the administrative state today. Disregarding the separation-of-powers framework that is the very foundation of the Constitution's structure, the Court endorsed two novel principles in *Humphrey's Executor v. United States* (1935): (1) that Congress could

delegate "quasi-legislative" and "quasi-judicial" powers to a commission in the executive branch; and (2) that because the commission's function was less executive than it was legislative or judicial, the chief executive could permissibly be denied removal power over its officers.[53] Without this upending of the separation of powers system, the administrative state as we know it could not have been built and could not continue in its current form, as many parts of the bureaucracy today operate on the basis of broad delegations of legislative power from Congress and—by way of limitations on the removal power—insulation from presidents and the voters who elect presidents.

If the Trump administration wants to be serious about reining in the bureaucracy and restoring some measure of republican accountability to national administration, it makes perfect sense that the administration would push for a reconsideration of *Humphrey's*. The time appears to be ripe for such an effort, as the Supreme Court in recent years has retreated from the logic of *Humphrey's*—though in incremental fashion, as is its wont under the leadership of Chief Justice Roberts. These reconsiderations, while incremental, have generated alarm and fierce resistance on the Left, because it understands that they have been slowly attempting to unwind the constitutional revisionism that has facilitated the empowering of the bureaucracy over the last 90 years. Nowhere is this clearer than in the direction the Court has taken in recent years on questions of appointment and removal.

First consider the president's power to appoint executive personnel, as the ability to hire subordinates is a critical element in any chief executive's prospects for implementing his vision. The Constitution specifies that personnel who are "officers of the United States" must be appointed under the methods of the Constitution's Appointments Clause, found in Article II, section 2, clause 2. Defenders

of the administrative state have sought to remove as many administrators as possible from the umbrella of the Appointments Clause, as the need to undergo the constitutional process of appointment creates a burden in staffing and empowering administrative agencies. So the question is, who exactly, among agency personnel, are "officers" requiring the constitutional method of appointment?[54]

An early, but slight, blow was struck against the administrative state on this question with the Supreme Court's 1976 decision in *Buckley v. Valeo*.[55] In its attempt to shield an agency—in this case, the Federal Elections Commission (FEC)—from the influence of the president, Congress had devised a rather odd method of appointing commissioners,[56] which led to the Court's striking down part of the statute on separation-of-powers grounds—the first time it had done so to any statute since the 1930s. *Buckley* held that FEC commissioners were indeed "officers," and that they therefore needed to be appointed in accord with the forms of the Constitution.[57] The statute in this case failed to do that, because it vested part of the appointment authority in Congressional figures not specifically named in the Appointments Clause (namely, in the Speaker of the House and the President *pro tempore* of the Senate). Yet unfortunately *Buckley* soon became very much an outlier, as courts in subsequent cases typically took great pains to find that agency personnel did not rise to the level of exercising "significant authority," which was the bar set by *Buckley* to trigger the Constitution's appointment process for "officers."

In its 2018 term, however, in the case of *Lucia v. SEC*, the Supreme Court seriously undercut this trend of lower courts narrowing *Buckley* and the scope of the Appointments Clause, finding that Administrative Law Judges ("ALJs") are indeed "officers," and thus require a mode of appointment specified in the Appointments Clause.[58]

ALJs are a staple of the administrative state, exercising considerable power in many agencies, even though—prior to the *Lucia* decision—their appointment was allowed to be made in a manner not specified in the Appointments Clause, because they were deemed not to be "officers." The *Lucia* case is especially significant in that it arose from a controversy under the Dodd-Frank financial-regulation law, which is the model law for advocates of an independent administrative state.

The removal power over agency personnel raises similar issues, as the aim for advocates of the administrative state is to shield agency personnel, as much as possible, from presidential control. *Humphrey's Executor* is the landmark case on this question—a case, as we've detailed above, greatly responsible for enabling the administrative state by allowing Congress to create agencies in the executive branch but to insulate them from presidential control.[59] The Supreme Court later expanded on this precedent in the *Morrison v. Olson* case from 1988, where it permitted Congress to shield even a federal prosecutor—as pure an executive official as one can find—from presidential control.[60]

But the Court has since started retreating from its constitutional revisionism in removal power cases. One important example of this came when it ruled against a new agency created by the Sarbanes-Oxley law: the Public Company Accounting Oversight Board (PCAOB). The PCAOB answers to the Securities and Exchange Commission (SEC), and is appointed by the SEC, but its members may not be removed at will. This arrangement effectively sets up a double layer of insulation from presidential control: the SEC cannot remove Board members at will, and under *Humphrey's*, the President cannot remove SEC commissioners at will, either. This is too little control for the president, the Supreme Court concluded in the case of

Free Enterprise Fund v. PCAOB, decided in 2010.[61]

Even more importantly, and more recently, the Court further trimmed Congress's power to insulate bureaucrats from presidential removal in *Seila Law v. CFPB*—a case concerning the structure of the Consumer Financial Protection Bureau. This agency is the crown jewel of the Dodd-Frank law, with a constitutionally questionable structure, even as administrative agencies go: a single administrator, not removable by the president, whose funds are not subject to annual congressional appropriations. In *Seila Law*, the Court overturned the statute's prohibition on at-will presidential removal and grounded its holding on the agency's single-administrator model, which distinguishes it from the multi-member commissions that, under *Humphrey's Executor*, are insulated from at-will presidential removal.[62] In both *Free Enterprise Fund* and *Seila Law*, the Court went further down the road of embracing the general principle of the unitary executive and the necessity of an at-will presidential removal power, yet declined to follow the logical consequences of this principle by extending it to agencies other than those at issue in these particular cases. The Court still maintained, in other words, that *Humphrey's Executor* was good law—just more narrowly applied.

Officials in the Trump administration, however, were clearly paying attention to the trend in these recent removal power cases. And the administration seems squarely focused on forcing the Court to confront the core of *Humphrey's* once and for all, as a centerpiece to making the bureaucracy more politically accountable. This aim surely explains President Trump's numerous high-profile firings of agency commissioners and other top bureaucrats who were previously thought to be immune from presidential removal. That the president is mostly losing when these removals are initially challenged at the district-court level

is unsurprising: in addition to the fired plaintiffs "shopping" quite effectively for ideologically sympathetic district judges, the laws in many of these instances explicitly forbid presidential removals without cause, and those laws are buttressed by the *Humphrey's* precedent. Even if federal district and appellate court judges happen to disagree with *Humphrey's*, they are bound to follow it unless and until it is overturned by the Supreme Court. Understanding these facts of life, the president is playing a longer game; his administration believes that the recent signals from the Supreme Court are in its favor, and—judging from the few times these removals have reached the Supreme Court thus far in Trump's second term—the president appears to be correct about the new inclination of the Court.

In its clearest indication of a new direction, the Supreme Court in May allowed the president to move forward with his removal of a commissioner of the National Labor Relations Board (NLRB).[63] This removal had previously been enjoined by a lower federal court, relying on the long-established legal understanding that officials at the NLRB and similar "independent" agencies were insulated from at-will presidential removal.[64] Coming to the Supreme Court on the emergency or "rocket" docket, this was not a full-blown consideration of the case's merits; yet the Court proclaimed that the president was likely to succeed on the eventual consideration of the merits, and thus reversed the lower court's injunction of the president's move. Most importantly, the Court proclaimed the general principle that, "because the Constitution vests the executive power in the President… he may remove without cause executive officers who exercise that power on his behalf[.]"[65] It cited as authority its own recent caselaw, which has endorsed the older, Madisonian *Myers* precedent as the controlling, general principle, while diminishing *Humphrey's* to the status of an increasingly

narrow exception.[66] It remains to be seen if the Court will simply continue to narrow the application of *Humphrey's*, or overturn it altogether. With the NLRB—or even more recently, with the Consumer Products Safety Commission (CPSC), where a Trump removal was upheld in July—the Court could simply say that the exception granted to the FTC in *Humphrey's* did not extend to the NLRB, CPSC, or similar agencies exercising more inherently executive functions.[67] But the president clearly wants to force the issue, which likely explains his removal in March of two commissioners of the FTC—the very agency that had been insulated from presidential removal in *Humphrey's*. And the Court has not only permitted the at-will removal of the FTC personnel to stand while the case plays out on the merits; it has now agreed to examine the case itself and to consider the validity of the *Humphrey's* precedent.[68]

On this recent line of removal cases, there was one very interesting twist when, in May's *Trump v. Wilcox* decision, the Supreme Court sided with the president's removal of the NLRB commissioner. In giving strong endorsement of the idea that elected presidents have to be able to control agencies and thus be able to remove their top officials, the Court took great pains to carve out an exception for the Federal Reserve—a hugely important entity that has been in the news for much of the president's second term in office, as the president and Fed Chairman Jerome Powell have clashed over interest rates. In *Wilcox*, the Court suggested that the Fed might be the sole agency able to retain an exception from a president's prerogative of at-will removal.[69] Its reasoning for this exception was vague—unsurprisingly, because it is not at all clear how the Fed, as a matter of constitutional logic, is all that distinct from the other "independent" entities in the national government over which the Court has now permitted at-will presidential removal.[70] Even if, as a matter of policy, one might find

good reason to support independence from politicians for the Fed, that does not answer this constitutional question. On the basis of the constitutional and republican logic that appears now to undergird the Court's new endorsement of presidential removal power, it remains to be seen how the Court might attempt to dance its way toward maintaining the Fed's insulation.

And once again President Trump is not going to let the issue drop. Just a few months after the Court signaled that it might stop short of embracing presidential removal for the Fed, the president went right ahead and fired Fed Governor Lisa Cook. To no one's surprise, including the administration's, the removal was enjoined by a strategically chosen district judge.[71] But the president is playing to the higher levels of the judicial ladder, and the Supreme Court will now ultimately have to explain why it is that the Fed gets to make hugely consequential national policy decisions while retaining its independence from the only officials whom the voters have constitutionally empowered to make such decisions—an independence that the Court no longer seems inclined to extend to any other federal entity.

And the Trump administration has thrown one additional curveball in this case. The law governing removal of officials at the Fed is like many of the laws pertaining to independent agencies: it says that the officials may only be removed by the president "for cause."[72] Similar to ordinary employment or contract law, this is typically taken to mean that one cannot be fired "at will" or, in this case, simply because a president may prefer an official more sympathetic with his own policy views. Instead, at least as these laws have generally been interpreted over the years, as long as an official does not commit some serious wrong—theft, bribery, other obvious forms of malfeasance—the official is presumed to be safe from presidential removal, even if

he is executing policy in a manner entirely at odds with the wishes of the elected chief executive. The curveball with the firing of Fed Governor Cook is that President Trump said that this was not an "at will" firing, but instead that he was removing Cook "for cause."[73] She is the subject of a criminal referral for mortgage fraud from the Federal Housing Finance Agency and at time of this writing is also the subject of a federal grand jury investigation.[74] So even if one were to say that it is constitutionally permissible for Congress to restrict the president to "for cause" removals, the president in this case is saying that there is a cause, and is thus arguably following the letter of the law. As with the question of "at will" presidential removals, whatever the Supreme Court ultimately decides on "for cause" removals will also have deep significance for the power of the administrative state, and for the president's ability to make the bureaucracy more politically accountable.

(B) Can the Judiciary Help Tame the Bureaucracy?

Much of our discussion thus far of the president's attempts to rein in the bureaucracy has required us to consider the litigation that inevitably comes with such attempts and thus also to consider what course the courts will ultimately follow. As we have explained, the courts have been willing enablers to the growth of administrative power in the decades since the Progressive Era and New Deal origins of the administrative state. Yet the Trump administration sees an opportunity to reverse this trend. In addition to the positive signs in recent rulings on appointment and removal, there have been rulings in other recent cases in the arena of administrative law that seem to invite further pushback on rule by agencies. This trend reached a critical point in the summer of 2024, when the Supreme Court issued a trio of critical administrative-law rulings, the most important of which finally killed off *Chevron* al-

together. While the Court received the most attention at the conclusion of its 2024 term for its decision on presidential immunity in *Trump v. United States*, the blows it struck against the discretionary power of the administrative state deserve at least as much attention.[75]

In the case of *Corner Post v. Federal Reserve*, the Court greatly expanded the period of time that individuals have in which to challenge agency regulations.[76] Under current law, there is a general, default time limit—known as a statute of limitations—giving a plaintiff a maximum of six years in which to bring a civil suit against the United States government for alleged harm, including many types of challenges to the legality of a federal agency's regulations.[77] But for a long time, courts had taken that to mean six years after the regulation was promulgated, across the board and regardless of a plaintiff's circumstances—so if, for example, an agency made a regulation in the year 2000, that regulation could be challenged by any potential plaintiff only up until 2006 and not beyond, no matter that a particular plaintiff might not actually be harmed by the regulation until sometime after 2006. What the Court ruled in *Corner Post*, however, was that the clock does not actually start ticking until the particular plaintiff bringing the case was actually harmed by the regulation. In other words, if the agency hands down an illegal regulation in 2000, but an individual or company does not come under its adverse effects until, say, 2020, that particular individual or company actually has until 2026 to challenge it. This may seem like a minor procedural point, but what it means is that it will be much more difficult for agencies to hide behind the fact that certain of their regulations are longstanding and have thereby become effectively immune from challenge.

Then, in the case of the *Securities and Exchange Commission v. Jarkesy*, the Court looked at how agencies im-

pose civil penalties[78]—in particular, at the fact that in most civil cases, agencies do not have to go to a traditional court to hand down civil penalties, but instead can simply impose fines through their own in-house system, where one's only option for appeal is to some other part of the agency itself. The Supreme Court put an end to that, at least for the SEC, in *Jarkesy*, where it said that the SEC's attempt to impose certain kinds of civil penalties triggered a defendant's right to a jury trial in an independent court.[79] While this is a fairly straightforward application of the Seventh Amendment, which guarantees the right to a jury trial in civil cases brought by any plaintiff under the common law where more than twenty dollars are at stake, agencies nonetheless had previously been allowed to act, essentially, as plaintiff, adjudicator, and initial court of appeals all within their own walls. Justice Sotomayor, in dissent, even made the remarkable argument that it should be up to Congress to decide if a citizen's Seventh Amendment right to a jury trial in civil cases should be respected at all.[80] Evidently failing to grasp that the entire point of the Bill of Rights is to protect certain liberties from discretionary legislative control, Sotomayor reasoned not only that Congress might have "good reasons" for dispensing with jury trials in civil cases, such as "greater efficiency and expertise," but also, that the "Court's job is not to decide who wins this debate. These are policy considerations for Congress in exercising its legislative judgment[.]"[81] In other words, the government might simply find it more efficient to punish citizens with civil penalties, without having to burden itself with a jury trial—never mind the Seventh Amendment. The majority of the Court correctly reasoned, quite to the contrary, that the punitive nature of the civil penalty (as opposed to its being merely restorative) necessarily triggered the Seventh Amendment right to jury.[82]

And most significant, in 2024, the Court ended its forty-year practice of *Chevron* deference in the case of *Loper Bright v. Raimondo*. Questions over *Chevron*'s meaning and application were complicated and subject to decades of refinement after its initial declaration in 1984; most administrative-law casebooks had to shed hundreds of pages once *Loper Bright* was handed down. Boiled down to essentials, *Chevron* had allowed agencies to claim broad authority to make policy, based on their own interpretations of vague statutes, and had required reviewing courts presumptively to defer to these agencies' judgments on matters of law. The Court concluded in *Loper Bright* that this deference doctrine violated the Administrative Procedure Act, as Section 706 of the APA says that "the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions."[83] Yet the decision did not go as far as it might have, because in concluding that *Chevron* deference violated a statute and in not reaching the question of the doctrine's constitutionality, the Court necessarily implied that Congress might be able to restore deference by changing the statute. This point is made by Justice Thomas in his concurring opinion, which contends that deference violates not just the statute but also the Constitution's definition of judicial power.[84]

In any event, *Loper Bright* did put an end for now to a doctrine that for decades had been at the heart of the administrative state's growth, and if we combine these 2024 decisions in *Jarkesy* and *Loper Bright* reining in the discretion of the bureaucracy with a doctrine that the Court has been expanding for several years—the so-called "major questions doctrine"—we can see how there is now a very different, and more restrictive, legal environment within which agencies must operate.[85] Under the major questions doctrine, the Court has basically said that on any policy question of major significance, an agency cannot regulate

unless it can show that Congress has given it explicit authorization in a statute to do so. One can be forgiven for thinking that this should be a rather obvious principle, since agencies are only supposed to have the powers that Congress gives them through law; but it is, in fact, a significant change from the manner in which agencies have been allowed to operate for many decades.

While these are promising developments, and create the best legal environment in decades for reining in the discretionary power of the bureaucracy, some serious challenges remain. It is certainly a positive development that agencies must now undergo greater legal scrutiny; yet if the end result is to shift governing power out of unelected agencies, and into the unelected courts, one can reasonably ask how useful this shift is for restoring government by the consent of the governed. Courts have many means at their disposal for second-guessing administrative decision making, means that can be applied with equal force when administrative decision making is in line with the policies of the elected president, and when it is against his policies.

One of the most effective tools that courts can employ for this purpose is a provision in Section 706 of the APA that allows reviewing courts to invalidate agency action deemed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"[86] This provision of the APA applies to agency policymaking, as opposed to the agency legal interpretations that were the objects of *Chevron* deference. Read plainly, the meaning of the APA is straightforward: when the law directs agencies to make policy, they must show that they have reasons when they do so—that the policy is the result of some discernible reasoning process. While reviewing courts do not get to substitute their own reasoning for that of the agency, they do get to ensure that the agency does more in justifying its actions than what a parent might say to an inquisitive

child: "because I said so." Courts have come to call this area of the law "hard look review,"[87] indicating that they must see in the reasons presented by agencies evidence that the agency took a "hard look" at the policy question.

This area of review was a principal vehicle for courts to stymie the policies of the first Trump administration. By one count, federal courts invalidated actions of the Trump administration over two hundred times during his first term.[88] A substantial portion of these rulings invoked arbitrary and capricious or "hard look" review in concluding that the administration had not provided sufficient reasoning to justify its actions, and applied the standards to major policy areas such as the environment, immigration, and the census. This kind of review presents something of a dilemma for proponents of President Trump's effort to rein in the bureaucracy and make agencies more accountable to the president's policy priorities. On one hand, "hard look" review is sometimes embraced by those who are wary of the administrative state's power, as it can be a check on administrative discretion in cases where fundamental rights are affected. On the other hand, there is reason to question the desirability of this trend from the perspective of republican principles. Presidents making regulatory policy changes often do so because they have campaigned on the policies and feel as if they have a mandate from voters to move administrative agencies in a particular direction. Such was certainly the case with Trump's first-term action on the environment and immigration, as it was with Obama-era policies on the environment. Yet the courts have maintained that such democratic reasons will not, standing alone, be acceptable in the hard-look review process.[89]

The major controlling case here is *Motor Vehicle Manufacturers' Association v. State Farm* (1983), in which the Supreme Court disallowed Reagan administration chang-

es in regulations on automobile passive restraint systems. Reagan had campaigned in 1980 promising to reduce regulatory burdens on domestic automobile manufacturers, a stance that contributed to his election victory in auto-industry states like Michigan. When he came into office, his administration justified rescinding certain automobile regulations by arguing that these regulatory rollbacks came out of a change in political leadership in a democratic country— that the voters had a valid prerogative, through their election of a new chief executive, to affect regulatory policy. But the Court was explicit in rejecting that reasoning as insufficient.[90] Instead, the Court insisted on seeing technical reasons for the policy change, which is a point worth emphasizing: the aim of the Court was not to stand up for individual rights in an instance of democratic excess. The guiding principle was neither republicanism nor liberalism, in other words, but the supremacy of agency *expertise*, and that principle of expertise has become the standard in these kinds of cases. This principle and the *State Farm* precedent are still alive and well in the federal judiciary, and they are potential roadblocks to President Trump's justifying his regulatory-policy changes on the sole ground that he was elected by voters to make such changes. Under existing precedent, such an argument, standing alone, is not sufficient to win in court, and so the Trump administration will also have to be careful to cite technical reasons for its policy shifts, supported by expert opinion, and to attend scrupulously to all requisite procedures in the administrative process.

The other roadblock to reining in the bureaucracy has received much more attention: the opposition of "rogue district court judges."[91] More precisely, opponents of the president's administrative and spending reforms have found great initial success in taking the president to court, because the first forum for most of these lawsuits is at the

district or trial court level—the first of the three rungs on the federal judicial ladder. These are the most numerous of the federal courts, and forum-shopping for a sympathetic judge is thus fairly simple. This is particularly true in states and judicial districts where conservatively oriented judges are few and far between. As a practical matter, while Republicans have focused most of their energy on appointments to the circuit courts of appeal—the second rung on the judicial ladder—Democrats have been much more active in targeting district-court appointments. And the practice of "senatorial courtesy" has enabled this effort: even during Republican presidential administrations and during periods of Republican control of the Senate, the Senate's rules require the sign-off of home-state senators on the president's district-court appointments. While the Senate has ended this so-called "blue slip" process for circuit court appointments, it has been maintained for district courts, and the practical consequence is that there are today plenty of districts where the president's opponents can be assured of a sympathetic judge. Republicans themselves can hardly complain about this, as they have showed Democrats the way. During the Obama and Biden administrations, instead of taking on the president directly through the exercise of the legislative power, the standard Republican tactic was to sue the president in federal court. And Republicans were also pretty adept at forum shopping—taking their litigation to more conservatively oriented judicial districts and thereby achieving some success at stymying recent Democrat presidents.[92]

Fighting the president through litigation in federal district court also has another advantage for the president's opponents: it takes time. The usual tactic here has been to petition for a very rapid initial consideration of a lawsuit, and to get an ideologically sympathetic district court hastily to issue a preliminary injunction.[93] Such preliminary

injunctions are not the final action of the court, nor do they result from a serious consideration of the merits; instead, they stop the president from carrying out his policy while the court takes the time for a fuller consideration of the lawsuit. But the president's opponents are not primarily interested in that fuller consideration; in fact, once the preliminary injunction is obtained, they hope the litigation proceeds as slowly as possible. The whole point is to run out the clock, and ideally to avoid review by an appellate court which might be less sympathetic. As the Claremont Institute's John Eastman has pointed out, this entire way of proceeding relies on an abuse of preliminary injunctions, which are being granted in defiance of the proper legal standard. The party seeking a preliminary injunction is supposed to face a very high burden: not only must they show a likelihood of success when the merits of the case are eventually decided; they also must show that they will suffer "irreparable harm" if the president's action is allowed to continue while the case is fully litigated. And the bar for demonstrating "irreparable harm" is itself supposed to be quite high. As Eastman explains, those claiming "irreparable harm" must show that they will suffer "an injury that cannot be remedied after the fact. It almost never includes things for which money damages (plus interest) can make the person whole. Take the typical wrongful discharge employment case. Preliminary relief is almost never permitted, because if the claimant succeeds, back pay with interest would fully compensate him. The asserted injuries are therefore not *irreparable*."[94] In fact, the very case that is cited as precedent for those litigating against the president's removal of agency personnel—*Humphrey's Executor*—is a case that was brought by a deceased official's estate, seeking back pay.

The ultimate fate of many of President Trump's executive actions—removals and otherwise—will depend on the

willingness of appellate courts and especially the Supreme Court to police ongoing abuses in the district courts, and to do so in a timely fashion. At the time of this writing, the Trump administration has been almost entirely victorious with cases that reach the Supreme Court, due in no small part to the prudence of the Solicitor General in focusing his emergency appeals on those cases most likely to find traction with a majority of the justices.[95] And the Court did seek to stem the widespread use of the so-called "universal" or "nationwide" injunction, whereby district courts had been enjoining presidential action not just as it related to the particular parties of a case, but to all similar parties across the country. In *Trump v. CASA*, the Court ruled that universal injunctions, for the most part, "exceed the district courts' power under the act of Congress that created them (and, quite arguably, also exceed the Constitution's Article III text that limits the judicial power to 'cases or controversies,' though the Court did not reach that alternative argument)."[96] While an important step in curbing district-court abuses, the Court's ruling in *CASA* did leave some avenues open for further abuse: district courts were left free to use class actions as a means of extending their injunctions beyond the particular parties to a case, and states were also left free to claim third-party status and sue the president on behalf of their residents. Justice Alito warned of this potential abuse in a concurrence to *CASA*, and his prediction was fulfilled within 48 hours of the decision's announcement, as district courts immediately turned to the class certification process to bypass it.[97] It remains to be seen if the Court will foreclose these additional avenues for abuse, and if—more generally—it will be willing to consider even more appeals of lower-court injunctions on an expedited basis. The ultimate success of many of the president's initiatives will hinge in no small part on this question.

(C) Conclusion: The Other—Forgotten—Popular Branch of Government

This essay began with a reminder about America's foundation, 250 years ago, on the principle of government by consent of the governed as articulated in the Declaration of Independence. And it has proceeded to show how the authority of consent has given way to rule by bureaucracy, and to consider current attempts by the president to recapture some of the control that an elected president is supposed to have over the bureaucracy if our system is to retain its republican character. And surely this presidential control is one vital, constitutional way in which national government can be made accountable to its sovereign—the people. But there is another, equally vital, and complementary way in which consent of the government can and should be restored, after decades of rule by our unelected bureaucrats and judges. That comes, of course, through Congress.

As important as it is in our republic for the president to bring the bureaucracy under his control, and thus under the control of the voters who elected him, the only reason this necessity presents itself is because Congress has, by law, long ago abdicated the bulk of its Article I powers in creating, empowering, and funding the administrative state. When President Obama, unable to get his policy agenda through Congress, instead unleashed the bureaucracy to rule by decree, Republicans in Congress, empowered into the majority by the 2010 election, could have used their Article I powers to push back. Instead, the elected Congress went running to the unelected courts, helping to usher in this latest era where almost all of our major policies emanate from unelected agencies and are then challenged in unelected courts. The only reason President Trump has needed to fight to regain some measure of republican control over the bureaucracy is because Con-

gress has empowered the agencies through legislation and has continued to fund them through appropriations. And while the Trump administration's flurry of executive orders is certainly one important way to restore democratic accountability in our government—after all, the president is elected and the bureaucrats are not—it would be far better if Congress, equally representing the voters, pursued its own legislative program of restoring popular government. The question of why it has not done so, and seems unlikely to do so, is beyond the scope of our topic here.

Until that situation changes, the only immediate prospect the country has for restoring the people's sovereignty over their government lies in the ongoing attempts by their elected president to rein in the permanent, unelected class that has come to power in the preceding decades. It is fitting that the fate of that effort will be determined as America reflects on the 250th anniversary of its independence and on what the principles of the Revolution require for the maintenance of our republican institutions.

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ENDNOTES

1. Alex Miller, "Dem Senator Compares American Founding Principle to Iran's Theocracy: 'Extremely Troubling' ", *Fox News,* September 4, 2025, https://www.foxnews.com/politics/dem-senator-compares-american-founding-principle-irans-theocracy-extremely-troubling.

2. Frank J. Goodnow, "The American Conception of Liberty" (1916) in *American Progressivism: A Reader*, ed. Ronald J. Pestritto and William J. Atto (New York: Lexington Books, 2008), 57.

3. "Progressive Party Platform of 1912," in *American Progressivism*, 273-287.

4. John Locke, "Of the Ends of Political Society and Government" in *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis, IN: Hackett Publishing Company, 1980), 65-68.

5. Woodrow Wilson, "Address to the Jefferson Club of Los Angeles, May 12, 1911," in *Papers of Woodrow Wilson* (hereafter cited as *PWW*) 23, 69 vols., ed. Arthur Link (Princeton: Princeton University Press, 1966-1993): 33-34.

6. Abraham Lincoln, "To Henry L. Pierce & Others," April 6, 1859, in *Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, NJ: Rutgers University Press, 1953), 376.

7. John Dewey, *Liberalism and Social Action* (Amherst, NY: Prometheus Books, 2000), 41.

8. Woodrow Wilson, "Socialism and Democracy" in *Woodrow Wilson: The Essential Political Writings*, ed. Ronald J. Pestritto (Lanham, MD: Lexington Books, 2005), 78.

9. Wilson, "Socialism and Democracy," 78. Emphasis added.

10. Wilson, "Socialism and Democracy," 79. Emphasis original.

11. Woodrow Wilson, "The Study of Administration," July, 1887, in *PWW* 5: 370-71.

12. Woodrow Wilson, "Government By Debate, December, 1882," in *PWW* 2: 224.

13. Woodrow Wilson, "What Can Be Done for Constitutional Liberty: Letters from a Southern Young Man to Southern Young Men, March 21, 1881," in *PWW* 2: 34-36. For an elaboration of this account of Wilson on national administration, see Pestritto, "Wilson, Roosevelt, and the Democratic Theory of National Progressivism," *Social Philosophy and Policy* 29:2 (Summer 2012): 318-34.

14. On the New Nationalism, see Sidney M. Milkis, *Theodore Roosevelt, the Progressive Party, and the Transformation of American Democracy* (Lawrence, Kansas: University Press of Kansas, 2009), 27-74; Jean M. Yarbrough, *Theodore Roosevelt and the American Political Tradition* (Lawrence, Kansas: University Press of Kansas, 2012), 211-227.

15. Theodore Roosevelt, "The New Nationalism," in *American Progressivism*, 217.

16. Roosevelt and Wilson, of course, opposed one another in the presidential contest of 1912, at which time Wilson was sharply critical of Roosevelt's vision for the empowerment of national administrative bodies. But as I endeavor to show in *Woodrow Wilson and the Roots of Modern Liberalism*, those differences on national administration did not pre-date the 1912 campaign, nor did they last long beyond it; they were, instead, a politically convenient way for Wilson to distinguish himself from his principal opponent and draw the support of the traditional Democratic constituencies. See Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, MD: Rowman & Littlefield, 2005), 254-59. Once Wilson won and assumed office, most of his major domestic initiatives involved the very kind of national regulation by commission that Roosevelt had advocated in the New Nationalism (in 1914 alone, Wilson signed two landmark laws greatly increasing national administrative power: the Federal Trade Commission Act and the Clayton Antitrust Act). In fact, Wilson's agenda looked so much like that on which Roosevelt had campaigned that one Roosevelt scholar has remarked that it was "exceedingly embarrassing to the Progressive Par-

ty. Wilson had stolen its thunder and much of its excuse for being." George E. Mowry, *Theodore Roosevelt and the Progressive Movement* (New York: Hill and Wang, 1960), 287.

17. See, especially, James Madison, "Federalist No. 51" in *The Federalist Papers*, ed. Clinton Rossiter (New York, NY: Penguin Putnam, Inc., 1961), 317-319.

18. See Pestritto, "The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis," *Social Philosophy and Policy* 24, no. 1 (Winter 2007): 18-20.

19. One of the clearest expressions of this principle can be found in the work of Harvard Law School's James Landis, who was brought by Franklin Roosevelt into his administration to craft securities legislation and became a principal architect of the administrative state that grew out of the New Deal. See Landis, *The Administrative Process* (New Haven, CT: Yale University Press, 1938).

20. Franklin D. Roosevelt, ""New Conditions Impose New Requirements upon Government and Those Who Conduct Government." Campaign Address on Progressive Government at the Commonwealth Club. San Francisco, Calif. September 23, 1932" in *The Papers and Public Addresses of Franklin D. Roosevelt* 1, ed, Samuel I. Rosenman (New York: Random House, 1938): 749-751.

21. Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107, no. 6 (1994): 1240. He cites two cases as the last instances of the Court applying the non-delegation doctrine: *Schechter Poultry v. United States*, 295 U.S. 495 (1935); and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

22. Lawson, "Rise and Rise," 1248.

23. 5 U.S.C. 551, 553-59, 701-06. For an elaboration on the origins of the APA, see Gary Lawson, *Federal Administrative Law*, 6th edition (Thomson Reuters, 2013), 257-58.

24. For the precise statutory definitions of rulemaking and adjudication, see 5 U.S.C. 551(4-7).

25. 5 U.S.C. 554, 556-57. More specifically, "formal" procedures for both rulemakings and adjudications require a hearing on the record with an administrative law judge, involving many

of the features one would normally associate with a judicial proceeding (testimony under oath, right of cross-examination, burden of proof on those proposing the rule or order, etc.), per Section 556. Both also involve a ban on *ex parte* contacts and require formal findings, per Section 557. In addition to these provisions, formal adjudications also require formal notice to parties and impose a separation of functions on agency personnel involved in the hearing, per Section 554. As distinguished from these "formal" procedures, "informal" rulemaking requires notice of the proposed rule, an opportunity for public comment, and a statement of basis and purpose when the final rule is promulgated. 5 U.S.C. 553. "Informal" adjudication is even less regulated, with the APA providing no meaningful procedural requirements.

26. *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973).

27. *Vermont Yankee v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

28. Lawson, *Federal Administrative Law*, 287-88.

29. The ambiguity arises from Section 172(b)(6) of the Clean Air Act Amendments of 1977.

30. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

31. The Court held, in *Chevron*, that where there is no "unambiguously expressed intent of Congress, . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. 837, at 843-44.

32. See, for example, the differences between Stevens's majority opinion and Scalia's concurrence in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

33. For overviews of key Warren Court decisions, see Phillip B. Kurland, "The Supreme Court, 1963 Term," *Harvard Law Review* 78, no. 1 (November 1964): 143-312, accessed June 25, 2014, http://dx.doi.org/10.2307/1338853. Paul A Freund, "New Vistas in Constitutional Law," *University of Pennsylvania Law Review* 112, no. 5 (March 1964): 631-646, accessed June 25, 2014, http://scholarship.law.upenn.edu/penn_law_review/vol112/iss5/1.

34. *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013).

35. The law in question was the Telecommunications Act of 1996, 47 *U.S.C.* § 332 (1996); the FCC interpretation can be found at 24 FCC Rcd. 13994, 13996 (2009).

36. "Reply Brief for Petitioners City of Arlington Et al.", *Scotus-Blog.com,* accessed September 27, 2025, https://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/Arlington-Reply-Final.pdf.

37. *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013), at 307.

38. *City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013), at 312-316.

39. For example: The rescinding of over 100 DEI contracts across multiple government agencies, totaling $1 billion; the shuttering of the Inter-American Foundation and its entire budget, which featured 48 employees earning an average salary of $131,000 per year, whose responsibilities included dispersing millions of dollars in grants for Latin American countries to support projects like alpaca farming, reducing social discrimination, vegetable gardens, expanding fruit and jam sales, and promoting cultural understanding of migrants; the shuttering of the African Development Foundation; the rescinding of $67 million in EPA grants for groups advocating 'environmental justice' mandates pushed by the Biden administration.

    See also the White House Fact sheet released on February 18, 2025, listing some of the more egregious projects scrapped by DOGE and on which the government had been wasting money: USAID grants $1.5 million to "advance diversity equity and inclusion in Serbia's workplaces and business communities," $4.6 million to help foreign groups promote LGBT projects like drag shows and pride parades, $20 billion to a financial institution allied with the Biden Administration to fund its pet projects, etc. WhiteHouse.Gov, February 18, 2025, https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-requires-transparency-for-the-american-people-about-wasteful-spending/.

40. Elon Musk and Vivek Ramaswamay, "The DOGE Plan to Reform Government", *Wall Street Journal,* November 20, 2024, https://www.wsj.com/opinion/musk-and-ramaswamy-

the-doge-plan-to-reform-government-supreme-court-guidance-end-executive-power-grab-fa51c020.

41. President Trump, Executive Order 14158, "Establishing and Implementing the President's 'Department of Government Efficiency'", *Federal Register* 90 (January 20, 2025): 8441, https://www.federalregister.gov/documents/2025/01/29/2025-02005/establishing-and-implementing-the-presidents-department-of-government-efficiency.

42. "Summary of the Report of the Committee on Administrative Management", January 12, 1937, *American Presidency Project,* https://www.presidency.ucsb.edu/documents/summary-the-report-the-committee-administrative-management; Reorganization Act of 1939, 53 U.S.C. § 561 (1939); President Roosevelt, Executive Order 8248, "Establishing the Divisions of the Executive Office of the President and Defining Their Functions and Duties", *Federal Register* 4 (September 8, 1939): 3864, https://www.federalregister.gov/executive-order/8248.

43. Theodore Wold, "A Century of Impotency: Conservative Failure and the Administrative State" in *Up from Conservatism: Revitalizing the Right After a Generation of Decay* ed. Arthur Milikh (New York: Encounter Books, 2023), 176—177.

44. See, for example: President Trump, "Memorandum on Directing the Repeal of Unlawful Regulations" (April 9, 2025), DCPD-202500466, https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/.

45. EPA 40 CFR, Chapter I: Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Federal Register 74, No. 239, 66496—66546 (December 15, 2009).

46. "Lee Zeldin's EPA Liberates American Industry", *National Review,* July 30, 2025, https://www.nationalreview.com/2025/07/lee-zeldins-epa-liberates-american-industry/.

47. The Public Lands Rule was promulgated by the Bureau of Land Management in 2024; it gives priority to recreation and conservation on public lands, and targets for restriction activities such as mining and grazing. See *Federal Register*, Vol. 89, No. 91 (May 9, 2024), 40308-40349. The Roadless Rule

was promulgated by the U.S. Forest Service in 2001, and it restricts logging and the building of roads in millions of acres of national forest. See *Federal Register*, Vol. 66, No. 9 (January 12, 2001), 3244-3273.

48. President Trump, Executive Order 14215, "Ensuring Accountability for All Agencies", *Federal Register* 90 (February 18, 2025): 10447, https://www.federalregister.gov/documents/2025/02/24/2025-03063/ensuring-accountability-for-all-agencies.

49. President Clinton, Executive Order 12866, "Regulatory Planning and Review", *Federal Register* 58, No. 190 (September 30, 1993): 51735, https://www.federalregister.gov/executive-order/12866.

50. For example: Hayley Durudogan and Michael Sozan, "What is *Humphrey's Executor* and Why Should You Care About It?", *Center for American Progress,* February 27, 2025, https://www.americanprogress.org/article/what-is-humphreys-executor-and-why-should-you-care-about-it/; Danielle Kurtzleben, "Trump Claims Expanded Power Over Independent Agencies", *NPR,* February 19, 2025, https://www.npr.org/2025/02/19/nx-s1-5302481/trump-independent-agencies; David Graham, "Independent Agencies Never Stood a Chance Under Trump", *The Atlantic,* March 27, 2025, https://www.theatlantic.com/newsletters/archive/2025/03/trumps-war-on-independent-agencies-ftc/682218/.

51. Charles Thach, Jr., *The Creation of the Presidency, 1775—1789: A Study in Constitutional History* (1923; repub. Indianapolis: Liberty Fund, 2007), 124-149.

52. *Myers v. United States*, 272 U.S. 52 (1926).

53. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

54. I leave aside here an additional distinction in the Appointments Clause between "inferior" and so-called principal officers, though the distinction does come into play in some legal disputes involving agencies. Principal officers must be appointed by the President, "by and with the Advice and Consent of the Senate." Congress, on the other hand, sets out in law the mode of appointing "inferior" officers, vesting the power of appointment "in the President alone, in the Courts

of Law, or in the Heads of Departments." U.S. Const. art. II, sec. 2, cl. 2.

55. *Buckley v. Valeo*, 424 U.S. 1 (1976).

56. The 1974 amendments to the Federal Election Campaign Act of 1971 directed that the six voting members of the Commission be appointed in the following manner: two appointments each by the President, the Speaker of the House of Representatives, and the President Pro Tempore of the Senate.

57. *Buckley v. Valeo*, 424 U.S. at 125–126, 143–144.

58. *Lucia v. SEC*, 585 U.S. 237 (2018).

59. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

60. *Morrison v. Olson*, 487 U.S. 654 (1988).

61. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

62. *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020).

63. *Trump v. Wilcox*, 145 S.Ct. 1415 (2025).

64. *Wilcox v. Trump*, 775 F. Supp. 3d 215 (D.D.C. 2025) (granting injunction against presidential removal), affirmed sub nom. *Harris v. Bessent*, No. 25-5057, 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025) (*en banc*) (denying government's request for stay against district court's injunction pending appeal).

65. *Trump v. Wilcox*, 145 S.Ct. 1415, 1415 (2025).

66. 145 S.Ct. at 1415.

67. *Trump v. Boyle*, 145 S.Ct. 2653 (2025).

68. *Trump v. Slaughter*, No. 25A264 (25-332), 2025 WL 2692050 (Sept. 22, 2025). The order states: "The parties are directed to brief and argue the following questions: (1) Whether the statutory removal protections for members of the Federal Trade Commission violate the separation of powers and, if so, whether *Humphrey's Executor v. United States*, 295 U. S. 602 (1935), should be overruled. (2) Whether a federal court may prevent a person's removal from public office, ei-

ther through relief at equity or at law." *Trump v. Slaughter*, 2025 WL 2692050, at *1.

69. *Trump v. Wilcox*, 145 S.Ct. at 1415: "Finally, respondents Gwynne Wilcox and Cathy Harris contend that arguments in this case necessarily implicate the constitutionality of for-cause removal protections for members of the Federal Reserve's Board of Governors or other members of the Federal Open Market Committee.... We disagree. The Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States. See *Seila Law*, 591 U.S. at 222, n. 8."

70. For a recent attempt at distinguishing the Federal Reserve from other agencies, see Aditya Bamzai and Aaron Nielsen, "Article II and the Federal Reserve," *Cornell Law Review* 109 (August, 2024): 843-910, though I offer no assessment of its persuasiveness.

71. *Cook v. Trump*, 1:25-cv-02903, (D.D.C.).

72. Federal Reserve Act of 1913, 63 P.L. 43, 63 Cong. Ch. 6, § 10, par. 2, Dec. 23, 1913, 38 Stat. 251, 260, codified today at 12 U.S.C. §§ 226, 242 (2025).

73. Donald J. Trump, "Letter to Federal Reserve Governor Cook Notifying Her of Her Dismissal from Office," August 25, 2025, https://www.presidency.ucsb.edu/documents/letter-federal-reserve-governor-lisa-cook-notifying-her-her-dismissal-from-office.

74. Ella Lee, "DOJ Investigating Fed Governor Lisa Cook", *The Hill*, September 4, 2025, https://thehill.com/regulation/court-battles/5486730-justice-department-probe-lisa-cook/; see also Bill Pulte's posting on X about the criminal referral on August 15, 2025: https://x.com/bennyjohnson/status/1958155539935866951. He posted about the second referral on August 28, 2025: https://x.com/pulte/status/1961044161097830852.

75. *Trump v. United States*, 603 U.S. 593 (2024).

76. *Corner Post, Inc. v. Bd. of Governors of Fed. Reserve*, 603 U.S. 799 (2024).

77. See 24 U.S.C. § 2401(a).

78. Generally, these are monetary penalties that go beyond restoring what was taken by a defendant's fraud or other action.

79. *SEC v. Jarkesy,* 603 U.S. 109 (2024).

80. A defendant's right to jury trial in *criminal* cases is governed by a different analysis under the Sixth Amendment, as opposed to the Seventh.

81. *Jarkesy*, 603 U.S. at 202 (Sotomayor, J., dissenting).

82. *Jarkesy,* 603 U.S. at 125 (Roberts, C.J.) ("In sum, the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore a type of remedy at common law that could only be enforced in courts of law. That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims.") (citations and internal quotation marks omitted).

83. See Section 706 of the APA, codified at 5 U.S.C. § 706, quoted in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 391 (2024); *see also Loper Bright*, 603 U.S. at 406–407 (Roberts, C.J., for the majority) ("The experience of the last 40 years has thus done little to rehabilitate *Chevron*. It has only made clear that *Chevron's* fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in 'the reviewing *court*,' to 'decide all relevant questions of law' and 'interpret . . . statutory provisions.' §706 (emphasis added).").

84. *Loper Bright*, 603 U.S. at 413–416 (Thomas, J., concurring).

85. Key cases on the "major questions" doctrine include: *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *UARG*, 573 U.S. 302; *King v. Burwell*, 576 U.S. 473 (2015); *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758 (2021) (per curiam); *Nat'l Fed'n of*

Indep. Bus. v. OSHA, 595 U.S. 109 (2022) (per curiam); and *West Virginia v. EPA*, 597 U.S. 697 (2022).

86. 5 U.S.C. § 706(2)(A).

87. *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 471–472 (D.C. Cir. 1974); *Motor Vehicle Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 40–43 (1983).

88. Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMLR 353, 385 (2021).

89. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

90. *State Farm*, 463 U.S. at 46–59.

91. See, for example, Sam Dorman, "Trump Agenda Slowed by a Flood of Lawsuits", *The Epoch Times,* February 19, 2025, https://www.theepochtimes.com/article/trump-actions-spur-growing-number-of-lawsuits-5812915; Nicolas Riccardi, "'Radical Rogue Judges' Targeted by Trump Administration as Legal Setbacks Pile Up: 'Judges Have No Authority to Administer the Executive Branch'", *Fortune,* March 17, 2025, https://fortune.com/2025/03/17/radical-rogue-judges-targeted-trump-administration-legal-setbacks/.

92. A representative case was *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), which was originally decided by Matthew Kacsmaryk, a conservative district judge, in the Northern District of Texas. At the district court level, the case was *Alliance for Hippocratic Medicine v. FDA*, 668 F. Supp. 3d 507 (N.D. Tex. 2023).

93. To be more precise, in most instances a district court will begin with a Temporary Restraining Order (TRO), which it may issue immediately and without briefing from all parties. TROs are designed to hold everything in place in the short space of time it will take for all parties to get before the judge and be heard. TROs have a limited shelf life, and thus must be replaced in fairly short order by a preliminary injunction if the court wishes to maintain the force of its ruling against the executive's action while the merits of the case are litigated. See *USCS Federal Rules of Civil Procedure*, Rules 65(a) and 65(b).

94. John C. Eastman, "Supreme Confusion", *The American Mind,* May 21, 2025, https://americanmind.org/salvo/supreme-confusion/. Emphasis in original.

95. Lawrence Hurley and Katherine Doyle, "White House Bullish After a Long String of Supreme Court Victories", *NBC,* September 22, 2025, https://www.nbcnews.com/politics/supreme-court/white-house-long-string-supreme-court-victories-rcna230870; "President Trump Stacks Up 21 Victories in the Supreme Court So Far", *WhiteHouse.gov,* September 8, 2025, https://www.whitehouse.gov/articles/2025/09/president-trump-stacks-up-21-victories-in-the-supreme-court-so-far/.

96. John C. Eastman, "CASA Is a Step in the Right Direction," *The American Mind,* July 8, 2025, https://americanmind.org/salvo/casa-is-a-step-in-the-right-direction/. See *Trump v. CASA, Inc.*, 606 U.S. 831 (2025).

97. *CASA*, 606 U.S. at 866–868 (2025) (Alito, J., concurring). The district courts proceeded to do just this in *Washington v. Trump*, 764 F. Supp. 3d 1050 (W.D. Wash. 2025) and *"Barbara," et al. v. Trump*, No. 25-cv-244-JL-AJ, 2025 WL 1904338 (D. N.H. July 10, 2025).

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PROVOCATIONS #9

Ronald J. Pestritto

GOVERNMENT BY THE UNELECTED

How It Happened, and How It Might Be Tamed

Establishment media and politicians have raised alarm over President Trump's efforts to cut the federal bureaucracy and make its top officials more loyal to him and his voters. How did we reach a point where national administrators—who wield immense power—see themselves as independent of the elected president? Why does it alarm elites when he expects the bureaucracy to carry out his program? The roots of this attitude go back to the original Progressive project to reshape American government. We are now witnessing the first serious effort since the 1930s to restore democratic accountability. In this *Provocation*, Ronald J. Pestritto explains how we got here—and what may come next.

Dr. Ronald J. Pestritto is a Senior Fellow at the Claremont Institute and graduate dean and professor of politics at Hillsdale College, where he holds the Charles and Lucia Shipley Chair in the American Constitution.

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