It didn't get much attention, but Justice Thomas's dissent two weeks ago in the Amtrak case was extraordinarily radical, even for him. The case involved a relatively obscure issue about the legal status of Amtrak. Justice Thomas used the occasion for a frontal attack on administrative law, including most of environmental law..

The heart of Thomas's argument is that only Congress can create general rules governing private conduct, so all executive rule making about private conduct is unconstitutional. For example, he says, the executive branch can never consider tradeoffs between conflicting policy goals. According to Thomas, at least a century of precedent must be overruled because "our mistake lies in assuming that any degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct." For example, most of the Clean Air Act involves rule making and would be wiped out by Thomas's approach.

Comparing agency rule making to legislation is commonplace. The same comparison has recently been made by the other conservative Justices as well. This comparison is the core of both Thomas's normative argument and his historical argument. But really, this is no more than an analogy. Agencies do create rules applying to private conduct, and so does Congress. But agencies are subject to a whole set of checks and balances that do not apply to Congress:

1. **Need for a factual record.** Agencies must document the factual basis for their rules. Congress need not.
2. **Reasoned explanation.** Agencies must give a reasoned explanation based on the factual record for their rules. Congress need not do so.
3. **Consistency with statutes.** A new agency rule must be consistent with existing statutes. Not so a new congressional enactment.
4. **Judicial review.** Courts review agency rules and frequently overturn them because of weak evidence, gaps in reasoning, or inconsistency with statutes. New congressional enactments can be reviewed only on constitutional grounds, which are much narrower.

You can see just how big the difference is by looking at climate policy. EPA is doing the best it can under its existing legal authority, but may or may not be upheld by the courts. And even what EPA has proposed is a long way from the national cap-and-trade system that Congress was considering in Obama's first term.

Thomas's argument also overlooks the advantages of deciding both policy and technical issues in rule making compared with case-by-case proceedings like

permits. Thomas seems to think the only advantage is efficiency, but there are also other important values involved. Rule makings are more transparent, providing greater political accountability; they allow all interested parties to participate, as opposed to more limited participation in permit and enforcement decisions; and they create better notice of legal requirements and more consistency. Thus, rule making may be more consistent with the values of a free, democratic society.

Rule making by agencies seems never to have troubled Thomas in his first two decades on the Court, not to mention during his service as an agency administrator. Not to be cynical, but Thomas's frenzied attack on executive power happens to come just at the time that congressional conservatives are beside themselves over Obama's executive orders. Strangely, none of them were worried by aggressive executive policymaking by Ronald Reagan or George W. Bush.