

## At the Front of the Train: Justice Thomas Reexamines the Administrative State

*Elbert Lin*

In his quarter-century as an Associate Justice, Clarence Thomas has been the most originalist, and arguably the most original, thinker on the Supreme Court. He has questioned the Court's Commerce Clause jurisprudence,<sup>1</sup> commercial speech doctrine,<sup>2</sup> and "purposes and objectives" strain of implied preemption.<sup>3</sup> He has staked out his own originalist views on the incorporation of the Establishment Clause against the States,<sup>4</sup> the Fourteenth Amendment's Privileges or Immunities Clause,<sup>5</sup> and whether a method of execution violates the Eighth Amendment.<sup>6</sup> He has declared that the notion of a "dormant" Commerce Clause "makes little sense"<sup>7</sup> and that the First Amendment does not encompass a student's right to speak in public schools.<sup>8</sup>

- 
1. *Lopez v. United States*, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring).
  2. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518-28 (1996) (Thomas, J., concurring in judgment).
  3. *Wyeth v. Levine*, 555 U.S. 555, 582-604 (2009) (Thomas, J., concurring in judgment).
  4. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45-54 (2004) (Thomas, J., concurring in judgment).
  5. *McDonald v. City of Chicago*, 561 U.S. 742, 805-58 (2010) (Thomas, J., concurring in part and in judgment).
  6. *Baze v. Rees*, 553 U.S. 35, 94-107 (2008) (Thomas, J., concurring in judgment).
  7. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).
  8. *Morse v. Frederick*, 551 U.S. 393, 410-22 (2007) (Thomas, J., concurring).

In the October 2014 Term, Justice Thomas set his sights on the administrative state, and the results were no less remarkable. In five separate writings,<sup>9</sup> Justice Thomas laid out an originalist understanding of the judicial and legislative powers that called for a reexamination of several strands of the Supreme Court’s administrative law jurisprudence. And he chastised the Court for “straying further and further from the Constitution without so much as pausing to ask why.”<sup>10</sup>

In this Essay, I explore why Justice Thomas may have chosen the October 2014 Term to focus closely on the administrative state and what impact his opinions might have going forward. In Part I, I briefly summarize the five opinions. I then suggest in Part II that growing criticism of the administrative state by several of his colleagues may have led Justice Thomas to believe the time was right for the kind of deep originalist dive he has given previously to other areas of the law. And though Justice Thomas himself had authored one of the Court’s most significant cases affording deference to administrative agencies—*National Cable & Telecommunications Ass’n v. Brand X Internet Services*<sup>11</sup>—I argue it should come as little surprise that he would be the first to question that case if he felt the Constitution demanded it. Ultimately, I think it very likely that Justice Thomas’s opinions will have a significant effect on the law, even though none of the five is controlling on the Court. In Part III, I offer four areas where that effect may be seen.

## I. AN ORIGINALIST TAKE ON THE ADMINISTRATIVE STATE

In a period spanning less than three months in the spring of 2015, Justice Thomas issued five concurring or dissenting opinions that set forth a comprehensive, originalist take on the administrative state. Unearthing what he determined to be the original understanding of the judicial and legislative powers, Justice Thomas called for a new look at four strands of the Court’s administrative law jurisprudence: (1) deference to agency interpretations of ambiguous regulations (so-called “*Seminole Rock* Deference”);<sup>12</sup> (2) agency authority to promulgate generally applicable rules governing private conduct;<sup>13</sup> (3) deference to agency interpretations of ambiguous federal statutes (“*Chevron*

---

9. See *infra* Part I.

10. *Michigan v. EPA*, 135 S. Ct. 2699, 2714 (2015) (Thomas, J., concurring).

11. 545 U.S. 967 (2005).

12. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

13. E.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

deference”);<sup>14</sup> and (4) agency authority to adjudicate private, as opposed to public or quasi-private, rights.<sup>15</sup> I address each in turn below.

### A. *Seminole Rock* Deference

In *Perez v. Mortgage Bankers Ass’n*,<sup>16</sup> Justice Thomas urged the Court to reconsider the line of precedent, beginning with *Bowles v. Seminole Rock & Sand Co.*,<sup>17</sup> which requires judges to defer to agency interpretations of regulations. As Justice Thomas explained, *Seminole Rock* “announced . . . without citation or explanation” that when faced with an ambiguous regulation, a court must give an agency’s interpretation “controlling weight.”<sup>18</sup> Echoing recent similar statements by several other members of the Court,<sup>19</sup> Justice Thomas concluded that *Seminole Rock* and its long line of progeny “raise[] serious constitutional questions.”<sup>20</sup> Writing only for himself in an opinion concurring in the judgment, Justice Thomas set forth two constitutional criticisms of *Seminole Rock* deference (sometimes called *Auer* deference<sup>21</sup>), both arising out of his understanding of the proper role of the judiciary.

His first criticism is that *Seminole Rock* deference “represents a transfer of judicial power to the Executive Branch.”<sup>22</sup> Reviewing a range of Founding Era documents, including the *Federalist Papers* and the *Anti-Federalist Papers*, Justice Thomas concluded that “the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.”<sup>23</sup> And because substantive regulations have the force and effect of law, they, too, must be subject to the independent interpretation of the courts.

---

14. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

15. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality op.).

16. 135 S. Ct. 1199 (2015).

17. 325 U.S. 410 (1945).

18. *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in judgment) (quoting *Seminole Rock*, 325 U.S. at 414).

19. See, e.g., *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part); see also Elbert Lin & Brendan J. Morrissey, *No Notice, No Deference: Agency Deference After Christopher v. SmithKline Beecham Corp.*, BLOOMBERG LAW (Aug. 14, 2012), <http://www.bna.com/no-notice-no-deference-agency-deference-after-christopher-v-smithkline-beecham-corp-by-elbert-lin-and-brendan-j-morrissey-wiley-rein-llp> [<http://perma.cc/2YWX-XJHM>] (describing the history of *Seminole Rock* deference and some recent skepticism by members of the Court).

20. *Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring in the judgment).

21. *Auer v. Robbins*, 519 U.S. 452 (1997).

22. *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in judgment).

23. *Id.*

But *Seminole Rock* deference subordinates a court's views to that of an agency. It thus "amounts to a transfer of the judge's exercise of interpretive judgment to . . . part of the Executive Branch."<sup>24</sup>

Justice Thomas's second criticism of *Seminole Rock* is that it "undermines the judicial 'check' on the political branches."<sup>25</sup> According to Justice Thomas, the Framers saw importance not only in the separation of powers, but also in "checks and balances to reinforce the separation of powers."<sup>26</sup> And though the other branches possess "several" checks on each other, the judiciary's "primary check on the excesses of the political branches" is to do its job—that is, to "exercise [the] judicial power" of "independent judgment."<sup>27</sup> By transferring that judgment to the executive branch, however, *Seminole Rock* deference forces courts to "abandon the judicial check."<sup>28</sup>

### B. Agency Rules Governing Private Conduct

On the same day as *Perez*, Justice Thomas concurred separately in the judgment in *Department of Transportation v. Ass'n of American Railroads*,<sup>29</sup> questioning the constitutionality of allowing agencies "to formulate generally applicable rules of private conduct" in the first place.<sup>30</sup> Under the original understanding of the Constitution, Justice Thomas concluded, rulemaking requires the exercise of legislative rather than executive power. Tracing the history of the theory of separation of powers on which the Constitution was founded, Justice Thomas determined that "the core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the . . . sense of generally applicable rules of private conduct."<sup>31</sup>

Justice Thomas concluded that it violates the separation of powers, as originally understood, to allow agencies the authority to formulate generally applicable rules of private conduct. Reviewing several of the Court's early precedents, Justice Thomas explained the critical difference between constitutionally permissible "conditional legislation" and Congress's modern-day practice of delegating to agencies. In conditional legislation, Congress creates a rule of pri-

---

24. *Id.* at 1219-20.

25. *Id.* at 1220.

26. *Id.* at 1216.

27. *Id.* at 1220-21.

28. *Id.* at 1221.

29. 135 S. Ct. 1225 (2015).

30. *Id.* at 1242 (Thomas, J., concurring in judgment).

31. *Id.* at 1245.

vate conduct, and the executive “makes the *factual* determination that causes that rule to go into effect.”<sup>32</sup> Much like the factual determination required to trigger an enforcement action, this action by the executive does not involve the exercise of *policy* discretion. In contrast, modern-day delegation to agencies permits policymaking by the executive with the force and effect of law, which is the core of the legislative power.

Justice Thomas criticized the Court’s reliance on the “intelligible principle” test as a way to make modern-day delegation to agencies consistent with the separation of powers. That test was first announced at a time when most delegations by Congress to the executive took the form of conditional legislation.<sup>33</sup> But today, the intelligible principle test “has been decoupled from the historical understanding of the legislative and executive powers.”<sup>34</sup> It is now assumed to allow Congress to delegate policy judgment to the executive, and is understood to “require[] nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law.”<sup>35</sup> That is a fundamental mistake, Justice Thomas explained.

Justice Thomas would abandon the “intelligible principle” test as a means of policing agency authority to formulate generally applicable rules of private conduct and instead simply forbid Congress from delegating such authority. He recognized that such a “return to the original meaning of the Constitution” would “inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable.”<sup>36</sup> But he saw that as a feature, not a bug. Justice Thomas explained that he agreed with John Locke, who believed “that the creation of rules of private conduct should be an irregular and infrequent occurrence.”<sup>37</sup>

### C. *Chevron Deference*

Roughly two weeks after *Perez* and *Association of American Railroads*, Justice Thomas applied the understandings of judicial and legislative power he explored in those cases to question the constitutionality of the deference afforded to agencies under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,

---

32. *Id.* at 1247.

33. *Id.* at 1246-47.

34. *Id.* at 1250.

35. *Id.* at 1251; see also *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (“In the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes . . .”).

36. *Ass’n of Am. R.R.s*, 135 S. Ct. at 1252 (Thomas, J., concurring in judgment).

37. *Id.*

*Inc.*<sup>38</sup> *Chevron* deference is premised on the presumption that when federal statutes include ambiguities, Congress intended to leave the meaning of those statutes “to agency discretion.” But as Justice Thomas explained in his concurring opinion in *Michigan v. EPA*,<sup>39</sup> that theory of deference violates either the judicial power or the legislative power.

On its most common justification, *Chevron* deference cannot be squared with the judicial power. The doctrine is “most often” justified as following from “Congress’ supposed choice to leave matters to agency discretion as an allocation of interpretive authority.”<sup>40</sup> But as Justice Thomas explained in *Perez*, the interpretation of law is a part of the judicial power. So if *Chevron* deference is about transferring ultimate interpretive authority to administrative agencies, the doctrine unconstitutionally transfers part of the judicial power to the executive.

Alternatively, *Chevron* deference could be justified as a delegation of the authority “to fill in gaps based on policy judgments made by the agency rather than Congress.”<sup>41</sup> This formulation appears to avoid any conflict with the judicial power under Article III, but it “runs headlong into” the legislative power under Article I.<sup>42</sup> As Justice Thomas explained in *Association of American Railroads*, the power to make generally applicable rules that bind private conduct falls exclusively within Congress’s domain and cannot constitutionally be transferred to the executive.

For Justice Thomas, these two constitutional limitations, like Scylla and Charybdis, may doom *Chevron* deference. He acknowledged that there may be a path through—reserving the question whether there is “some unique historical justification for deferring to federal agencies.”<sup>43</sup> But he rebuked the Court for the “paltry” effort it has made at understanding whether such a path exists.<sup>44</sup>

#### D. Administrative Adjudication of Private Rights

In two final cases from the October 2014 Term, Justice Thomas called for a more thorough look at the adjudication of claims involving purely private

---

38. 467 U.S. 837 (1984).

39. 135 S. Ct. 2699 (2015).

40. *Id.* at 2712 (Thomas, J., concurring).

41. *Id.* at 2713.

42. *Id.*

43. *Id.*

44. *Id.*

rights outside Article III courts. In dissenting opinions in both *Wellness International Network v. Sharif*<sup>45</sup> and *B & B Hardware, Inc. v. Hargis Industries, Inc.*,<sup>46</sup> Justice Thomas explained that public rights were historically understood as “‘rights belonging to the people at large,’ as distinguished from ‘the private unalienable rights of each individual.’”<sup>47</sup> Thus, Blackstone “identified the private rights to life, liberty, and property as the three ‘absolute’ rights—so called because they ‘appertain[ed] and belong[ed] to particular men . . . as individuals.’”<sup>48</sup> A third category of rights are quasi-private rights, which consist of “statutory entitlements . . . bestowed by the government on individuals.”<sup>49</sup>

This distinction is important because, according to Justice Thomas, “historical evidence suggests that the adjudication of core private rights is a function that can be performed only by Article III courts.”<sup>50</sup> The legislative and executive branches “may dispose of public rights at will—including through non-Article III adjudications.”<sup>51</sup> But “the inalienable core of the judicial power vested by Article III in the federal courts is the power to adjudicate *private* rights disputes.”<sup>52</sup>

Justice Thomas acknowledged that “[t]he distinction between disputes involving ‘public rights’ and those involving ‘private rights’ is longstanding,” but explained that “the contours of the ‘public rights’ doctrine have been the source of much confusion and controversy.”<sup>53</sup> In some cases, “the line between public and private rights has blurred.”<sup>54</sup> In others, the Court appears to have reversed “the distinction between private and public rights.”<sup>55</sup> Justice Thomas urged a “return to the historical understanding of ‘public rights.’”<sup>56</sup>

---

45. 135 S. Ct. 1932 (2015).

46. 135 S. Ct. 1293 (2015).

47. *Wellness Int’l Network*, 135 S. Ct. at 1965 (Thomas, J., dissenting) (quoting *Lansing v. Smith*, 4 Wend. 9, 21 (N.Y. 1829)) (emphasis omitted).

48. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 119 (1765)).

49. *B & B Hardware*, 135 S. Ct. at 1316 (Thomas, J., dissenting).

50. *Id.*

51. *Wellness Int’l Network*, 135 S. Ct. at 1965 (Thomas, J., dissenting).

52. *Id.* at 1967.

53. *Id.* at 1964–65.

54. *Id.* at 1966.

55. *Id.* at 1967.

56. *Id.*

## II. A TRADITION OF GOING TO THE FRONT OF THE TRAIN

To those familiar with the Supreme Court’s administrative law jurisprudence, this recent quintet of rulings from Justice Thomas may come as a surprise. After all, Justice Thomas wrote the majority opinion in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,<sup>57</sup> a decision that now-Justice Neil Gorsuch once held out as an exemplar of the fallacies of *Chevron* deference.<sup>58</sup> In *Brand X*, Justice Thomas concluded that *Chevron* mandates that an agency’s interpretation of ambiguous statutory language supersedes any previous judicial interpretation of that same language. That, Justice Thomas explained, is because “*Chevron* teaches that a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is *not authoritative*.”<sup>59</sup> Rather, “the agency remains the authoritative interpreter . . . of such statutes.”<sup>60</sup> Justice Thomas’s holding in *Brand X* does “seem to follow pretty naturally” from *Chevron*, but in doing so it also “brings the colossus . . . fully into view,” as then-Judge Gorsuch put it.<sup>61</sup> And it certainly would be understandable for someone who has read *Brand X* to be surprised by Justice Thomas’s forceful declaration a decade later that “[t]he judicial power . . . requires a court to exercise its independent judgment in interpreting and expounding upon the laws” — “including ambiguous ones administered by an agency.”<sup>62</sup>

But to those familiar with Justice Thomas, the recent rulings should not be surprising at all. They are merely the latest example of Justice Thomas’s willingness to reconsider doctrines of the Court that he finds inconsistent with the Constitution, even where he has previously written or joined opinions applying or acknowledging those doctrines. Though he is not the only Justice who has done so in recent memory,<sup>63</sup> he is almost certainly the one who has done it most frequently. Any former clerk of the Justice will recognize some version of his instruction, “go to the front of the train and see who’s driving this thing” —

---

57. 545 U.S. 967 (2005).

58. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150-51 (10th Cir. 2016) (Gorsuch, J., concurring).

59. *Brand X*, 545 U.S. at 983 (emphasis added).

60. *Id.*

61. *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring).

62. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment)).

63. See Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 *YALE L.J.* 1600, 1603 (2017) (praising Justice Scalia for “ha[ving] no trouble admitting previous mistakes”).



Justice Thomas's way of saying that he wants to make sure a line of precedent is built on a solid, constitutional foundation.

Consider, for example, Justice Thomas's separate opinion in *Wyeth v. Levine*,<sup>64</sup> rejecting the Court's longstanding doctrine of "purposes and objectives" preemption. He had previously authored or joined opinions that acknowledged the existence of this form of implied preemption.<sup>65</sup> But in *Wyeth*, Justice Thomas explained that he could "no longer assent"<sup>66</sup> to such preemption because it is based on "perceived conflicts with broad federal policy objectives, legislative history, [and] generalized notions of congressional purposes that are not embodied within the text of federal law."<sup>67</sup> The Supremacy Clause makes supreme only those laws made pursuant to the Constitution, and "[c]ongressional and agency musings . . . do not satisfy the Article I, § 7, requirements for enactment of federal law."<sup>68</sup>

Sometimes Justice Thomas will flag a doctrine for reconsideration in an appropriate case,<sup>69</sup> though he does not always do so.<sup>70</sup> Here, close watchers of Justice Thomas's jurisprudence will recall that although he authored *Brand X*, he also previously questioned the "intelligible principle" doctrine in an opinion that presaged, at least, his recent opinion in *Association of American Railroads*. More than sixteen years ago, Justice Thomas wrote separately in *Whitman v. American Trucking Ass'ns*,<sup>71</sup> expressing his doubt that "the intelligible principle doctrine serves to prevent all cessions of legislative power" and his willingness to address whether the Court's "delegation jurisprudence has strayed too far from our Founder's understanding of separation of powers."<sup>72</sup>

---

64. 555 U.S. 555 (2009).

65. See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (Thomas, J.); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., dissenting).

66. *Wyeth*, 555 U.S. at 604 (Thomas, J., concurring in judgment).

67. *Id.* at 583.

68. *Id.* at 587.

69. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting) (noting that "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence" and expressing willingness to "reevaluat[e] its meaning in an appropriate case"); *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Thomas, J., concurring) (expressing willingness "[i]n an appropriate case" to reconsider *Calder v. Bull*, 3 Dall. 386 (1798), and its holding that the Ex Post Facto Clause applies only in the criminal context).

70. See, e.g., *Lopez v. United States*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (setting forth an original understanding of the Commerce Clause).

71. 531 U.S. 457 (2001).

72. *Id.* at 487 (Thomas, J., concurring).

Although I of course do not claim any direct knowledge of what finally caused Justice Thomas to focus so intensely on administrative law in the October 2014 Term, one possible reason was the growing criticism of the administrative state by several of his colleagues. For example, in the years leading up to the October 2014 Term, Justice Scalia had called for the Court to dispense with *Seminole Rock* deference,<sup>73</sup> and Chief Justice Roberts and Justice Alito had shown signs of having questions about the doctrine's validity.<sup>74</sup> And in *Christopher v. SmithKline Beecham* in 2012, a five-Justice majority imposed a new "unfair surprise" limitation on the application of *Seminole Rock* deference, finding it inappropriate "to require regulated parties to divine [an] agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference."<sup>75</sup>

In several other recent cases, Chief Justice Roberts and Justice Scalia wrote majority opinions that imposed some limits on *Chevron* deference. In one, Justice Scalia held that an agency's interpretation of statutory language is "unreasonable" under *Chevron* if the interpretation "would bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization."<sup>76</sup> In another, Chief Justice Roberts held that *Chevron* does not apply in "extraordinary cases" where there may be "reason to hesitate before concluding that Congress has intended" to delegate interpretive authority to the agency claiming deference.<sup>77</sup> The Chief Justice found deference to be inappropriate because the case involved "a question of deep 'economic and political significance' that [wa]s central to th[e] statutory scheme," and because the agency claiming deference did not have relevant "expertise."<sup>78</sup>

Finally, in 2013, Chief Justice Roberts sought unsuccessfully to prohibit the application of *Chevron* in cases involving the threshold question whether an

---

73. *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part) (calling for the Court to overrule *Seminole Rock* deference); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring) (doubting the validity of *Auer* deference).

74. *Decker*, 133 S. Ct. at 1338-39 (Roberts, C.J., concurring); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (Alito, J.) (citing John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996)).

75. *Christopher*, 132 S. Ct. at 2167-68.

76. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

77. *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (quoting *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159 (2000)).

78. *Id.* at 2489 (quoting *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444).

agency has interpretive authority over a particular statute. In his dissent in *City of Arlington v. FCC*,<sup>79</sup> the Chief Justice stressed that “[t]he administrative state ‘wields vast power and touches almost every aspect of daily life,’ in a way that “[t]he Framers could hardly have envisioned.”<sup>80</sup> “[T]he danger posed by the growing power of the administrative state,” he cautioned, “cannot be dismissed.”<sup>81</sup>

Aware of this growing concern over the administrative state, and watching his colleagues attempt to rein in agency deference on a seemingly ad hoc basis, Justice Thomas may have felt that the time had come for a trip to the front of the train. Indeed, in *Association of American Railroads*, Justice Thomas remarked, “We have too long abrogated our duty to enforce the separation of powers required by our Constitution[, and instead] have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure.”<sup>82</sup> And in *Michigan*, he expressed “alarm[.]” that the Environmental Protection Agency “felt sufficiently emboldened by th[e] [Court’s] precedents to make the bid for deference that it did.”<sup>83</sup> Perhaps prompted by this sense of alarm, Justice Thomas made the case for a step back to the original meaning of the Constitution.

### III. A LEGACY IN ADMINISTRATIVE LAW?

What effect might Justice Thomas’s five opinions have on the future of the administrative state? None of the five is controlling on the Court, nor is any one joined by another member of the current Court.<sup>84</sup> Nevertheless, I believe that the opinions will have a significant impact, of which evidence can already be seen.

One likely effect of Justice Thomas’s willingness to rethink the Court’s administrative law jurisprudence, including his own majority opinion in *Brand X*,

---

79. 133 S. Ct. 1863 (2013).

80. *Id.* at 1878 (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010)).

81. *Id.* at 1879. In addition to the growing chorus of criticism among Justice Thomas’s colleagues on the Court, a number of legal scholars had focused their attention on the propriety of the administrative state. Perhaps most notable at the time was Philip Hamburger’s book, see PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

82. *Ass’n of Am. R.R.s.*, 135 S. Ct. 1225, 1254–55 (2015) (Thomas, J., concurring in judgment).

83. *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

84. Four of the five opinions were on behalf of Justice Thomas alone. The last opinion, *B & B Hardware*, was joined by Justice Scalia.

is that lower court judges may feel empowered to develop the conversation further in their own separate writings. So far, the most prominent example of this effect may be the 2016 concurring opinion (mentioned earlier) by now-Justice Gorsuch in *Gutierrez-Brizuela*. That opinion expanded in several ways on Justice Thomas's questions about *Chevron* deference by exploring, among other things, some of the doctrine's practical failures.<sup>85</sup> But there are others, too. In *Waterkeeper Alliance v. EPA*, Judge Janice Rogers Brown of the D.C. Circuit acknowledged the "Article III renaissance . . . emerging against the judicial abdication performed in *Chevron's* name."<sup>86</sup> In *Global Tel\*Link v. FCC*, Judge Brown's colleague, Judge Laurence Silberman, responded to "the recent expressed concern about *Chevron*" by urging that "*Chevron's* second step can and should be a meaningful limitation on . . . administrative agencies."<sup>87</sup> And in *Egan v. Delaware River Port Authority*, Judge Kent Jordan of the Third Circuit wrote separately to express his view that "[t]he doctrine of [administrative] deference deserves another look."<sup>88</sup> Quoting Justice Thomas throughout his opinion, Judge Jordan explained that "*Chevron* and *Auer* and their like are, with all respect, contrary to the roles assigned to the separate branches of government" and "spread the spores of the ever-expanding administrative state."<sup>89</sup>

A second likely effect of Justice Thomas's opinions will occur in the pages of law journals and law reviews. Justice Thomas relied in part on some of the seminal works of leading academics.<sup>90</sup> And his opinions, in turn, are likely to encourage more scholarly thought in this area. Already, at least one article has been written in response to a question left open by Justice Thomas in *Michigan*—that "[p]erhaps there is some unique historical justification for deferring to federal agencies."<sup>91</sup> As Aditya Bamzai notes in his Article in the *Yale Law Journal*, that is no small question; if such historical justification exists, it may "suggest[] that separation of powers poses no barrier to judicial deference to executive interpretation."<sup>92</sup> Ultimately, Bamzai concludes that judicial deference

---

85. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring).

86. *Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring).

87. *Global Tel\*Link v. FCC*, 859 F.3d 39, 59 (D.C. Cir. 2017) (Silberman, J., concurring).

88. *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

89. *Id.*; see also *Our Country Home Enters., Inc. v. Comm'r*, 855 F.3d 773, 790 (7th Cir. 2017) ("We note that some judges have questioned the *Chevron* doctrine's wisdom.").

90. See, e.g., HAMBURGER, *supra* note 81; Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

91. *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring).

92. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 927 (2017).

is indeed a modern innovation, an important finding that one might expect to see cited in a future Supreme Court opinion.<sup>93</sup>

Another likely effect is a change in the way litigants approach cases involving agency action. On questions of statutory and regulatory interpretation, litigants know that if their case reaches the Supreme Court, they cannot count on Justice Thomas deferring to the agency's view. From the outset, any litigants supporting the agency's position will need to consider developing and preserving a reading of the plain text that is likely to garner Justice Thomas's vote. Indeed, agencies themselves will need to be cognizant during the rulemaking process, in anticipation of litigation, that Justice Thomas may no longer accept the argument that an agency "has the discretion to choose among the range of permissible interpretations of the statutory language."<sup>94</sup> In addition, as suggested by Sasha Volokh, litigants challenging agency action will want to consider advancing the argument that the agency has acted pursuant to an unconstitutional delegation of legislative power. Based on Justice Thomas's view of legislative power in *Association of American Railroads*, that argument could attract "a fifth vote that makes the difference" if and when a case reaches the Supreme Court.<sup>95</sup>

A final likely effect of Justice Thomas's opinions is an increase in dialogue among the political branches about reform of the administrative state. The opinions cry out not only for the Court to reconsider its approach to agency action, but also for Congress to take back the reins from agencies. There is ample room for administrative agencies under Justice Thomas's view of the separation of powers. They can play a role in enforcement, granting permits, or carrying out conditional legislation. Their expertise could still be brought to bear in crafting rules governing private conduct, so long as those rules are actually enacted by the body vested with the legislative power, which is how the system generally works in states like West Virginia.<sup>96</sup> There is much to discuss if our

---

93. Another recent article seeks to delve deeper into Justice Thomas's exploration of the difference between public rights and private rights in *Wellness International Network* and *B & B Hardware*. See Laura Ferguson, *Revisiting the Public Rights Doctrine: Justice Thomas's Application of Originalism to Administrative Law*, 84 GEO. WASH. L. REV. 1315 (2016).

94. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17004, 17006 (Apr. 2, 2010) ("Since EPA's interpretation of the regulations is not precluded by the statutory language, EPA is electing to maintain that interpretation on policy grounds.").

95. Sasha Volokh, *Should Supreme Court Litigants Be More Aggressive?*, VOLOKH CONSPIRACY (June 1, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/should-supreme-court-litigants-be-more-aggressive> [<http://perma.cc/R2SQ-RSF5>].

96. See *Chico Dairy Co. v. W. Va. Human Rights Comm'n*, 382 S.E.2d 75, 81 (W. Va. 1989) (all "legislative" rules promulgated by an executive agency must be "submitted to, reviewed by and approved by the legislative rule-making review committee and the legislature").

political leaders are willing to take a cue from Justice Thomas and begin a serious conversation.

#### IV. CONCLUSION

In the spring of 2015, Justice Thomas sent a message in a quintet of remarkable separate opinions: he had surveyed the front of the administrative law train, and he did not like what he saw. Why he did so is anyone's guess, though I have offered in this Essay one possible reason. More important is the fact that he did it. Justice Thomas has thrown open the door to a much-needed conversation among judges, scholars, litigants, and policymakers about the administrative state. I believe we will all be better for it.

*Elbert Lin is the Solicitor General of West Virginia and a former law clerk to Justice Clarence Thomas. This Essay is based on talks given at Yale Law School and Columbia Law School in early 2017 and reflects the views of the author alone.*

Preferred Citation: Elbert Lin, *At the Front of the Train: Justice Thomas Reexamines the Administrative State*, 127 YALE L.J. F. 182 (2017), <http://www.yalelawjournal.org/forum/at-the-front-of-the-train>.