

Justice Thomas and the Originalist Turn in Administrative Law

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INTRODUCTION

Until this term, administrative law seemed beyond the reach of originalist scrutiny at the Supreme Court. Then, in a series of six originalist opinions, Justice Thomas called into question agency rulemaking, judicial deference to agencies, and certain agency adjudications.

In *Department of Transportation v. American Association of Railroads (AAR)*, Justice Thomas wrote a concurrence arguing that the Constitution forbids agencies from making “generally applicable rules of private conduct.”¹ The same day, in *Perez v. Mortgage Bankers Association*, he wrote another concurrence, adding that judicial deference to an agency’s interpretation of its own regulation undermined Article III.² He briefly noted that similar arguments applied to agency interpretations of statutes in his dissent from *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,³ and at more length in his concurrence in *Michigan v. EPA*.⁴ He also dissented in *B&B Hardware, Inc. v. Hargis Industries, Inc.*, because he doubted that an agency could constitutionally adjudicate the private right at issue.⁵ Finally, in *Wellness International Network, Ltd. v. Sharif*, Justice Thomas dissented once more, expanding on his doubts about modern public rights doctrine.⁶

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1. 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment). Full disclosure: Last summer, I worked at the firm that represented the respondents; however, I did not work on this case. All views in this Essay are my own.
 2. 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment).
 3. No. 13-1371 (U.S. June 25, 2015) (Thomas, J., dissenting).
 4. No. 14-46 (U.S. June 29, 2015) (Thomas, J., concurring).
 5. 135 S. Ct. 1293, 1310 (2015) (Thomas, J., dissenting).
 6. 135 S. Ct. 1932, 1960 (2015) (Thomas, J., dissenting).

This Essay proceeds in two parts. Part I summarizes Justice Thomas's six opinions. Part II highlights their significance as the first sustained originalist critique of administrative law by a Supreme Court Justice. Their originalism distinguishes these opinions from earlier administrative law opinions, which have not sought and followed original meaning as binding law.

These six opinions are part of a systematic originalist reexamination of administrative law by Justice Thomas. The opinions interlock with one another, draw on originalist scholarship, answer questions raised in previous opinions, and develop new questions for future opinions and scholarship. Several pieces have discussed one or more of these cases, but this Essay looks at all six in detail to make clear the sophisticated and sweeping nature of Justice Thomas's originalist critique of administrative law this past term.⁷

I. THE OPINIONS

A. Rulemaking and Deference

In *AAR*, the Supreme Court unanimously held that Amtrak was a governmental entity for purposes of a challenge to its role in writing rules for

7. Dan McLaughlin, whose article went to press while this Essay was being edited, calls attention to all six opinions as part of a broader review of the term. See Dan McLaughlin, *Giving Thomas His Due*, 20 WEEKLY STANDARD No. 42 (July 20, 2015), http://www.weeklystandard.com/articles/giving-thomas-his-due_988078.html [<http://perma.cc/XVB9-9LCV>]. Sasha Volokh has also given detailed treatment to the *AAR* concurrence and its connection to *Perez*. Sasha Volokh, *Justice Thomas Delivers What He Promised on February 27, 2001*, VOLOKH CONSPIRACY (Mar. 11, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/11/justice-thomas-delivers-what-he-promised-on-february-27-2001> [<http://perma.cc/Q4MH-PXKW>] [hereinafter *Justice Thomas Delivers*]; see also Daniel Fisher, *Railroad Case Is a Vehicle for Conservative Attack on the Administrative State*, FORBES (Mar. 9, 2015, 6:10 PM), <http://www.forbes.com/sites/danielfisher/2015/03/09/supreme-court-conservatives-use-mundane-rulings-to-question-the-administrative-state> [<http://perma.cc/YQ8A-DLHK>] [hereinafter *Railroad Case*]; Daniel Fisher, *Supreme Court Conservatives Grudgingly Allow Labor Department To Change Its Mind*, FORBES (Mar. 9, 2015, 3:03 PM), <http://www.forbes.com/sites/danielfisher/2015/03/09/supreme-court-conservatives-grudgingly-allow-labor-to-change-its-mind> [<http://perma.cc/L4TW-EC5B>]; Jonathan Keim, *Perez v. Mortgage Bankers Association: Formalism Trumps Originalism*, NAT'L REV. ONLINE (Mar. 12, 2015, 12:57 PM), <http://www.nationalreview.com/bench-memos/415306/perez-v-mortgage-bankers-association-formalism-trumps-originalism-jonathan-keim> [<http://perma.cc/W7UA-VVNY>]; Sasha Volokh, *Perez, Another Iceberg Supreme Court Opinion: The Best Lies Beneath*, VOLOKH CONSPIRACY (Mar. 12, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/12/perez-another-iceberg-supreme-court-opinion-the-best-lies-beneath> [<http://perma.cc/4PH4-KGJ5>]; Ed Whelan, *Justice Thomas Re-Examines First Principles of Administrative Law*, NAT'L REV. ONLINE (Mar. 13, 2015, 11:57 AM), <http://www.nationalreview.com/bench-memos/415375/justice-thomas-re-examines-first-principles-administrative-law-ed-whelan> [<http://perma.cc/E77E-HAGT>].

track usage. The Court remanded the case for further consideration of non-delegation and due process challenges brought by a group of freight railroads.⁸ Justice Thomas concurred because he would have held that agencies do not have the power to promulgate “generally applicable rules of private conduct.”⁹ His opinion consists of a syllogism: general agency rules are laws; only Congress can make laws; the courts must therefore apply the Constitution and invalidate those rules.

Justice Thomas first excavated the Founders’ definition of “law,” with help from Blackstone: a law is “a generally applicable ‘rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.’”¹⁰ Agency rules typically purport to be just that. So, to validly promulgate them, agencies would have to have legislative power.

But Justice Thomas explained that Article I’s Vesting Clause empowers only Congress to make laws.¹¹ The Vesting Clause is textually “exclusive,” insofar as “only the vested recipient of that power can perform it.”¹² And that is important because the Vesting Clause also imposes “certain restrictions on the *manner* in which those powers are to be exercised.”¹³ One restriction is explicit: laws are to be made through a process of bicameralism and presentment. Another is implicit in the notion of a limited delegation. To quote Locke via Justice Thomas, “the legislative c[annot] transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it [cannot] pass it over to others.”¹⁴ The words of James Wilson at the Pennsylvania ratification convention confirm that the Founding generation did not understand Congress to be a supreme power capable of re-delegating its powers.¹⁵

Justice Scalia has previously recognized the constitutional problems with delegation.¹⁶ Unlike Justice Scalia, however, Justice Thomas believes originalism also requires courts to enforce the Founders’ understanding of “law,” arguing in *AAR* that the original meaning of Article III requires the

8. *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1228 (2015).

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

10. *Id.* at 1244 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *44).

11. *Id.* at 1240.

12. *Id.* at 1241.

13. *Id.*

14. *Id.* at 1244 (quoting JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 141, at 71 (John W. Gough ed., 1947) (1689)).

15. *Id.* at 1245.

16. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (“[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”).

courts to enforce the original meaning of Article I. In Justice Thomas’s words, courts may not “forego [their] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law.”¹⁷

For that proposition, Justice Thomas cited his concurrence in *Perez*.¹⁸ In that opinion, Justice Thomas argued that the federal judicial power exclusively belongs to the courts, and that “the judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.”¹⁹ In a tradition stretching back to English law, “[j]udges have long recognized their responsibility to apply the law” – meaning judges interpret the law themselves and decide cases accordingly.²⁰ With a nod to Publius, Justice Thomas illuminated the original meaning of Article III’s Vesting Clause: “if a case involved a conflict between a law and the Constitution, judges would have a duty ‘to adhere to the latter and disregard the former.’”²¹

In *Perez*, the Court dealt with the procedure an agency must follow to amend an interpretive rule. The Court unanimously held that under the Administrative Procedure Act, courts could not require agencies to use notice-and-comment procedures to do so.²² Justice Thomas went further and addressed *Seminole Rock/Auer* deference by courts to agency interpretations of their own regulations.²³ He wrote that such deference “should be reconsidered in an appropriate case” because it cedes the exclusively vested federal judicial power to agencies.²⁴

Justice Thomas expressed two main concerns about *Seminole Rock* and *Auer*. First, as discussed above, courts are obligated to interpret and apply the law, which provides a check on the political branches.²⁵ Second, the judicial power comes with restraints not applicable to agencies, just like the legislative power does. One restraint is independence, both from external political pressures and “the bias of having participated in [the law’s] formation.”²⁶ The

17. *AAR*, 135 S. Ct. at 1246.

18. *Id.*

19. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment).

20. *Id.* at 1220.

21. *Id.* (quoting THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed. 1961)).

22. *Id.* at 1203 (majority opinion).

23. *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

24. *Perez*, 135 S. Ct. at 1225.

25. *Id.* at 1220.

26. *Id.* at 1218 (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98 (Max Farrand ed., rev. ed. 1966) (statement of Rufus King)).

latter kind of independence is premised on the notion that the rule of law requires impartial application of the laws, something a law's drafter—and any agency tasked with implementing the law—would be tempted not to provide.²⁷ Another restraint inherent in the original understanding of the judicial power was that judges would be “guided ‘by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.’”²⁸ But *Auer* instructs judges *not* to use the “recognized tools of interpretation to determine the best meaning of a regulation.”²⁹ For these reasons, Justice Thomas concluded, the doctrine “should be reconsidered in an appropriate case.”³⁰

Justice Thomas has been more tentative about whether these arguments undermine *Chevron* deference to agency interpretations of statutes, but he did raise the question in two opinions after *Perez*. In *Texas Department of Housing*, the majority held that the Fair Housing Act prohibited disparate impact liability. In dissent, Justice Thomas wrote that the Court should not “transfer our responsibility for interpreting those [statutory] provisions to administrative agencies.”³¹ But because the Court did not use *Chevron*, there was no reason to address *Chevron* itself. Then, in *Michigan v. EPA*, the Court denied *Chevron* deference to an EPA interpretation of the Clean Air Act because it was unreasonable.³² Justice Thomas concurred, citing *Texas Department of Housing*, *Perez*, *AAR*, and *B&B Hardware*, and squarely questioned whether *Chevron* was constitutional. He left the question open, however, because the agency lost this case even under *Chevron*.³³

B. Public and Private Rights

Similar Article III issues surfaced in Justice Thomas's dissents in *B&B Hardware* and *Wellness International*, which addressed public rights doctrine. Justice Thomas divided rights into three historical categories: public rights (“those belonging to the public as a whole”),³⁴ quasi-private rights (“those

27. For more on this point, see *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment).

28. *Perez*, 135 S. Ct. at 1217 (quoting THE FEDERALIST No. 78 at 471 (Alexander Hamilton) (Clinton Rossiter ed. 1961)).

29. *Id.* at 1219.

30. *Id.* at 1225.

31. *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371, slip op. at 7 (U.S. June 25, 2015) (Thomas, J., dissenting).

32. *Michigan v. EPA*, No. 14-46, slip op. at 15 (U.S. June 29, 2015).

33. *Id.*, slip op. at 2-4 (Thomas, J., concurring).

34. *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting).

‘privileges’ or ‘franchises’ that are bestowed by the government on individuals”),³⁵ and core private rights (such as life, liberty, and property).³⁶ As a historical matter, administrative agencies could only adjudicate the first two categories,³⁷ although Justice Thomas acknowledged two “narrow historical exceptions” for cases in federal territories and cases in courts-martial.³⁸ This entire structure, he explained, was “carried . . . forward into the Vesting Clauses.”³⁹

Justice Thomas only began to flesh out a corrected public rights doctrine in *B&B Hardware* and *Wellness International*. In the first case, the Court held that a determination by the Trademark Trial and Appeal Board could have issue preclusive effect in federal court.⁴⁰ In the final part of his dissent, Justice Thomas turned to the constitutional question of public rights (which do not require an Article III court) and private rights (which do). He suggested that a trademark might be a private right because it “appears to be a private property right that ‘has been long recognized by the common law and the chancery courts of England and of this country.’”⁴¹ Trademark registration, however, seems to be a quasi-private right.⁴² Justice Thomas also proposed, in line with Professor Caleb Nelson, that “administrative tax determinations may . . . have enjoyed a special historical status.”⁴³ As for bankruptcy courts, at issue in *Wellness International*, they “likely enjoy a unique, textually based exception, much like territorial courts and courts-martial do.”⁴⁴

Even more tentatively, Justice Thomas sketched out three questions in *Wellness International*, a case involving the powers of bankruptcy courts but one with implications for all non-Article III tribunals. He wrote that the presence of a private right, rather than a public right, might determine whether an Article III court is required. If that were true, consent by the private right-holder might “lif[t] that ‘private rights’ bar, much in the way that waiver lifts the bar imposed by the right to a jury trial.”⁴⁵ But that would raise a new question about whether there are still “aspects of the adjudication that demand the

35. *Id.* (quoting Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007)).

36. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1963 (2015) (Thomas, J., dissenting).

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

38. *Wellness Int’l*, 135 S. Ct. at 1963-64 (Thomas, J., dissenting).

39. *Id.* at 1965.

40. *B&B Hardware*, 135 S. Ct. at 1299 (majority opinion).

41. *Id.* at 1317 (Thomas, J., dissenting) (quoting *In re Trade-Mark Cases*, 100 U.S. 82, 92 (1879)).

42. *Id.*

43. *Id.*

44. *Wellness Int’l*, 135 S. Ct. at 1967 (Thomas, J., dissenting).

45. *Id.* at 1968.

exercise of the judicial power, such as entry of a final judgment enforceable without any further action by an Article III court.”⁴⁶ Even if not, Justice Thomas reminded readers that Congress would still need proper originalist authority to create any historical exception, such as for bankruptcy courts.⁴⁷ In short, Justice Thomas has begun to refine a public rights doctrine for originalists in *B&B Hardware* and *Wellness International*—but he has only begun.

II. THE ORIGINALIST TURN

These opinions are remarkable for four reasons: they are originalist in a doctrinal area where originalism has previously slumbered; they open a new front for originalism to influence administrative law, namely the courts; they embody a systematic critique spread across six opinions; and they are likely only the beginning of Justice Thomas’s originalist turn in administrative law.

First, these opinions are remarkable because they are originalist. Neither of the Court’s originalist Justices have previously identified relevant textual provisions, analyzed their original meaning in depth, and followed that evidence to a conclusion questioning administrative law doctrines.⁴⁸ When other opinions have invoked separation of powers or the Founders’ design, it has been in a functionalist or pragmatic way. For example, Justice Scalia mentioned separation of powers and cited Montesquieu in his own rejection of *Auer*, but he did so without identifying the relevant text and building the case for its original meaning.⁴⁹ And even when Justice Scalia acknowledged the original meaning of Article I’s Vesting Clause in *Mistretta v. United States*, he found it not “readily enforceable by the courts.”⁵⁰ By contrast, Justice Thomas filed six thorough originalist opinions, not only “thick with citation to the roots

46. *Id.*

47. *Id.* at 1969.

48. See, e.g., *Wellness Int’l*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211 (Scalia, J., concurring in the judgment); *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring); *Whitman v. United States*, 135 S. Ct. 352 (2014) (statement of Scalia, J., respecting the denial of certiorari) (application of *Chevron* to criminal cases); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (Alito, J.) (*Auer*); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring) (*Auer*); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting) (*Skidmore*); *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000) (Thomas, J.) (*Auer*).

49. *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part). For another example, see *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (Roberts, C.J., dissenting).

50. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (non-delegation).

of our constitutional system,”⁵¹ but also thick with citation to the text itself. That text, as discussed above, is the Vesting Clauses. To explain them, he examined originalist scholarship, ratification debates, pre-Revolutionary English sources that the Founders would have read, and early American cases indicating the understanding of the Founding generation.⁵² And where originalism contradicts an administrative law precedent, he took it as his judicial duty to apply the Constitution.

Second, these opinions are significant because they are judicial opinions. Justice Thomas draws from the work of scholars like Philip Hamburger and Caleb Nelson, but a Justice adds something powerful to those ideas by putting them into the U.S. Reports for all to read. It may encourage litigants to raise these arguments in pursuit of Justice Thomas’s vote.⁵³ Even if no Justice joins Thomas, however, his opinions will likely reach a broader legal and lay audience than academic writing does. And if nothing else, supporters of the current administrative state can no longer dismiss originalist critiques of administrative law as purely academic.

Third, these opinions form an interlocking treatment of administrative law in which one opinion depends on points made in others. Part I of this Essay laid out how the doctrines Justice Thomas analyzed—non-delegation, judicial deference, and public rights—involve common questions about the Vesting Clauses. The opinions themselves even cite one another: in *AAR*, Justice Thomas cited *Perez*; in *Perez*, he cited *AAR*; in *B&B Hardware*, he cited *Perez* and *AAR*; in *Wellness International*, he cited *Perez*, *AAR*, and *B&B Hardware*; in *Texas Department of Housing*, he cited *Perez*; and in *Michigan v. EPA*, he cited *Perez*, *AAR*, *B&B Hardware*, and *Texas Department of Housing*.

The interlocking whole also extends backwards in time to questions posed in previous opinions. Back in 2001, Justice Thomas wrote a short concurrence suggesting he might “be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding

51. McLaughlin, *Giving Justice Thomas His Due*, *supra* note 7.

52. See *Wellness Int’l*, 135 S. Ct. at 1963-70 (Thomas, J., dissenting); *B&B Hardware*, 135 S. Ct. at 1316-18 (Thomas, J., dissenting); *Perez*, 135 S. Ct. at 1215-22 (Thomas, J., concurring in the judgment); *AAR*, 135 S. Ct. at 1242-52 (Thomas, J., concurring in the judgment).

53. Sasha Volokh and Daniel Fisher both expect litigants to respond. See *Railroad Case*, *supra* note 7; Volokh, *Should Supreme Court Litigants Be More Aggressive?* (June 1, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/should-supreme-court-litigants-be-more-aggressive> [<http://perma.cc/RC9Y-AEW4>] (“In light of this, I’d think that whenever someone wants to invalidate agency action and Justice Thomas isn’t already on their side for other reasons, that party probably ought to briefly mention that the agency is unconstitutional based on Justice Thomas’s theory of the non-delegation doctrine in *DOT v. Ass’n of American Railroads*. It could be a fifth vote that makes a difference.”).

of separation of powers.”⁵⁴ In 2011, Justice Scalia wrote his own short concurrence identifying his misgivings about modern public rights doctrine.⁵⁵ When viewed in this context, this past term seems to be a major turning point in a multi-decade originalist project of re-examining administrative law.

Relatedly, and finally, with these opinions Justice Thomas laid the groundwork for future installments. Sometimes, he did so by raising and reserving questions for future opinions, which will perhaps draw upon future originalist scholarship answering those questions. In *AAR*, he wrote that conditional legislation, in which “Congress creates the rule of private conduct, and the President makes the *factual* determination that causes that rule to go into effect,” would be constitutional.⁵⁶ The distinction between permissible conditional legislation and impermissible agency lawmaking, as Sasha Volokh has noted, remains to be illuminated.⁵⁷ Furthermore, as he observed in his *B&B Hardware* and *Wellness International* opinions, serious questions remain about whether a right is public, quasi-private, or private; what exceptions to the public-rights doctrine exist; what effect consent by the private right-holder has; what (if any) residual Article III functions remain after parties consent; and what affirmative power Congress has to establish non-Article III tribunals.

On judicial deference, Justice Thomas has indicated in *Texas Department of Housing* and *Michigan v. EPA* that he is inclined to apply the concerns he raised in *Perez* to *Chevron* deference. Because neither case required him to squarely address *Chevron*, he did not. What he did say was that “[p]erhaps there is some unique historical justification for deferring to federal agencies, but these cases reveal how paltry an effort we have made to understand it or to confine ourselves to its boundaries.”⁵⁸ It now seems that when the question does arise, the burden will be on defenders of *Chevron* to persuade him.

CONCLUSION

Justice Thomas may be the only member of the Court willing to systematically rethink administrative law on originalist grounds.⁵⁹ But with

54. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). Sasha Volokh has also noted this connection. See *Justice Thomas Delivers*, *supra* note 7.

55. *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (Scalia, J., concurring).

56. *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1247 (2015) (Thomas, J., concurring in the judgment).

57. *Justice Thomas Delivers*, *supra* note 7.

58. *Michigan v. EPA*, No. 14-46, slip op. at 4 (U.S. June 29, 2015) (Thomas, J., concurring) (internal citation omitted).

59. See McLaughlin, *Giving Justice Thomas His Due*, *supra* note 7. Justice Scalia joined the initial *B&B Hardware* dissent but then did not join the more substantive dissent in *Wellness International*, suggesting he would not go as far as Justice Thomas.

these six opinions, he has taken the originalist critique of administrative law out of the academy and into the courts. Litigants now avoid these questions at their own risk. And beyond the Court, the originalist position on administrative law is prominently available for all to read. What's more, if this term was any indication, we can expect more of these opinions from him in the future.

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