SAYING WHAT THE LAW IS, JUSTICE THOMAS STYLE

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Saying What the Law Is, Justice Thomas Style

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During his thirty years on the Supreme Court, Justice Clarence Thomas has profoundly impacted how we think about the separation of powers and, in particular, has illuminated how aspects of the administrative state contravene the Constitution's text and structure. In this short essay, I focus on the Justice's methodology for spurring doctrinal shifts. Many judges stay only on the surface of the law, accepting the status quo and what has built up over time. Justice Thomas, however, excavates the historical origins of a legal principle, delves into the philosophical or theoretical foundations of that principle, and then expounds the meaning of the law in specific cases. His approach reveals not only the power of historical understanding and originalism, but the seeming impossibility of saying what the law is without understanding where it originated and the path it has traveled to the present.

Justice Thomas has employed this general method to reconsider numerous legal doctrines,[1] but here I examine his

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[1] *See, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (Thomas, J., dissenting) (Article III standing requirements); United States v. Sineneng-Smith, 140 S. Ct. 1575, 1583 (2020) (Thomas, J., concurring) (scope of the overbreadth doctrine); McKee v. Cosby, 139 S. Ct. 675, 675 (2019) (Thomas, J., concurring in the denial of certiorari) (actual malice standard for limited-purpose public figures); McDonald v. City of Chicago, 561 U.S. 742, 805 (2010) (Thomas, J., concurring in part and concurring in the judgment) (right to keep and bear arms as a privilege of citizenship); Sabri v. United States, 541 U.S. 600, 610 (2004) (Thomas, J., concurring in the judgment) (scope of Necessary and Proper Clause in conjunction with the spending power); Zelman v. Simmons-

approach to the non-delegation principle. Open-ended delegations are the cornerstone of the administrative state because they place substantial, and often unconstrained, regulatory authority with Executive Branch agencies. Whether, or the extent to which, Congress may divest itself of legislative power are questions not only of abstract jurisprudence, but also of enormous practical consequence to the operation of modern government. Justice Thomas demonstrates an authentic approach to dislodging precedents that have been left in place for pragmatic or institutional reasons unconnected to their legal validity.

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Knowing you have a problem is often the first step to recovery. Reconsiderations of the law often begin with the recognition of a disruption in the law, something that simply does not make sense in light of the text and structure of the Constitution. Working within government makes one attentive to the legal pathologies of the modern administrative state, as I learned through my own experience in the Executive Branch.[2] Justice Thomas' ability to identify and understand the tensions between administration and the Constitution was indelibly shaped by his experience as the Chairman of the Equal Employment Opportunity Commission ("EEOC"). Leading the agency for almost eight years, he demonstrated a willingness to do the right thing, often in the face of contrary political pressures.

In the seminar we taught together on the history and foundations of the administrative state, Justice Thomas recounted stories about his experience running a federal agency

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Harris, 536 U.S. 639, 676 (2002) (Thomas, J., concurring) (incorporation of the Establishment Clause); United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (commerce power).

[2] *See generally* Neomi Rao, *The Hedgehog & the Fox in Administrative Law*, 150 DAEDALUS 220 (2021).

and how these shaped his thinking on administrative law. As head of the EEOC when *Chevron* was decided, he was empowered, like other agency heads, by the Court's holding that courts should defer to reasonable agency interpretations of ambiguous laws.[3] Nonetheless, he thought, "wait a minute, this is a license to steal."[4] Where is the boundary between the legislative, executive, and judicial powers? He also told the class that he regretted authoring *National Cable & Telecommunications Association v. Brand X Internet Services*, which held that a court must disregard its prior precedent interpreting an ambiguous statute in favor of an agency's subsequent interpretation.[5] That decision, he explained, brought him to the edge of an abyss. When standing at the edge and peering into the void, he realized the Court had gone too far and needed to reassert its constitutional responsibility to review agency interpretations of law.[6]

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[3] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984).

[4] Federalist Society, *Discussion with Justice Clarence Thomas at 2020 Annual Florida Chapters Conference*, YOUTUBE at 1:17:40–43 (Jan. 31, 2020), https://www.youtube.com/watch?v=RvmGHEYmXSQ&t=4249s.

[5] 545 U.S. 967, 982 (2005) (reasoning that requiring judicial interpretations to give way to agency interpretations follows from "*Chevron*'s premise … that it is for agencies, not courts, to fill statutory gaps"). *See also id*. at 983 (concluding an agency may "choose a different construction [of an ambiguous statute than a court], since the agency remains the authoritative interpreter (within the limits of reason) of such statutes").

[6] Justice Thomas has expressly called for a reconsideration of *Brand X*. *See* Baldwin v. United States, 140 S. Ct. 690, 694 (2020) (Thomas, J., dissenting from the denial of certiorari) ("By requiring courts to overrule their own precedent simply because an agency later adopts a different interpretation of a statute, *Brand X* likely conflicts with Article III of the Constitution."). Justice Thomas has

Pulling back on judicial deference to agency interpretations of the law was in a sense only the outer layer of the administrative onion—the core problem was open-ended delegations of rulemaking authority to executive agencies. Justice Thomas first flagged concerns about the non-delegation doctrine and the "intelligible principle" test in a short concurrence in *Whitman v. American Trucking Associations*.[7] He noted, "I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"[8] Justice Thomas noted the Court's "intelligible principle" test is inconsistent with the separation of powers and the vesting of all legislative powers in Congress and then waited for a case in which a challenge to the test was squarely raised.

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Once you see a disruption in the law, you can't unsee it: taking the historical and philosophical perspective. Having planted a flag on non-delegation, Justice Thomas began disinterring the history behind it. As in other areas of the law, his separate writings also spurred further scholarly research and writing on the non-delegation doctrine. When a current doctrine appears inconsistent with the Constitution's text and the structure of separated powers, the Justice will look for its origins, tracing it back to its roots. This process inevitably leads to a reevaluation of existing doctrine.

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shown an unusual willingness to reconsider his prior decisions along with many older precedents.

[7] 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("Although this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of 'intelligible principles.'" (citation omitted)).

[8] *Id*.

With respect to the Supreme Court's non-delegation doctrine, that reevaluation arrived in his concurrence in *Department of Transportation v. Association of American Railroads*.[9] Justice Thomas discussed at length the history and origins of the non-delegation principle, which requires a separation of the legislative power from the executive power. He explained that the key legal issue "is the proper division between legislative and executive powers. An examination of the history of those powers reveals how far our modern separation-of-powers jurisprudence has departed from the original meaning of the Constitution."[10]

Justice Thomas identified as a basic principle of the rule of law that "the Executive may not formulate generally applicable rules of private conduct."[11] He traced this principle from Greek and Roman times through the English Civil War, the repudiation of King Henry VIII's claim to lawmaking powers, and Blackstone's *Commentaries*. Individual liberty and the protection of the core rights of life, liberty, and property depended on separating lawmaking and law enforcement. A person could be deprived of private rights only by a standing law, given in advance by the legislature and not altered or taken away by a decree of the Executive.

In returning to early legal origins, Justice Thomas also elucidated longstanding jurisprudential principles. These are rooted in the political theory behind our constitutional democracy, as well as Greek and Roman law, the common law, natural law, international law principles, and judicial practice. With respect to the essential idea that legislative power cannot be exercised by the Executive, Justice Thomas explained why the "intelligible principle" test is fundamentally inadequate in

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[9] 575 U.S. 43, 66 (2015) (Thomas, J., concurring in the judgment).
[10] *Id*. at 69.
[11] *Id*. at 70.

light of the text and structure of the Constitution as well as the political philosophy that animates it.

For instance, he pointed to John Locke's observation that the "freedom of men under government … is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it."[12] Similarly, Justice Thomas noted that Blackstone "defined a tyrannical government as one in which 'the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men,' for 'wherever these two powers are united together, there can be no public liberty.'"[13] Justice Thomas noted that irrespective of the view of parliamentary supremacy, Blackstone thought delegations of lawmaking power were "disgraceful."[14]

The Justice then explained how these principles informed the Framers of the U.S. Constitution. From the separation of powers built into the structure of the federal government, we understand that "the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it."[15] Namely, Congress may not delegate its legislative powers. Moreover, "history confirms that the core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make

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[12] *Id*. at 72 (quoting JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 13 (J.W. Gough ed., 1947) (1690)); *see generally* Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1 (2018).

[13] *American Railroads*, 575 U.S. at 73 (Thomas, J., concurring in the judgment) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *142).

[14] *Id*. at 74 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *424) (alteration adopted).

[15] *Id*.

'law' in the Blackstonian sense of generally applicable rules of private conduct."[16]

Importantly, by recalling these fundamental legal principles, Justice Thomas implicitly rebutted the common arguments that courts could not determine whether Congress had delegated its lawmaking power because (1) courts are unable to articulate a rule to apply in determining a line between legislative and executive powers;[17] and (2) the structural competition between the political branches would adequately prevent delegations and therefore no judicial review was necessary.[18] Justice Thomas demonstrated not only why a reconsideration of the "intelligible principle" test was necessary for preventing delegations of legislative power, but also pointed the way for judicial enforcement of the non-delegation principle.

While Justice Thomas' approach is often described simply as originalist, his is a rich and nuanced originalism, looking

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[16] *Id*. at 76.

[17] Justice Scalia, for instance, maintained that although Congress could not delegate its lawmaking power, courts were unable to enforce any meaningful non-delegation principle. *See* 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.").

[18] Elsewhere I have explained why the rivalry between the political branches and ordinary checks and balances are ineffective in protecting against congressional delegations of legislative power to the Executive Branch. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1511 (2015) (explaining that delegation can empower individual members of Congress at the expense of Congress as an institution and therefore "[d]elegations unravel the competition between the President and members of Congress," and because structural restrictions fail to deter excessive delegations there is "greater urgency for judicial review of nondelegation challenges").

beyond the writings of the Founding Fathers to the historical and philosophical foundations that formed the founding generation's legal education, training, and way of thinking about the law.

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Expounding the law. After excavating the history and foundations of a legal principle, Justice Thomas articulates his reasoning in prose that is plain and intelligible to the public. Judges must "say what the law is," but the law is not just the holding of a case—it is also the reasoning behind the decision.

Justice Thomas carefully lays out legal history and jurisprudential premises, setting the stage for subsequent application of the law to new cases. Decisions that merely assume basic legal principles are particularly inadequate in the present era, in which legal education and specialized practice are far removed from legal history and jurisprudence. To recognize and recover our shared foundations requires judges to go further in explaining what the law is and where it comes from. Careful expositions of the law educate and provide public reasons for the law.

There are other important functions served by Justice Thomas' writings, even when they do not command a majority. First, these writings present a challenge. Once Justice Thomas has carefully articulated the history and reasons behind a legal principle, such as the prohibition on delegations of legislative power, other justices and scholars must grapple with his articulation of the law. If they disagree, they must show that his historical account is incorrect or misunderstands fundamental legal principles. Additional historical information may further advance our understanding of the separation of powers. But if those who disagree with Justice Thomas' account of the law cannot or will not identify support from history or longstanding legal principles, they must straightforwardly argue the history and foundations of the law do not really matter. Justice Thomas' account will require them to state frankly that, for

example, the modern administrative state must be justified with reference to a precedent of relatively recent vintage, irrespective of any inconsistencies with the text and structure of the Constitution.[19]

In any event, Justice Thomas' challenge will have revealed something important—elucidation of legal principles on the one hand, or frank acknowledgement that the justifications of modern doctrines such as the "intelligible principle" test are ultimately not derived from the Constitution at all.[20]

Justice Thomas' expositions of the law also make it harder to simply redefine the meaning of constitutional terms. For instance, in a separate opinion in *Whitman*, Justice Stevens explained that rather than treating rulemaking authority as an exercise of the executive power, the Court should "frankly acknowledg[e]" that when agencies enact rules they are in fact exercising delegated legislative power.[21] Justice Stevens maintained that "it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power.'"[22] He explained that nothing in the vesting clauses of Article I and II "limit the authority of either recipient of power to delegate authority to others."[23] Thus, when Congress conferred authority to the EPA, "it effected a constitutional delegation of

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[19] *See, e.g.,* Gundy v. United States, 139 S. Ct. 2116, 2129–30 (2019) (applying the "intelligible principle" test based on precedent such as *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), but not reconsidering the test).

[20] *See* Rao, *supra* note 2, at 222–24 ("[P]roponents of the administrative status quo do not claim it is consistent with the Constitution, but rather maintain that administrative agencies nonetheless serve values reflected in the Constitution.").

[21] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment).

[22] *Id*.

[23] *Id*. at 489; *see also* U.S. CONST. art. I, § 1; *id*. art. II, § 1.

legislative power to the EPA."[24] While perhaps an honest approach to the precedents, Justice Stevens relied only on the absence of an explicit restriction on delegation for his conclusion that legislative power may be delegated by Congress. He otherwise offered no theory of separation of powers; no consideration of the structure of the Constitution; and no reference to the rich foundation that animated the Founders.

Perhaps in part because of Justice Thomas' exposition in *American Railroads*, no justice adopted this pragmatic reallocation of legislative power in *Gundy v. United States*, the Supreme Court's most recent consideration of the non-delegation principle.[25] Justice Thomas' erudite separate writings politely lay down the gauntlet. Arguing that delegations of legislative power are constitutional would now require advancing an alternative account of, not only the original meaning of the Constitution, but also the historical underpinnings of the rule of law and the development of the separation of powers.[26]

Expositions of the law also have a far-reaching impact on the development of the law at the Supreme Court and in lower courts. Justice Gorsuch's dissent in *Gundy* builds on the

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[24] *Whitman*, 531 U.S. at 490 (Stevens, J., concurring in part and concurring in the judgment).

[25] 139 S. Ct. 2116, 2123 (2019) (explaining that the "assignment of [legislative] power to Congress is a bar on its further delegation," but going on to apply the "intelligible principle" test to determine what constitutes an unconstitutional delegation).

[26] Some scholars have sought to provide a different account of non-delegation principles at the Founding. *See generally* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021).

principles and legal research in Justice Thomas' concurrence in *American Railroads*.[27] When the next non-delegation challenge reaches the Supreme Court, these separate writings will invariably shape the Court's decision and mode of analysis. The impact occurs not only in a few dozen cases heard by the Supreme Court, but also in constitutional challenges in the lower courts.

Justice Thomas' methodology has profoundly impacted the way I think about my responsibility as an Article III judge. While the inferior courts cannot contravene Supreme Court precedents, lower court judges take an oath to uphold the Constitution and the laws of the United States.[28] Judges can, and in my view should, look to find the meaning of the law, not just the meaning of judicial precedents. Decisions of the Supreme Court and courts of appeal often reflect development over time, and it is important to understand the evolution of the judicial gloss on the Constitution as well as statutes. In assessing the original meaning of the Constitution and the text of a statute, judges can consider recent judicial precedents in light of a wider and deeper body of law. When the precedents have veered away from legal foundations, they still bind a lower court judge, but often they can be applied in a way that brings them closer to the law.

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Understanding how the law developed can reveal fault lines—disruptions from our shared legal origins. When Justice Thomas discovers one of these disruptions, as with the modern non-delegation doctrine, he assiduously works to put the law

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[27] *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (echoing Justice Thomas in concluding that in "the Constitution, … the people had vested the power to prescribe rules limiting their liberties in Congress alone").

[28] U.S. CONST. art. VI ("[A]ll … judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution[.]").

back on track. Justice Thomas' approach, the careful excavation and then exposition of the law, returns to a traditional way of thinking about law by explaining jurisprudential foundations and promoting greater fidelity to the Constitution. For thirty years, Justice Thomas has prompted a reevaluation of numerous legal doctrines, and his way of saying what the law is has changed the way we think about the Constitution.