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Thomas Pushes High Court to Revisit Agency Deference

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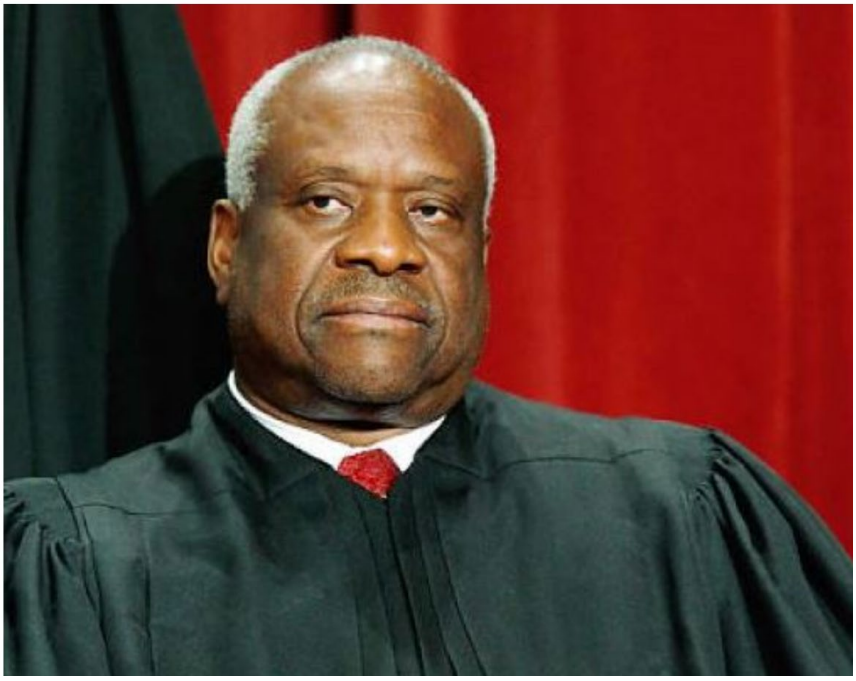
TIM RYAN / February 24, 2020



U.S. Supreme Court Justice Clarence Thomas (Charles Dharapak, Associated Press)

WASHINGTON (CN) — Justice Clarence Thomas on Monday continued his campaign for the Supreme Court to reconsider a pair of landmark administrative law cases courts have long relied on to evaluate federal regulations.

¶2 In an 11-page opinion dissenting from the full court's decision not to hear a dispute over a tax refund from the producers of the 2004 movie "Ray," Thomas reiterated his objections to the court's decisions in both *Chevron v. Natural Resources Defense Council* and the subsequent case *National Cable & Telecommunications Association v. Brand X.* The two holdings create among the most important precedents to administrative law and have been the target of criticism from conservatives who say they give too much power to agencies. Defenders of the deference doctrines say they are important for regulatory agencies to flex their expertise and respond to changing regulatory conditions.

¶3 Under *Chevron,* **courts defer to agency interpretations of ambiguous laws** it is charged with administering, so long as that interpretation is "reasonable." In a similar vein, the court in 2005 held in *Brand X* that courts should defer to an agency's interpretation of an ambiguous law even if a federal court released ruled on the issue before the agency did.

¶4 Thomas' opinion Monday explicitly calls on the court to revisit *Brand X,* while blasting *Chevron* as running counter to the Constitution. Though Thomas himself authored the *Brand X* opinion, he said Monday the holding "appears to be inconsistent with the Constitution, the Administrative Procedure Act (APA) and traditional tools of statutory interpretation.

¶5 "Regrettably, *Brand X* has taken this court to the precipice of administrative absolutism," Thomas wrote. "Under its rule of deference, agencies are free to invent new (purported) interpretations of statutes then require courts to reject their own prior interpretations. *Brand X* may well follow from *Chevron,* but in so doing, it poignantly lays bare the flaws of our entire executive-deference jurisprudence."

¶5 As for *Chevron,* Thomas said it "compels judges to abdicate the judicial power without constitutional sanction," goes against historical practice and **upsets the checks** the framers built into the Constitution. "When the executive is free to dictate the outcome of cases through erroneous interpretations, the courts cannot check the executive by applying the correct interpretation of the law," Thomas wrote.

¶6 Thomas' crusade from the high court bench has largely been a lonely one, though Justice Neil Gorsuch has also publicly questioned *Chevron*, including, including as a judge on the 10th Circuit. The court last year pared back another core administrative law doctrine known as *Auer* deference that holds courts must defer to agency's reasonable interpretations of their own regulations.