

JUSTICE CLARENCE THOMAS: A BRIEF TRIBUTE

Judge Pasco M. Bowman II

Ronald Reagan is a man of great personal integrity. He has a warm, gentle manner that instantaneously makes him a charismatic figure to all with whom he comes in contact. His strong, unwavering adherence to principle is an unusual coupling with his disarming smile.¹

On encountering these words written by Charles Wick about Ronald Reagan, I was struck by the thought that they also are completely applicable to Clarence Thomas. Integrity, warmth, gentleness, charisma, unwavering adherence to principle, and a disarming smile—these qualities epitomize Clarence Thomas, just as they characterize Ronald Reagan.

The similarities between the two men do not end there. Both Reagan and Thomas are the product of small towns. Both grew up in less than affluent circumstances. Both understand the importance of family and community. The President and the Associate Justice share strong religious beliefs and an optimistic view of life, knowing that the key to overcoming social ills, as well as to individual achievement, lies in self-discipline, personal responsibility, and hard work. Both men recognize that the great promise of America is to foster liberty, to eliminate all artificial barriers and unnecessary restraints so that the constructive energies of every person may be set free. Both perceive that when initiative and creative energy are unleashed from the heavy hand of the state, good things happen that redound to the benefit of everyone.

I know Justice Thomas to be a warm, engaging, and immensely likeable man. When he enters, he lights up the room. He has a keen sense of humor, a hearty laugh, and a genuine interest in those he meets. Though he has suffered his share and more of fortune's slings and arrows, I find in him no trace of bitterness. Instead, I find good cheer and a quiet confidence that it is his carping critics who, like communism, will wind up in the ash can of history. I would not bet against him.

I have come to know Justice Thomas best through his work as Circuit Justice for my circuit, the Eighth Circuit. The circuit includes a large chunk of the Midwest—Missouri, Iowa, and Minnesota—leavened with a touch of the Deep South—Arkansas—plus a healthy slice of the Great Plains and the “wild west”—North Dakota, South Dakota, and

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¹ Tribute from Charles Z. Wick (Jan. 1997), in *A SHINING CITY: THE LEGACY OF RONALD REAGAN* 47 (D. Erik Felten ed., 1998).

Nebraska. No justice could possibly work harder at knowing his circuit and being a presence there than Justice Thomas does. Besides attending all of our judicial conferences, he has traveled widely in the circuit, speaking to bar associations great and small from Kansas City and St. Louis to Cedar Rapids and Mason City, Iowa. Two years ago he met for several days in Omaha with our bankruptcy judges. More recently, he was in Kansas City for the dedication of a new federal courthouse.² He has made it plain that he intends to know the people and places of the circuit as well as time and circumstances permit. We are grateful to Justice Thomas, and we are glad the Chief Justice has assigned him to us.

Of course, I also know Justice Thomas through his written opinions. This brief tribute is not the place for a comprehensive attempt to describe his contributions to the Supreme Court's jurisprudence. I shall mention several opinions, however, that I believe illustrate dominant themes of his work.

In matters of statutory interpretation, Justice Thomas seeks the meaning of the statute from its language and structure, not from extraneous sources or policy arguments. He is not one to overread a statute. The Justice's dissenting opinion in *Oubre v. Entergy Operations, Inc.*³ is illustrative. *Oubre* arose under the Older Workers Benefit Protection Act (OWBPA),⁴ which imposes certain minimum requirements that waivers of claims under the Age Discrimination in Employment Act of 1967 (ADEA)⁵ must meet in order to be considered "knowing and voluntary." The question presented was whether the plaintiff, who had waived her ADEA claims under an employment-termination agreement that failed to comply with the OWBPA, could maintain an ADEA action against the employer without first tendering back the consideration she had received in exchange for the waiver. The Fifth Circuit affirmed the district court's holding that she could not, because her failure to tender back the consideration amounted to a ratification of the waiver.⁶ Reversing, the Supreme Court held that the OWBPA abrogates the common law doctrines of ratification and "tender back." Justice Thomas, joined by Chief Justice Rehnquist, dissented.⁷ Noting that a statute is not to be read as repealing common law doctrines unless the legislature has evinced a clear intent to do so, Justice Thomas observed that the OWBPA does not address either

² The Charles Evans Whittaker United States Courthouse, Kansas City, Missouri, dedicated October 23, 1998.

³ 522 U.S. 422 (1998).

⁴ 29 U.S.C. § 626(f) (1994).

⁵ *Id.* §§ 621-634 (1994).

⁶ *See Oubre*, 522 U.S. at 425.

⁷ *See id.* at 434 (Thomas, J., dissenting).

ratification or “tender back.” Accordingly, he concluded that the OWBPA does not abrogate those doctrines, and that the decision of the court of appeals should be affirmed.⁸

Similarly, in constitutional matters, Justice Thomas is not one to overread the reach of the constitutional doctrine at issue. For example, in *Kansas v. Hendricks*,⁹ the Court had before it Kansas’s Sexually Violent Predator Act, which provides for the civil commitment of persons who, because of a “mental abnormality,” are likely to engage in “predatory acts of sexual violence.”¹⁰ *Hendricks*, a pedophile who had a long history of sexually molesting children, was ordered committed pursuant to the Act. On appeal, the Kansas Supreme Court invalidated the Act on substantive due process grounds. In an opinion written by Justice Thomas, the Court reversed. The Act’s definition of “mental abnormality,” said Justice Thomas, includes pedophilia and, coupled with *Hendricks*’s demonstrated lack of control and likelihood of future dangerousness, satisfies the requirements of substantive due process.¹¹ Another example of Justice Thomas’s restrained reading of constitutional mandates is found in his dissent in *Hudson v. McMillian*,¹² a prison case in which he argues that the Eighth Amendment is not violated by a single incident of force that causes only minor injuries.

This restrained reading of federal constitutional limits on state power is consistent with Justice Thomas’s views concerning both the reserved powers of the states (or of the people) and the enumerated powers of Congress. Dissenting in *U. S. Term Limits, Inc. v. Thornton*,¹³ Justice Thomas reaches the conclusion (referencing the Tenth Amendment in the course of his argument) that

[n]othing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.¹⁴

Justice Thomas’s dissent in *Thornton* is an example of his “original understanding” approach to constitutional interpretation. *United States*

⁸ Justice Scalia also dissented, agreeing with Justice Thomas that because no “tender back” was made, the court of appeals should be affirmed. *See id.* (Scalia, J., dissenting). Justice Scalia did not consider ratification an appropriate second basis for affirmance.

⁹ 521 U.S. 346 (1997).

¹⁰ KAN. STAT. ANN. §§ 59-29a01 to -29a17 (1994 & Supp. 1997).

¹¹ *See Hendricks*, 521 U.S. at 360.

¹² 503 U.S. 1, 17 (1992) (Thomas, J., dissenting).

¹³ 514 U.S. 779, 845 (1995) (Thomas, J., dissenting).

¹⁴ *Id.*

*v. Lopez*¹⁵ provides another example. Justice Thomas's concurring opinion,¹⁶ which supports the Court's decision that the Commerce Clause does not authorize Congress to prohibit gun possession within 1,000 feet of a school, is an appeal for a look back to the "original understanding" of that clause. He suggests reexamination of the Court's "substantial effects" test in order that the Court may formulate "a coherent test that does not tend to 'obliterate the distinction between what is national and what is local and create a completely centralized government.'"¹⁷

Last, I shall mention Justice Thomas's concurring opinion in *Missouri v. Jenkins*,¹⁸ the Kansas City school desegregation case. Concurring in the Court's decision that certain remedial measures exceeded the authority of the district court, Justice Thomas begins his opinion by remarking, "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."¹⁹ He makes clear his view that race is an impermissible criterion for state action,²⁰ but warns that federal courts "should avoid using racial equality as a pretext for solving social problems that do not violate the Constitution."²¹ The entire opinion reflects Justice Thomas's firm view that all persons are equal in the eyes of the law and that usurpations of power are no more attractive in the judiciary than in the other branches of government.

I salute Justice Thomas for the power of his character, intellect, and personality, and for the power of his opinions as well. His service on the Court has been marked by great distinction. May he continue to serve for many years to come.

¹⁵ 514 U.S. 549 (1995).

¹⁶ *Id.* at 584 (Thomas, J., concurring).

¹⁷ *Id.* at 585 (Thomas, J., concurring) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

¹⁸ 515 U.S. 70 (1995).

¹⁹ *Id.* at 114 (Thomas, J., concurring).

²⁰ "This Court should never approve a State's efforts to deny students, because of their race, an equal opportunity for an education." *Id.* at 137-38 (Thomas, J., concurring).

²¹ *Id.* at 138 (Thomas, J., concurring).