THE JURISPRUDENCE OF CLARENCE THOMAS

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In his eight years on the United States Supreme Court, Justice Clarence Thomas has distinguished himself by the high quality of his writing, the clarity of his expression, and the tremendous force of logic and reasoning in his opinions. But the foremost characteristic, which makes him one of the most outstanding jurists ever to sit on the Court, is his fidelity to the Constitution.

As all of his opinions – whether majority decisions, concurrences, or dissents – demonstrate, his extensive research and careful application of history and precedent show his commitment to following the letter and spirit of our Nation's Founding Charter. He faithfully carries out the responsibility of every judge to say what the law *is*, leaving questions of what the law *should be* to the elected legislative branch of government.

I. THE TERM LIMITS CONTROVERSY

Justice Thomas's careful scholarship and adherence to the Constitution is well portrayed by his 1995 dissent in a case that sought to define the authority of the States in regard to a fundamental question of Constitutional interpretation. In *U.S. Term Limits, Inc. v. Thornton,*[1] the issue was whether the States had the power to regulate elections by limiting the number of terms a U.S. Senator or member of the House of Representatives could serve. The Constitution sets out certain qualifications for Representatives and Senators in Article I, § 2 and § 3.[2] In *Thornton*, the majority relied heavily on *Powell v. McCormack,*[3] which held that Congress cannot add to or detract from the qualifications in Article I. *Powell* did not, however, address whether the States could supplement the qualifications in Article I. In order to invalidate state-imposed qualifications, the Court in *Thornton* had to adopt an entirely new theory of State sovereignty – namely that the powers reserved to the States did not comprise all powers not delegated to the federal government, but something less. According to the majority, the Tenth

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1 514 U.S. 779 (1995).

2 The qualifications concern age, citizenship, and residence. *See* U.S. CONST. art. I., §§ 2, 3.

3 395 U.S. 486 (1969).

Amendment "could only 'reserve' that which existed before" ratification of the Constitution.[4] The Court reasoned that electing representatives to the national Congress was a new right, arising from the Constitution itself.[5] Thus, the Court ruled that the Tenth Amendment provides no basis for concluding that the States enjoy a reserved right to add qualifications to those fixed in the constitution.[6]

In a dispute that highlights the key difference between the majority and the dissent led by Justice Thomas, the Court reasoned that any state power to add qualifications must come, not from the reserved powers of state sovereignty, but from the delegated powers of national sovereignty. In a passage that turns the traditional understanding of the power of the States on its head, the Court concluded that: "In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist."[7]

Furthermore, the Court noted that although term limits was a major controversy to the Founding Fathers, nowhere in the ratification debates did they find a statement that the States could, under the new Constitution, require term limits for their congressional representatives.[8] The Court reasoned that if the Framers believed that the States retained the authority to impose term limits, "it is inconceivable that the Federalists would not have made this obvious response to the arguments of the pro–rotation forces."[9]

In a bold and thorough dissent, Justice Thomas rebutted the majority's opinion point–by–point and articulated a drastically different view of the Tenth Amendment. As Thomas explained: "The Federal Government and the States thus face different default rules: Where the Constitution is silent about the exercise of a particular power–that is, where the Constitution does not speak either expressly or by necessary implication–the Federal Government lacks the power and the States enjoy it."[10] Thomas's view of the Tenth Amendment and the limited nature of federal power is a constant theme throughout his jurisprudence.

Specifically, Thomas argued that for the Court to invalidate the term limits amendment to the Arkansas constitution, it must point to something in the U.S. Constitution that deprives the people of Arkansas the power to enact such measures. In the majority opinion, Justice

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4 *Thornton*, 514 U.S. at 802.
5 *See id.* at 805.
6 *See id.* at 802.
7 *Id.* at 805.
8 *See id.* at 812.
9 *Id.* at 814.
10 *Id.* at 848.

Stevens criticized Justice Thomas's view of the Tenth Amendment. Stevens stated that Justice Thomas's "Tenth Amendment argument misconceives the nature of the right at issue because the Amendment could only 'reserve' that which existed before" the ratification of the Constitution.[11] Thomas soundly refuted the argument that the States could not reserve any powers that they did not control at ratification with the following common sense observation.

> The Tenth Amendment's use of the word "reserved" does not help the majority's position. If someone says that the power to use a particular facility is reserved to some group, he is not saying anything about whether that group has previously used the facility. He is merely saying that the people who control the facility have designated that group as the entity with authority to use it. The Tenth Amendment is similar: The people of the States, from whom all governmental powers stem, have specified that all powers not prohibited to the States by the Federal Constitution are reserved "to the States respectively, or to the people."[12]

Also, Justice Thomas cited the prior power of the States to add qualifications to their representatives in the Federal Congress under the Articles of Confederation. He noted that the States "unquestionably" had the power to establish qualifications for their delegates above and beyond the qualifications in the Articles of Confederation.[13]

Thomas then examined the actual text of the Constitution's Qualifications Clauses. He noted that the Clauses do not, on their face, prohibit the States from adding term limits. Thomas argued that the Qualification Clauses "merely establish *minimum* qualifications."[14] The texts of the Clauses, Thomas noted, are fundamentally different from an exclusive formulation like the following: "Every Person, who shall have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall, when elected, be an Inhabitant of that State in which he shall be chosen, shall be eligible to be a Representative."[15] Such a formulation, as opposed to the actual Qualifications Clauses, would be exclusive and prevent term limits or other additional qualifications from being imposed without a constitutional amendment.

Thomas reasoned that the overall structure of the Constitution contradicts the Court's holding that the States cannot supplement the Qualifications Clauses. He urged the Court not to "read constitutional provisions to preclude state power by negative implication. The very

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11 *Id.* at 802.

12 *Id.* at 851–52 (quoting U.S. CONST. amend. X).

13 *See id.* at 851 n.3.

14 *Id.* at 867–68.

15 *Id.* at 868 (internal quotation marks omitted).

structure of the Constitution counsels such hesitation."[16] Specifically, he noted that Article I, § 10 contained a list of express prohibitions on the States. In light of the Tenth Amendment, combined with Article I, §10's express prohibitions on the States, "caution should be exercised before concluding that unstated limitations on state power were intended by the Framers."[17] Moreover, Thomas noted that many of the prohibitions on the States in Article I, § 10 seem implicit in other constitutional provisions, yet the Framers expressly stated the prohibitions.[18] For example, even though Article I, § 8 gives Congress, and not the States, the power to coin Money, Article I, § 10 prohibits the States from coining money.[19] As Thomas so accurately noted, "The fact that the Framers nonetheless made these prohibitions express confirms that one should not lightly read provisions like the Qualifications Clauses as implicit deprivations of state power."[20] Neither the text nor the apparent purpose of the Qualification Clauses, Justice Thomas argued, does anything to refute the following analysis of this very issue by Thomas Jefferson:

> Had the Constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the Constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications . . . . But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non–resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State.[21]

Thomas agreed with the majority and the Court in *Powell v. McCormack*[22] that Congress, as opposed to the States, has no power to prescribe the qualifications for its members.[23] His reasoning, however, highlights again the key difference between his approach and that of the majority. Thomas argued that the fact that Congress cannot add qualifications does not indicate that the Qualifications Clauses contain

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[16] *Id.* at 870.

[17] *Id.* (quoting Nevada v. Hall, 440 U.S. 410, 425 (1979)).

[18] *See id.* at 870–71.

[19] Article I, § 10 expressly states that "No State shall . . . coin Money . . . ." U.S. CONST. art. I, § 10.

[20] *Thornton*, 514 U.S. at 871.

[21] *Id.* at 874 (quoting Letter to Joseph C. Cabell (Jan. 31, 1814), *in* 14 WRITINGS OF THOMAS JEFFERSON (A. Lipscomb ed. 1904)) (internal quotation marks omitted) (ellipsis in original).

[22] 395 U.S. 486 (1969).

[23] *See Thornton*, 514 U.S. at 875.

"a hidden exclusivity provision."[24] The reason for Congress' incapacity to add qualifications, Thomas argued, "is not that the Qualifications Clauses deprive Congress of the authority to set qualifications, but rather that nothing in the Constitution grants Congress this power. In the absence of such a grant, Congress may not act."[25]

Furthermore, Thomas contended that the fact that the Framers did not grant Congress the power to supplement the Qualifications Clauses does not imply that the Framers intended to bar the States from doing so.[26] One obvious reason that the Framers denied Congress the power to supplement the Qualifications Clause was that Congressional incumbents could use this power to determine, and thus limit, who could run against them.[27] But as Justice Thomas reminded the court, "neither the people of the States nor the state legislatures would labor under the same conflict of interest when prescribing qualifications for Members of Congress, and so the Framers would have had to use a different calculus in determining whether to deprive them of this power."[28]

Thomas persuasively dismissed the majority's argument that the lack of statements in the ratification debates that the States could enact term limits indicates that they lack this power. Thomas turned this argument back on the majority—the recorded ratification debates contain no statement that the States cannot enact term limits. As he noted, during ratification, the existing rule in America allowed the States to prescribe eligibility requirements for their delegates to Congress in addition to the qualifications in the Articles of Confederation, even though the Articles gave Congress itself no power to impose such qualifications.[29] If the new Constitution was understood to deprive the States of this vital power, Thomas reasoned, then one would have expected opponents of the Constitution to seize on it in arguing against ratification. "The fact is that arguments based on the absence of recorded debate at the ratification conventions are suspect, because the surviving records of those debates are fragmentary."[30]

II. THERE ARE LIMITS TO THE COMMERCE CLAUSE

Perhaps no provision of the Constitution has been more abused by judicial interpretation than the Commerce Clause. Time and again, it has been used to justify the centralization of power in the national government by both the judiciary and Congress in a manner that totally

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[24] *Id.*
[25] *Id.*
[26] *See id.* at 917.
[27] *See id.*
[28] *Id.* at 877.
[29] *See id.* at 899–900.
[30] *Id.* at 900.

disregards the intent of the Framers to create a federal government of limited authority.

In *United States v. Lopez*,[31] Justice Thomas wrote a concurrence that has been described as "the most interesting judicial explication of the Commerce Clause in more than half a century."[32] In *Lopez*, the Court invalidated the federal Gun–Free School Zones Act,[33] which prohibited the possession of a gun within 500 feet of a school. The Court ruled that the statute exceeded Congress' power under the Commerce Clause[34] because the possession of a gun in a local school zone is not an economic activity that could have a substantial effect on interstate commerce.[35] The Court reasoned that the Gun–Free School Zones Act is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[36]

Justice Thomas's concurrence focused on the Court's recent Commerce Clause jurisprudence, specifically the "substantial effects test." Under this test, Thomas noted, Congress "may regulate not only 'Commerce . . . among the several states,' U.S. Const. Art. I, §8, cl. 3, but also anything that has a 'substantial effect' on such commerce."[37] Thomas examined the text, structure, and history of the Commerce Clause to demonstrate how far the Court has deviated from the Framers' original understanding of the Clause, and how the substantial effects test has contributed to this deviation.

First, Thomas noted that modern jurisprudence used a much broader definition of "commerce" than the Framers intended, one that includes essentially all economic activity.[38] At the time of ratification, "commerce" had a much narrower meaning.[39] Specifically, Thomas noted that "commerce" then consisted of selling, buying, and bartering,[40] as opposed to manufacturing and agriculture, and the Framers clearly understood and appreciated the difference. As evidence, Thomas quoted

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[31] 514 U.S. 549 (1995).

[32] John O. McGinnis, *Original Thomas, Conventional Souter: What Kind of Justices Should the Next President Pick?*, POL'Y REV. 25 (Fall 1995).

[33] 18 U.S.C. § 922(Q) (Supp. III 1994).

[34] U.S. CONST. art. I, § 8, cl. 3.

[35] *See Lopez*, 514 U.S. at 567.

[36] *Id.* at 561.

[37] *Id.* at 584 (Thomas, J., concurring).

[38] *See id.* at 585–89.

[39] *See id.* at 585–86 (quoting 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 361 (4th ed. 1773)) ("defining commerce as 'Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick'") (brackets in original).

[40] As Justice Thomas noted, during the discussion of the Commerce Clause during ratification, the Framers often used trade, in its bartering sense, and commerce interchangeably. *See id.* at 586 (citing THE FEDERALIST NO. 4, at 22 (John Jay) (Jacob E. Cooke ed., 1961) (contending that foreign nations will cultivate our friendship when our "trade" is prudently regulated by the Federal Government)).

Alexander Hamilton, the biggest proponent of the constitutional framers of a strong federal government. Hamilton repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors,[41] and Hamilton specifically wrote that "the supervision of agriculture" is beyond the power of the federal government.[42] Although the Framers understood that commerce, manufacturing, and agriculture were closely related, they gave Congress power to regulate only commerce. Consequently, Thomas argued, the Framers intended that Congress' power under the Commerce Clause to be quite limited.[43]

Perhaps more importantly, Justice Thomas analyzed the text and structure of the Commerce Clause to attack the substantial effects test. First, he made the obvious point that the Commerce Clause does not state that Congress may "regulate matters that substantially affect commerce" between the States. "Clearly, the Framers could have drafted a Constitution that contained a 'substantially affects interstate commerce' clause had that been their objective."[44] Second, Thomas reasoned that under the substantial effects test, many of Congress' other enumerated powers under Art. I, § 8 are superfluous. If Congress may regulate all matters that "substantially affect" interstate commerce, Thomas noted, then there is no reason for the Constitution to specify that Congress may enact bankruptcy laws, coin money, grant patents and copyrights, or punish counterfeiters because these activities obviously substantially affect commerce.[45] Such an interpretation of the Commerce Clause, Thomas wrote, "that makes the rest of § 8 superfluous simply cannot be correct."[46] In addition, if a substantial effects test can be appended to the Commerce Clause, Thomas asked, then why not to every other power of the Federal Government? Thomas argued that if this were the case, Congress could then regulate all matters that "substantially affect" bankruptcies, the Army and Navy, etc.[47] In sum, "Where the Constitution was meant to grant federal authority over an activity substantially affecting interstate commerce,

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[41] *See id.* at 586 (Thomas, J., concurring) (citing THE FEDERALIST NO. 36, at 224 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

[42] *Id.* at 591 (citing THE FEDERALIST NO. 17, at 106 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

[43] *See id.* at 590.

[44] *Id.* at 588.

[45] *See id.* Moreover, as Justice Thomas notes, the Framers knew that many of the other enumerated powers in § 8 concerned matters that "substantially affected" interstate commerce, but they specifically included them nonetheless. *Id.* at 588–89. Justice Thomas specifically noted that Madison spoke of the bankruptcy power as being "intimately connected with the regulation of commerce." *Id.* at 592 (citing THE FEDERALIST NO. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961)).

[46] *Id.* at 589 (Thomas, J., concurring).

[47] *See id.* at 588.

the Constitution contains an enumerated power over that particular activity."[48]

In addition to its lack of grounding in the original understanding of the Constitution, Thomas attacked the substantial effects test on the grounds that "it appears to grant Congress a police power over the nation."[49] Thomas reminded the Court that when asked at oral argument if there were any limits to federal power under the Commerce Clause, the Government was "at a loss for words."[50] The substantial effects test suffers from this overexpansion, Thomas explained, because of its "aggregation principle."[51]

> Under so–called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether the class of activities *as a whole* substantially affects interstate commerce, not whether any specific activity within the class has such effects when consider in isolation.[52]

Having surveyed the text and historical understanding, Justice Thomas then turned to the early precedent interpreting the Commerce Clause. Thomas argued that the Dissent and past precedent have misconstrued the early cases involving the Commerce Clause, particularly Chief Justice Marshall's opinion in *Gibbons v. Ogden.*[53] In *Gibbons*, Justice Thomas noted, the Court ruled that federal power does not encompass "commerce" that "does not extend to or *affect* other states."[54] In other words, the *Gibbons* Court held that federal power does not apply to purely intrastate commerce.[55] Thomas argued that the dissent misconstrued this quote from *Gibbons* by inferring that whenever any activity *affects* interstate commerce, it follows that Congress can regulate such activity.[56] Thomas reasoned that this "affects" language in *Gibbon,* at most, permits Congress to regulate only intrastate *commerce* that substantially affects interstate commerce *per se*, as opposed to *any activity* that substantially affects interstate commerce.[57] As Thomas wrote: "There is no reason to believe that Chief Justice Marshall was asserting that Congress could regulate all

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48 *Id.* at 592.

49 *Id.* at 600.

50 *Id.* (citing Tr. of Oral Arg. 5).

51 *Id.*

52 *Id.* (citations omitted).

53 22 U.S. (9 Wheat.) 1 (1824).

54 *Lopez*, 514 U.S. at 594 (citing *Gibbons*, 22 U.S. (9 Wheat.) at 194) (emphasis added).

55 *See id.* at 595.

56 *See id.*

57 *See id.*

activities that affect interstate commerce."[58] This distinction between intrastate commerce and any intrastate activity is key to Justice Thomas's concurrence. Although Justice Thomas left to a future case the announcement of an improved jurisprudence for Congress' authority under the Commerce Clause, he had little trouble with the facts in *Lopez*.

> But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, through the 50 States. Our Constitution quite properly leaves such matters to the individual States, *notwithstanding these activities' effects on interstate commerce.*[59]

III. THOMAS ORIGINALISM AND THE PROTECTION OF CIVIL LIBERTIES

A. McIntyre v. Ohio Elections Commission

In *McIntyre v. Ohio Elections Commission,*[60] the Court invalidated an Ohio statute that prohibited the distribution of anonymous campaign literature. Unlike a statute that prohibited all anonymous literature, the statute in *McIntyre* applied only to unsigned documents designed to influence a political election.[61] The Court held that the statute was thus a content–based restriction on speech.[62] As a content–based regulation, the Court subjected the statute to "exacting scrutiny," requiring it to be narrowly tailored to serve a compelling state interest.[63] After analyzing the statute under traditional strict scrutiny standards, the Court invalidated the statute under the Free Speech and Press Clauses of the First Amendment.[64]

Although Justice Thomas concurred in the judgment, he used a very different constitutional analysis. Beginning his concurrence, Thomas wrote:

> Instead of asking whether "an honorable tradition" of anonymous speech has existed throughout American history, or what the "value" of anonymous speech might be, we should determine whether the phrase "freedom of speech, or of the press," *as originally understood,* protected anonymous political leafleting . . . . We should seek the

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58 *Id.*

59 *Id.* at 585 (emphasis added).

60 514 U.S. 334 (1995).

61 *See id.* at 344. The facts in *McIntyre* were distinguishable from *Talley v. California*, 362 U.S. 60 (1960), where the Court invalidated a California statute that prohibited all anonymous hand billing "in any place under any circumstance." *McIntyre*, 514 U.S. at 334 (citing *Talley*, 362 U.S. at 60–61).

62 *McIntyre*, 514 U.S. at 345.

63 *See id.* at 347.

64 *See id.* at 357.

> original understanding when we interpret the Speech and Press Clauses . . . .[65]

Thomas acknowledged that there is no record of debate or discussion of anonymous political speech either in the First Congress, which drafted the Bill of Rights, or in the state ratifying conventions.[66] If there is no such record of debate or discussion of a particular constitutional provision, Thomas counseled, we should determine "'what history reveals was the contemporaneous understanding of the [Constitution's] guarantees.'"[67] Thus, Thomas contended, "our analysis must focus on the practices and beliefs held by the Founders concerning anonymous political articles and pamphlets."[68]

Thomas noted how extensively the Framers themselves used anonymous political writing.[69] As Thomas reminded the Court, the *Federalist Papers*, published under the pseudonym "Publius," are but the most famous example of anonymous political writing during the ratification period.[70] In fact, "[t]he practice of publishing one's thoughts anonymously or under pseudonym was so widespread that only two major Federalist or Anti–Federalist pieces appear to have been signed by their true authors, and they may have had special reason to do so."[71] To determine the original understanding of the Free Speech and Press Clauses, Thomas recalled how the Continental Congress treated anonymous political articles. In 1779, some in the Continental Congress attempted to uncover the identity of the author of an anonymous article that accused Congress of causing inflation and engaging in fraud.[72] When one member, Elbridge Gerry, moved to force the printer to identify the author, his motion failed.[73] Opponents of Gerry's motion to pierce the author's anonymity attacked it as violating the freedom of the press.[74] These opponents in Congress argued that "[t]he liberty of the Press ought not be restrained" and "[w]hen the liberty of the Press shall be restrained . . . the liberties of the people will be at an end."[75] According to

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65 *Id.* at 359 (Thomas, J., concurring) (emphasis added).

66 *See id.* at 360.

67 *Id.* at 359 (quoting Lynch v. Donnelly, 465 U.S. 668, 673 (1984)) (brackets added). While *Lynch* involved the Establishment Clause, Thomas argued that the Framers' original understanding of the Constitution should govern in interpreting the Speech and Press clauses, just as it does in the Religion clauses. *See id.*

68 *Id.* at 360.

69 *See id.* at 360–61.

70 *See id.* at 360.

71 *See id.* at 368.

72 *See id.* at 361.

73 *See id.*

74 *See id.*

75 *Id.* at 362 (citing *Henry Laurens, Notes of Debates*, July 3, 1779, *in* 13 LETTERS OF DELEGATES TO CONGRESS 1774–1789 139 (G. Gawalt & R. Gephart eds., 1986)).

Justice Thomas, this episode indicates that the Continental Congress believed that the freedom of the press included and protected anonymous writings.[76]

In addition, Thomas described how attempts in the private sector to prohibit anonymous political speech were similarly attacked as violating freedom of the press. Thomas recalled how a firestorm erupted when two Federalist newspapers, the Massachusetts *Centinel* and the Massachusetts *Gazette*, refused to publish anonymous articles.[77] These editorial decisions, Thomas noted, were specifically attacked as violating the freedom of the press.[78] One prominent Anti–Federalist, "Philadelphiensis" attacked these refusals to publish anonymous articles with the following:

> In this desperate situation of affairs . . . the friends of this despotic scheme of government, were driven to the last and only alternative from which there was any probability of success; namely the *abolition of the freedom of the press*. . . . In Boston the liberty of the press is now completely abolished; and hence all other privileges and rights of the people will in a short time be destroyed.[79]

In New York, another Anti–Federalist wrote that such Federalist efforts to prevent anonymous publishing would "'REVERSE the important doctrine of the freedom of the press.'"[80]

Justice Thomas reasoned that the controversy over these newspapers' refusal to publish anonymous political literature is relevant for several reasons.[81] First, as Thomas noted, the Anti–Federalists, who were the driving force behind the Bill of Rights, clearly believed that the right to publish anonymously was protected by the freedom of the press.[82] Second, Thomas argued that although these editorial decisions did not constitute state action and thus not implicate the Bill of Rights, the Anti–Federalist believed that the Federalists were merely "flexing the governmental powers they would fully exercise upon the Constitution's ratification."[83] Third and perhaps most importantly,

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[76] *See id.*

[77] *See id.* at 363–64.

[78] *See id.* at 364.

[79] *Id.* at 365 (quoting Philadelphiensis, *Essay I, Independent Gazetteer*, Nov. 7, 1787 *in* 3 THE COMPLETE ANTI–FEDERALIST 102 (H. Storing ed., 1981)).

[80] *Id.* at 336 (quoting Detector, *New York Journal*, Oct. 25, 1787, *in* DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 318 (J. Kaminsky & G. Saladino eds., 1981)).

[81] *See id.* at 366.

[82] *See id.*

[83] Thomas noted how one anti–Federalist viewed the issue: "Here we see pretty plainly through [the Federalists'] excellent regulation of the press, how things are to be carried on after the adoption of the new constitution." *Id.* at 365 (quoting Philadelphiensis, *Essay I, Independent Gazetteer*, Nov. 7, 1787, *in* 3 THE COMPLETE ANTI–FEDERALIST 102 (H. Storing ed., 1981)).

Thomas noted that these Federalist newspapers capitulated and agreed to print anonymous articles after they were attacked as violating the freedom of the press.[84] After discussing in depth these attempts to ban anonymous writing, Thomas wrote: "The understanding described above, however, when viewed in light of the Framers' universal practice of publishing anonymous articles and pamphlets, indicates that the Framers shared the belief that such activity was firmly part of the freedom of the press."[85]

Although Justice Thomas voted with the majority, he concurred only in the judgment because "the majority fails to seek the original understanding of the First Amendment . . . ."[86] To Thomas, the majority's traditional content–based speech analysis, while "faithfully" followed, was not necessary because "the original understanding [of the First Amendment] provides the answer."[87]

B. Wilson v. Arkansas

In *Wilson v. Arkansas*,[88] the Court considered whether the common law "knock–and–announce" rule was incorporated into the reasonable search inquiry under the Fourth Amendment.[89] The common law rule requires law enforcement officers to announce their presence and authority prior to entering someone's premises.[90] The facts in *Wilson* were straightforward. The police obtained a valid search warrant to search a suspected drug dealer's home.[91] At the outset of the search, the police found the main door to the suspect's home open.[92] While opening an unlocked screen door and entering the house, the police identified themselves and stated that they had a warrant. Inside the home, the police found a variety of narcotics and discovered the suspect flushing marijuana down the toilet.[93] Before trial, the suspect argued that the search was invalid and the evidence should be suppressed because the officers failed to "knock and announce" their presence before entering.[94]

Justice Thomas wrote the opinion for a unanimous Court. As Thomas stated, the issue before the Court was, as stated above, quite narrow—does the common law knock–and–announce rule form part of

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84 *See id.* at 366–67.
85 *Id.* at 367.
86 *Id.* at 370.
87 *Id.*
88 514 U.S. 927 (1995).
89 *See id.* at 929.
90 *See id.*
91 *See id.*
92 *See id.*
93 *See id.*
94 *See id.* at 930.

the inquiry concerning whether a search and seizure is "reasonable" under the Fourth Amendment?[95] In answering this question in the affirmative, Justice Thomas led the Court to embrace the original meaning of the Constitution as a basis for constitutional interpretation.

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures."[96] While Thomas explained that the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, he stated that "our effort to give content to this term [reasonableness] may be guided by the meaning ascribed to it by the Framers of the Amendment."[97] Although the common law generally protected a man's house as "'his castle of defense and asylum,'"[98] Thomas noted that even the common law allowed the sheriff to enter a person's home to make a valid arrest or otherwise execute the King's process.[99] To this general rule, Thomas explained, the common law courts added an important qualification:

> *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* . . . for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensure to the party, when no default is in him . . . .[100]

In addition, Justice Thomas noted that the founding–era commentators agreed with the common law knock–and–announce rule.[101] Perhaps the most prominent of such commentators, Sir William Blackstone, stated that the sheriff may "'justify breaking open doors, if possession be not quietly delivered.'"[102] Even more precise was William Hawkins, who stated that the "'law doth never allow' an officer to break open the door of a dwelling . . . unless he 'first signify to those in the house the cause of his coming, and request them to give him admittance.'"[103]

Justice Thomas explained how the common law knock–and–announce principle was incorporated into early American law.[104] Thomas noted that most States that ratified the Fourth Amendment had

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[95] *See id.*

[96] U.S. CONST. amend. IV (emphasis added).

[97] *Wilson*, 514 U.S. at 931.

[98] *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *288).

[99] *See id.* at 931.

[100] *Id.* at 931–32 (quoting Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B.1603)) (emphasis added).

[101] *See id.* at 932.

[102] *Id.* at 933 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *412).

[103] *Id.* at 932 (quoting 2 W. HAWKINS, PLEAS OF THE CROWN, ch. 14, § 1, at 138 (n.p. 1787)).

[104] *See id.* at 933–34.

officially incorporated the English common law, presumably including the knock–and–announce principle.[105] More importantly, early American courts followed suit and adopted the knock–and–announce rule.[106] This led Justice Thomas to conclude:

> Given the longstanding common–law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.[107]

Those who have a strong interest in law enforcement should not be alarmed by Justice Thomas's opinion in *Wilson*. Thomas stressed that not every entry must be preceded by announcement.[108] Instead, the knock–and–announce principle is only one factor to be considered in the reasonableness inquiry.[109] Thomas emphasized that officers could dispense with announcement in cases where the suspect is an escapee, evidence is likely to be destroyed, or when threat of violence exists.[110] Finally, Thomas noted that under the facts in *Wilson*, the unannounced entry may well have been justified and remanded the case to allow the State courts to make the determination.[111]

C. Kansas v. Hendricks

In *Kansas v. Hendricks*,[112] the Court addressed the Kansas Sexually Violent Predator Act. This Act established a civil commitment procedure for repeat sexual offenders.[113] It defined "sexually violent predators" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."[114] Under the Act, after a medical evaluation occurred, a trial would be held to determine beyond a reasonable doubt whether the individual was a sexually violent predator.[115] If that determination was made, the person would be confined for "control, care, and treatment

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105 *See id.* at 933.

106 *See id.* (citing Walker v. Fox, 32 Ky. 404, 405 (1834); Howe v. Butterfield, 58 Mass. 302, 305 (1849); Burton v. Wilkinson, 18 Vt. 186, 189 (1846)).

107 *Id.* at 934.

108 *See id.*

109 *See id.*

110 *See id.* at 936.

111 *See id.* at 937.

112 521 U.S. 346 (1997).

113 *See id.* at 350.

114 *Id.* at 352.

115 *See id.* at 353.

until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."[116]

The Respondent, Hendricks, who had been convicted and imprisoned for a series of sexual offenses, was the first person civilly committed under the Sexually Violent Predator Act.[117] Hendricks argued that the Act establishes criminal proceedings and that confinement under the Act necessarily constitutes punishment.[118] He claimed that because the "punishment" of confinement was based on past conduct for which he had already been convicted and imprisoned, the Constitution's Double Jeopardy and Ex Post Facto Clauses were violated.[119]

Writing for the majority, Justice Thomas rejected the contention that the Sexually Violent Predator Act created a criminal penalty at all.[120] Thomas reasoned that civil commitment under the Act does not implicate either of the primary objectives of criminal punishment: retribution or deterrence.[121] The Act is not retributive, Thomas noted, because it does not affix blame for prior crimes.[122] Instead, under the Act, past criminal conduct is used solely for evidentiary purposes to show a mental abnormality or to support a finding of future dangerousness.[123] In addition, Thomas noted, the fact that the Act does not require either a criminal conviction or a finding of scienter to commit someone is further evidence that it is not retributive.[124]

Also, Justice Thomas held that the Act did not serve a deterrent purpose.[125] To be committed under the Act, a person must suffer from a "mental abnormality" or "personality disorder."[126] Such a person, Thomas reasoned, is unlikely to be deterred by the threat of civil confinement.[127] Moreover, the conditions surrounding the civil confinement, which mirror those of the state mental hospital, do not suggest a punitive purpose on the State's part.[128]

Hendricks argued that his confinement's potentially indefinite duration and the lack of "legitimate" treatment were evidence of the Act's punitive intent.[129] Thomas dismissed these points as well.

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116 *Id.*
117 *See id.* at 367–68.
118 *See id.* at 361.
119 *See id.* at 360–61.
120 *See id.* at 361.
121 *See id.* at 362–63.
122 *See id.* at 362.
123 *See id.*
124 *See id.*
125 *See id.* at 362–63.
126 *Id.* at 362.
127 *See id.* at 362–63.
128 *See id.* at 363.
129 *See id.* at 363–65.

Concerning the confinement's potentially indefinite duration, Thomas noted that this indeterminate confinement was consistent with the purpose of the act, namely to confine the person until his mental abnormality no longer causes him to be a threat to others.[130] Also under the Act, the maximum length of time one can be confined pursuant to a single judicial proceeding is one year.[131] If Kansas seeks to confine someone beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement.[132]

Concerning the alleged lack of treatment, Thomas noted that the Kansas Supreme Court found that treatment is not possible for Hendricks' condition.[133] Thomas stated that the "we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others."[134] Thomas reasoned that it would be "of little value" to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed.[135]

IV. CONCLUSION

This small sampling of the opinions authored by Justice Thomas shows the high quality of his legal research and the excellence of his scholarship. His work is a model of superior writing. But, most importantly, he has remained true to the highest ideals of his judicial philosophy by carefully interpreting the Constitution and always being cognizant of its limitations on a judge's authority. This combination of high achievement and commendable restraint makes Clarence Thomas an outstanding jurist for all ages.

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130 *See id.* at 363.
131 *See id.* at 364.
132 *See id.*
133 *See id.* at 365.
134 *Id.* at 366.
135 *See id.*