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Black Like Me: The Free Speech Jurisprudence of Clarence Thomas

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ABSTRACT

As arguably the most ferocious conservative on the Supreme Court, Clarence Thomas is not usually associated with civil liberties causes, except insofar as popular myth portrays him as hostile to those causes. Contrary to this mythology, however, Thomas has carved out a definitively speech-protective path in his First Amendment opinions. While there have been some notable exceptions, it can be argued that Clarence Thomas is the most pronounced free speech absolutist on the Supreme Court since Hugo Black, who famously (if somewhat apocryphally) believed that "no law means no law" when it comes to the First Amendment.

This article will track Justice Thomas' free speech jurisprudence, with an eye on observing how it has changed—or remained constant—over time. Specific attention will be paid to Thomas' quarrels with the majority's compromise approaches to contemporary free speech controversies such as commercial speech and campaign finance regulation, and to his insistence that the free speech clause tolerates little in the way of even incremental restrictions on expression. Along the way, the paper will systematically compare Thomas' overall theory of what free speech means to the approaches to the subject taken by other Justices and theorists.

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> *"It is my belief that there ARE absolutes in our Bill of Rights, and that they were put there by men who knew what words meant, and meant their prohibitions to be absolute."*
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> Justice Hugo Black
> Madison Lecture, New York University School of Law
> February 17, 1960

INTRODUCTION

For one of the most scrutinized and psychoanalyzed figures in Supreme Court history, Clarence Thomas has inspired a startling paucity of writing about his jurisprudence. While there have been biographies of Justice Thomas[1] (and one autobiography),[2] narratives of his confirmation hearings,[3] and accounts of his symbolic place in contemporary American

1. *See, e.g.*, KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS (2007); KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS (2004); JOHN L. COOPER, THE PRINCE AND THE PAUPER: THE CASE AGAINST CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT (2001); JOHN GREENYA, SILENT JUSTICE: THE CLARENCE THOMAS STORY (2001); ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY (2001).

2. *See* CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007).

3. *See, e.g.*, JANE FLAX, THE AMERICAN DREAM IN BLACK AND WHITE: THE CLARENCE THOMAS HEARINGS (1999); JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994); CHRISTOPHER E. SMITH, CRITICAL JUDICIAL NOMINATIONS AND POLITICAL CHANGE: THE IMPACT OF CLARENCE THOMAS (1993); TIMOTHY B. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL, AND THE STORY OF A SUPREME COURT NOMINATION (1992).

politics,[4] he has inspired comparatively little in the way of book-length exploration of his judicial philosophy,[5] despite being on the Court now for over seventeen years. Much of this limited treatment of his jurisprudence that does exist, furthermore, appeared several years ago; there seems to be only one study of Thomas' jurisprudence that covers his recent output.[6]

The scholarship on Thomas is complicated, meanwhile, by its tone. Little of the writing aspires to neutrality; much of it is either hagiography or polemic. Henry Mark Holzer's analysis of Thomas's opinions is subtitled "A Conservative's Perspective," leaving a reader little doubt of what the author's take on the opinions will be. On the other end of the spectrum, accounts of Thomas which purport to make "the case against" him,[7] or hold him up as emblematic of "the failure of constitutional conservatives,"[8] or insist that he should be impeached for perjuring himself during his confirmation hearings,[9] similarly fail to provide reliably detached analysis.

The story of Clarence Thomas is told somewhat more comprehensively in the law reviews. There are a host of articles that place Thomas in a subject-specific context, such as race,[10] federalism,[11] the Guantanamo detentions,[12] and criminal justice,[13] as well as a handful of intriguing articles about Thomas' overall jurisprudential philosophy.[14]

4. *See, e.g.*, CHRISTOPHER E. SMITH AND JOYCE BAUGH, THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY (2000); RONALD SURESH ROBERTS, CLARENCE THOMAS AND THE TOUGH LOVE CROWD: COUNTERFEIT HEROES AND UNHAPPY TRUTHS (1994).

5. *See* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (1999); SAMUEL A. MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES (2002).

6. *See* HENRY MARK HOLZER, KEEPER OF THE FLAME: THE SUPREME COURT OPINIONS OF CLARENCE THOMAS 1991-2006: A CONSERVATIVE'S PERSPECTIVE (2007).

7. *See* COOPER, *supra* note 1.

8. *See* MARCOSSON, *supra* note 5.

9. *See* SMITH & BAUGH, *supra* note 4.

10. *See, e.g.*, Andre Douglas Pond Cummings, *Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in this Part of Town,"* 21 HARV. BLACKLETTER L.J. 1 (2005); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005); Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323 (2004).

11. *See* David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339 (1996).

12. *See* Christopher E. Smith & Cheryl D. Lema, *Justice Clarence Thomas and Incommunicado Detention: Justifications and Risks*, 39 VAL. U. L. REV. 783 (2005).

13. *See* Eric L. Muller, *Where, But For the Grace of God, Goes He? The Search For Empathy In the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225 (1998).

14. *See* Kendall Thomas, *Reading Clarence Thomas*, 18 NAT'L BLACK L.J. 224 (2004); Samuel Marcosson, *Colorizing the Constitution of Originalism: Clarence*

Yet it is still surprising for such a polarizing figure to have aroused a relatively small amount of appraisals of his work.[15]

Perhaps most surprisingly, there does not seem to be a comprehensive examination of Thomas' work on freedom of speech. The reason this is a surprise is that in his years on the Court, Thomas has emerged as a distinctive and interesting voice on free expression. While he is often disparaged as merely a clone—or a puppet—of his fellow conservative Antonin Scalia, the picture of Clarence Thomas that emerges over time is one that evinces significant variance between him and Scalia, or for that matter between him and any one of his colleagues on the contemporary Court.[16]

Thomas at the Rubicon, 16 LAW & INEQ. 429 (1998); Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1 (1997).

15. Specific assessments of Thomas in political science journals mostly deal with the mechanics of his confirmation. *See* Vincent L. Hutchings, *Political Context, Issue Salience, and Selective Attentiveness: Constituent Knowledge of the Clarence Thomas Confirmation Vote*, 63 J. POL. 846 (2001); L. Martin Overby, Beth M. Henschen, Michael H. Walsh, & Julie Strauss, *Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas*, 86 AM. POL. SCI. REV. 997 (1992); Martin Shefter, *Institutional Conflict Over Presidential Appointments: The Case of Clarence Thomas*, 25.4 POL. SCI. & POL. 676 (1992); Lee Sigelman & James S. Todd, *Clarence Thomas, Black Pluralism, and Civil Rights Policy*, 107 POL. SCI. Q. 231 (1992). For public reaction to his confirmation, see Dianne Rucinski, *A Review: Rush To Judgment? Fast Reaction Polls in the Anita Hill-Clarence Thomas Controversy*, 57 PUB. OPINION Q. 575 (1993); Dan Thomas, Craig McCoy, & Allan McBride, *Deconstructing the Political Spectacle: Sex, Race, and Subjectivity in Public Response to the Clarence Thomas/Anita Hill 'Sexual Harassment' Hearings*, 37 AM. J. POL. SCI. 699 (1993). For discussion on how his nomination affected the 1992 elections, see Thomas P. Kim, *Clarence Thomas and the Politicization of Candidate Gender in the 1992 Senate Elections*, 23 LEGIS. STUD. Q. 399 (1998); Robin M. Wolpert & James G. Gimpel, *Information, Recall, and Accountability: The Electorate's Response to the Clarence Thomas Nomination*, 22 LEGIS. STUD. Q. 535 (1997). There are isolated articles in political science journals which take on Thomas' performance on the bench. *See* Rudolph Alexander, Jr., *Justice Clarence Thomas' First Year on the U.S. Supreme Court: A Reason for African-Americans to be Concerned*, 27 J. BLACK STUD. 378 (1997). For the most part, these journals will leave jurisprudential analysis to law reviews.

16. If anything, Thomas' iconoclasm seems to be increasing, generally speaking. In two high-profile cases at the end of the 2008-2009 Term, Thomas found himself occupying a position which attracted no other votes. On June 22, in *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009), the Court unanimously held that the Texas district should have a greater opportunity to demonstrate that the preclearance provisions of the Voting Rights Act should not apply to it. Thomas was the only Justice arguing directly that § 5 of the Act be stricken as unconstitutional; while his colleagues all noticed problems with this part of the law, none but Thomas were willing to raise comprehensive objections. *Id.* at 2517 (Thomas, J., concurring in the judgment and dissenting in part). Three days later, in *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), Thomas was the only Justice arguing for the constitutionality of a school's strip-search of a teenage girl (in a search for ibuprofen tablets the girl was rumored to be hiding).

Northwest Austin and *Safford* are the latest examples in a skyrocketing trend: the increasing number of times Clarence Thomas finds himself alone in dissent. In his first

Indeed, one has to go back in time to find a true analog to Clarence Thomas on the subject of speech. The singular distinguishing characteristic of Thomas' free speech jurisprudence has been a mostly uncompromising absolutism on the meaning of the First Amendment and how little leeway it affords government to finesse its protections, even at the margins. Where his contemporaries on the Court are perhaps too willing to fashion compromises or tolerate corner-cutting on free speech, Thomas positions himself as a stubborn and even iconoclastic dogmatist. He disposes of artificial distinctions that strike him both as intellectually bankrupt and stealthily enabling of governmental regulation of speech through a side door.

In these respects, the other Supreme Court Justice that Clarence Thomas most resembles is Hugo Black. At least until the very end of his career, Black was a boisterous advocate of the limitlessness of the First Amendment, which in his eyes defied any governmental attempt to place any restriction on speech, no matter how incremental or allegedly necessary it might be. Black eloquently disseminated his philosophy on speech many times and in many fora. In his dissent in *Beauharnais v. Illinois*[17] (joined by his good friend William O. Douglas), Black angrily criticized the majority's recognition of the concept of group libel as a dangerous precedent that could empower government to criminalize any differences of political opinion:

> To say that a legislative body can, with this Court's approval, make it a crime to petition for and publicly discuss proposed legislation seems as farfetched to me as it would be to say that a valid law could be enacted to punish a candidate for President for telling the people his views. I think the First Amendment, with the Fourteenth, "absolutely" forbids such laws without any "ifs" or "buts" or "whereases." Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech. The Court [today] does not act on this view of the Founders. It calculates what it deems to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship.[18]

Black restated his absolutism eight years later, in an even broader form. Invited to give the inaugural Madison Lecture at New York University School of Law, Black used the occasion to remind his listeners of why he

fifteen years on the Court, through the end of the 2005-2006 Term, Thomas issued twelve solo dissents. But in the last three Terms, Thomas has issued another ten solo dissents.

17. Beauharnais v. Illinois, 343 U.S. 250 (1952).

18. *Id*. at 275 (Black, J., dissenting).

continued to argue for "total incorporation" of the Bill of Rights. While his Court colleagues clung to the vision that the Fourteenth Amendment only made portions of the Bill of Rights binding upon the states, Black insisted that the entire Bill of Rights was made applicable to the states. His absolutism about the nature of rights in general was a natural hothouse for the development of his absolutism about speech in particular:

> It is my belief that there *are* "absolutes" in our Bill of Rights, and that they were put there by men who knew what words meant, and meant their prohibitions to be "absolute." . . . The historical and practical purposes of a Bill of Rights, the very use of a written constitution . . . all point to the creation of a government which was denied all power to do some things under any and all circumstances, and all power to do other things except in the manner prescribed.[19]

Black's embrace of free speech was so all-encompassing in fact, that in an interview two years after the Madison Lecture, he suggested that the First Amendment even safeguarded libel and slander.[20] As one of the biographies of Black has put it, to Black "[t]he First Amendment's guarantee of free speech was much more than 'an admonition'; it was a categorical command to government to leave the people alone!"[21]

This article will show how Clarence Thomas' free speech jurisprudence is a descendant of Black's absolutist free speech tradition, albeit with some points of dissonance. There are some subject areas in which Black and Thomas overlap, most notably the First Amendment's applicability to students. But what makes the parallels between Black and Thomas so interesting is that for the most part, Thomas is applying his absolutist free speech principles in subject areas which Black never had occasion to contemplate, such as commercial speech and campaign finance. Even though Thomas is working in a set of worlds to which Black was rarely or never exposed, the free speech outlook which backstops his legal conclusions in those areas owes quite a lot to his legendary predecessor.

19. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960).

20. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 513 (1994). Black would give voice to this sentiment in 1964, in his concurrence in New York Times v. Sullivan, 376 U.S. 254 (1964). Noting that "state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials," Black declared that "the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty." *Id.* at 295 (Black, J., concurring).

21. HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 138 (1992).

While it is easy to point out the philosophical similarities between Black's and Thomas' approach to free speech, it is a little more difficult to place Thomas in the broader continuum of free speech theory. After delineating Thomas' positions in several hot-button areas of free speech in the first stages of this article, the article will then proceed to show that Thomas does not fit precisely into any of the traditional understandings of what free speech is, what it does, and how it works. Classical formulations of free speech include the belief that it is designed to facilitate democratic decisionmaking,[22] or to enable individual self-fulfillment,[23] or to prevent mainstream ideas from overrunning new or dissident ideas.[24] Clarence Thomas' version of free speech cannot be inserted comfortably within any of these formulations; he seems to derive more inspiration from Ayn Rand or F.A. Hayek than from Alexander Meiklejohn or Thomas Emerson. Despite his marked similarities to Hugo Black, Clarence Thomas is a true free speech original.

CLARENCE THOMAS ON SPEECH: THE DATA

Beginning with his first published opinion for the Court, released on January 14, 1992,[25] Clarence Thomas has written a total of 432 opinions through the end of the 2008-09 Term, and has written the Opinion of Court 149 times (an average 8.76 Opinions of the Court per Term, which is the lowest rate of any current Justice with at least five years' service).[26] Out of his 432 opinions, thirty-one of them are speech cases, listed in the table on the following page. Five of his speech opinions are main opinions, sixteen are concurrences, seven are dissents (two of these are from denials of certiorari), and three are concurrences-in-part-and-dissents-in-part).[27]

22. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

23. *See generally* THOMAS EMERSON, THE SYSTEM OF FREE EXPRESSION (1970).

24. *See generally* David A.J. Richards, *Free Speech As Toleration*, *in* FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY (W.J. Waluchow, ed., 1994).

25. *See* Molzof v. United Sates, 502 U.S. 301 (1992), in which Thomas authored a unanimous decision confirming the federal government's liability for damages stemming from an accident at a VA hospital. This was not only Thomas' first main opinion for the Court, but also the first opinion he had written of any kind; he had not published any concurrences or dissents prior to this case.

26. *See* Appendix, *infra*.

27. Hugo Black's numbers are as follows: he served thirty-four terms on the Court, from 1937-1938 through 1970-1971. In that time, he wrote 501 main opinions, an average of 14.73 per term. Of course, Black's tenure is part of an era when the Court was usually deciding over 100 cases per term, and sometimes over 200. Today, the Court has not decided more than 100 cases in a single term since 1995; by contrast, in Black's tenure, the Court decided fewer than 100 case in a given term only twice (1949 and

Clarence Thomas' Supreme Court Speech Opinions

NAME	CITATION	TYPE OF OPINION	SOLO?	JOIN?
Federal Communications Commission v. Fox Television Stations	129 S.Ct. 1800 (2009)	Concur	YES	YES
Washington State Grange v. Washington State Republican Party	128 S.Ct. 1184 (2008)	Main	*n/a*	*n/a*
Morse v. Frederick	551 U.S. 393 (2007)	Concur	YES	YES
Tennessee Secondary School Athletic Association v. Brentwood Academy (a/k/a "Brentwood 2")	551 U.S. 291 (2007)	Concur	YES	NO
Beard v. Banks	548 U.S. 521 (2006)	Concur	NO	NO
Randall v. Sorrell	548 U.S. 230 (2006)	Concur	NO	NO
Johanns v. Livestock Marketing Association	544 U.S. 550 (2005)	Concur	YES	YES
McConnell v. Federal Election Commission	540 U.S. 93 (2003)	Concur/Dissent	YES	in part
Federal Election Commission v. Beaumont	539 U.S. 146 (2003)	Dissent	NO	*n/a*
Virginia v. Black	538 U.S. 343 (2002)	Dissent	YES	*n/a*
Borgner v. Florida Board of Dentistry	537 U.S. 1080 (2002)	Dissent (cert denial)	YES	*n/a*
Ashcroft v. American Civil Liberties Union	535 U.S. 564 (2002)	Main (plurality)	*n/a*	*n/a*
Thompson v. Western States Medical Center	535 U.S. 357 (2002)	Concur	YES	YES

1953). *See* Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, & Thomas G. Walker, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 72-75 (4th ed. 2007).

Black wrote a total of eighty-one opinions in speech cases: twenty-one main opinions, twenty concurrences, and forty dissents (including one dissent from a denial of certiorari). Here again, context is required. During Black's tenure, the Court comprehensively revolutionized libel law, and felt its way through several attempts to define obscenity. Yet these spikes in speech cases occurred in the 1960's, when Black had already been on the Court for two decades. Many of his concurrences and dissents prior to 1960 were attempts to underscore the free speech dimensions of cases in which the majority had ignored the First Amendment's significance (such as in loyalty oath cases).

Ashcroft v. Free Speech Coalition	535 U.S. 234 (2002)	Concur	YES	NO
Lorillard Tobacco Co. v. Reilly	533 U.S. 525 (2001)	Concur	YES	YES
Federal Election Commission v. Colorado Republican Federal Campaign Committee (a/k/a "Colorado 2")	533 U.S. 431 (2001)	Dissent	NO	*n/a*
U.S. Department of Agriculture v. United Foods	533 U.S. 405 (2001)	Concur	YES	YES
Good News Club v. Milford Central School	533 U.S. 98 (2001)	Main	*n/a*	*n/a*
Shaw v. Murphy	532 U.S. 223 (2001)	Main	*n/a*	*n/a*
Avis Rent-a-Car v. Aguilar	529 U.S. 1138 (2000)	Dissent (cert denial)	YES	*n/a*
United States v. Playboy Entertainment Group	529 U.S. 803 (2000)	Concur	YES	YES
Nixon v. Shrink Missouri Government PAC	528 U.S. 377 (2000)	Dissent	NO	*n/a*
Greater New Orleans Broadcasting Association v. United States	527 U.S. 173 (1999)	Concur	YES	NO
Buckley v. American Constitutional Law Foundation	525 U.S. 182 (1999)	Concur	YES	NO
Glickman v. Wileman Brothers & Elliott	521 U.S. 457 (1997)	Dissent	NO	*n/a*
Denver Area Education Telecommunications Consortium v. Federal Communications Commission	518 U.S. 727 (1996)	Concur/Dissent	NO	NO
Colorado Republican Federal Campaign Committee v. Federal Election Commission (a/k/a "Colorado 1")	518 U.S. 604 (1996)	Concur/Dissent	NO	in part
44 Liquormart v. Rhode Island	517 U.S. 484 (1996)	Concur	YES	in part
Capitol Square Review and Advisory Board v. Pinette	515 U.S. 753 (1995)	Concur	YES	YES
Rubin v. Coors Brewing Company	514 U.S. 476 (1995)	Main	*n/a*	*n/a*
McIntyre v. Ohio Elections Commission	514 U.S. 334 (1995)	Concur	YES	NO

Breaking down this raw data even further, the following is evident:

- Of his sixteen concurrences, seven of them were opinions written when he refused to sign onto the main opinion in the case, eight of them were opinions he offered in addition to joining the main opinion, and one was an opinion submitted when he was only willing to join part of the main opinion;
- Of his sixteen concurrences fourteen were solo opinions (as was one of his three concurrences-in-part-dissents-in-part);
- Of his five "regular" dissents, only one was a solo opinion (his two dissents from denials of certiorari were solo efforts).

Finally, while this article will periodically delve into the philosophical similarities and differences between Clarence Thomas and Antonin Scalia on free speech, some data can be relayed now:

- Scalia signed onto four of Thomas' main free speech opinions (all but *Washington State Grange v. Washington State Republican Party*, in which Scalia dissented);
- Scalia signed onto all eight of the Thomas free speech concurrences, dissents, or partials that were not solo efforts;
- Of these eight, five of them were also signed by Scalia only (two were signed by Scalia and Rehnquist, one was signed by Scalia, Rehnquist, and Kennedy);
- Out of the twenty-nine full free speech cases in which Clarence Thomas has written an opinion of some sort (not counting the two cases in which Thomas dissented from a denial of certiorari), Thomas and Scalia were on the same side of the case twenty-five times; only in *Washington State Grange v. Washington State Republican Party*, *Ashcroft v. Free Speech Coalition*, *United States v. Playboy Entertainment Group*, and

McIntyre v. Ohio Elections Commission did they find themselves on opposite sides of a case.[28]

CLARENCE THOMAS ON SPEECH: JURISPRUDENTIAL BEGINNINGS

It was over three years into his tenure on the Court before Thomas published his first free speech opinion. Thomas concurred in *McIntyre v. Ohio Elections Commission*,[29] in which the Court threw out a fine assessed to a protestor who was anonymously leafleting against a proposed school tax ballot initiative, in violation of a state ban on leaflets that did not contain the name and address of the author or sponsoring organization.[30] Agreeing with the result, but refusing to join John Paul Stevens' majority opinion, Thomas gave his own reasons why the fine was constitutionally impermissible.

Although Thomas conceded that there was no specific protection for anonymous speech written into the First Amendment, his expansive look at the history of anonymous speech showed that the Framers' era was replete with anonymous pamphlets and newspaper columns, including, of course, *The Federalist Papers*, written under the pseudonym "Publius."[31] Amidst this lengthy disquisition on the place of anonymous speech in the founding era, however, was a brief remark that stood as a portent of Thomas' future writings.

The primary reason Thomas refused to join Stevens' opinion was methodological. Stevens, as Thomas saw it, had committed the cardinal sin of balancing. He had essentially weighed the public interest in knowing the identity of political speakers (as well as the government's interest in being able to regulate the conditions for ballot propositions) against the interest of speakers to remain anonymous if they so desire. The fact that Stevens had arrived at the correct result when balancing these interest was of no moment. To Thomas, the problem with Stevens'

28. In Virginia v. Black, 538 U.S. 343 (2003), Thomas takes the unusual step of signing onto Scalia's concurring opinion, but also issuing his own solo dissenting opinion. This case will be discussed in detail later in this article.

29. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

30. In an eerie coincidence, the Court's emphatic defense of the free speech rights of the anonymous anti-government protestor was released on the same day that Timothy McVeigh and Terry Nichols blew up the Alfred Murrah Federal Building in Oklahoma City: April 19, 1995.

31. *See McIntyre*, 514 U.S. at 360 (Thomas, J., concurring). Interestingly, Thomas used this occasion to chide the historical references Stevens relied upon: "Whether 'great works of literature' by Voltaire or George Eliot have been published anonymously should be irrelevant to our analysis, because it sheds no light on what the phrases 'free speech' or 'free press' meant to the people who drafted and ratified the First Amendment." *Id.* at 370.

approach was that Stevens had sought in the first place to make a finding "that anonymous speech has an expressive value both to the speaker and to society that outweighs public interest in disclosure,"[32] instead of recognizing that a speaker's right to be anonymous was absolute (and completely consistent with the history).

THE ICONOCLAST EMERGES: COMMERCIAL SPEECH

On the same day the opinion in *McIntyre* was released, the Court announced its decision in a case that had been argued six weeks after *McIntyre*'s oral argument: *Rubin v. Coors Brewing Company*.[33] This case would be a landmark in Clarence Thomas' free speech jurisprudence, and not just because it is the first main opinion on free speech that he produces. More importantly, it is the beginning of an extended and dissident path for Thomas on a subject which takes up more than a quarter of his free speech output: commercial speech.

Back in 1942, in *Valentine v. Chrestensen,*[34] the Supreme Court said that advertising was not entitled to the protection of the First Amendment. That decision, however, was casually written by Owen Roberts, and did not evince much in the way of intellectual rigor. Eventually, the Court's hostility towards advertising receded, but did not completely evaporate. Starting in the early 1970's, the Court gradually began feeling its way towards an alternative posture, leading to its 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[35] in which it reversed course and announced that commercial speech was entitled to some level of First Amendment shelter, albeit not the complete protection afforded to noncommercial speech. After struggling for a couple of years to formulate a methodology that would pin down the different levels of protection, the Court finally announced a four-part test for determining the constitutionality of an advertising restriction, in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.[36]

32. *Id.*

33. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

34. Valentine v. Chrestensen, 316 U.S. 52 (1942).

35. Va. State. Bd. of Pharm. v. Va. Citizens' Consumer Council, 425 U.S. 748 (1976).

36. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980). The *Central Hudson* test is as follows: (1) the expression must concern lawful activity and not be misleading; (2) there must be a substantial governmental interest supporting the proposed regulation; (3) the regulation must directly advance the governmental interest; and (4) the regulation must be no more extensive than necessary. *See id.* at 566.

Far from clarifying matters, though, *Central Hudson* seemed to invite more confusion about the constitutional status of advertising.[37] The one area that appeared to be settled was the Court's unanimous sense that advertising was not entitled to the full protections of the First Amendment.[38] Clarence Thomas, in time, would shatter that unanimity, and his opinion in *Rubin* was the first step down that road.

At issue in *Rubin* was a 1935 federal law prohibiting beer labels from disclosing alcohol content. The stated reason for the law was to prevent "strength wars" among brewers; if they could print alcohol content on the label, this would give incentive for brewers to ratchet up the proof of their product. In 1987, the Coors Brewing Company submitted beer labels for governmental approval that disclosed alcohol content anyway; when their label was rejected, they challenged the constitutionality of the ban. Writing for a unanimous Court, Thomas threw the ban out, but did so via a routine application of the *Central Hudson* test.[39]

The following year, however, Thomas fired his first real shot in his lonely commercial speech revolution, in *44 Liquormart v. Rhode Island*.[40] A Rhode Island law banning the advertisement of prices of alcoholic beverages had been invoked against a liquor store that had advertised prices on mixers and snack foods, and printed the word "Wow!" next to a picture of vodka bottles. According to the state, d implied bargain prices on alcohol, and a $400 fine was imposed. The

37. Over the years, the Court experimented with a "greater-includes-the-lesser" approach which held that if government has the power to ban an activity outright (such as casino gambling), then it can ban advertising of that activity even if it allows the activity itself to remain legal, *see* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986), only to later abandon that approach, *see* 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996). The Court also revamped the fourth prong into a general requirement of "fit" between the comprehensiveness of the regulation and the seriousness of the stated governmental interest. *See* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989). Despite these periodic modifications, *Central Hudson* remains the rule for commercial speech, much to Clarence Thomas' dismay, as we shall see.

38. Even after *Virginia Pharmacy*, William Rehnquist continued to insist that advertising was not entitled to *any* First Amendment protection whatsoever, *see* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (Rehnquist, J., dissenting); Carey v. Population Services International, 431 U.S., 678 (1977) (Rehnquist, J., dissenting). After *Central Hudson*, Rehnquist was essentially forced to concede the partial First Amendment protections afforded to commercial speech, but he still worked to undermine those protections. *See generally Posadas de P.R. Assocs.*, *supra* note 37.

39. Thomas disposed of the ban by pointing out that the government had other, less onerous, means of preventing "strength wars," Rubin v. Coors Brewing Co., 514 U.S. 476, 490-91 (1995), and that the ban made no sense in light of other regulations on alcohol sales, which included several state laws that *required* disclosure of alcohol content. *Id.* at 488.

40. 44 Liquormart v. Rhode Island , 571 U.S. 484 (1996).

Court threw out the ban and the state law, with John Paul Stevens applying the standard *Central Hudson* test.

In a separate concurrence, however, Clarence Thomas announced his philosophical objections to the test, and indeed to the Court's entire line of commercial speech cases. Directly challenging the Court's longstanding assumption that commercial speech was not entitled to the full protections of the First Amendment, Thomas flatly declared, "I do not see a philosophical or historical basis for asserting that 'commercial speech' is of 'lower value' than 'noncommercial' speech."[41] In *Virginia Pharmacy Board*, he pointed out, the Court had recognized that "'a particular consumer's interest in the free flow of commercial information' may be as keen, or keener than, his interest in 'the day's most urgent political debate.'"[42] In the intervening years, however, the Court had only paid lip service to that sentiment. Now Thomas urged that the Court should be more mindful of:

> the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.[43]

Thomas' emphatic opinion here in *44 Liquormart* marks the emergence of what should be described as a truly libertarian perspective on not only commercial speech, but on the First Amendment writ large.

This libertarian perspective is also evident in a later commercial speech case. In *Lorillard Tobacco v. Reilly*,[44] the Court unanimously invalidated Massachusetts' regime of restrictions on the advertising of cigarettes. Although Thomas joined Sandra Day O'Connor's main opinion, he also contributed a separate concurrence. In a stark contrast to O'Connor's technocratic approach, Thomas' concurrence reads like a clarion call reminding readers of the role free speech plays as a weapon against governmental overreaching:

> No legislature has ever sought to restrict speech about an activity it regarded as harmless and inoffensive. Calls for limits on expression

41. *Id*. at 522 (Thomas, J., concurring).

42. *Id.* at 518-19, quoting Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976).

43. *Id.* at 520.

44. Lorillard Tobacco v. Reilly, 535 U.S. 525 (2001).

> always are made when the specter of some threatened harm is looming. The identity of the harm may vary. People will be inspired by totalitarian dogmas and subvert the Republic. They will be inflamed by racial demagoguery and embrace hatred and bigotry. Or they will be enticed by cigarette advertisements and choose to smoke, risking disease. It is therefore no answer for the State to say that the makers of cigarettes are doing harm: perhaps they are. But in that respect they are no different from the purveyors of other harmful products, or the advocates of harmful ideas. When the State seeks to silence them, they are all entitled to the protection of the First Amendment.[45]

On the topic of commercial speech, Thomas has been a model of consistency, and a pointedly active one, at that. He has contributed an opinion in each of the five more commercial speech cases that the Court has decided since *44 Liquormart*, and in each opinion he has restated his opposition to the Court's commercial-noncommercial speech dichotomy. In addition to his long opinion in *Lorillard Tobacco,* he has submitted three other simple one-paragraph reminders that he rejects this dichotomy.[46] His dissent in *Glickman v. Wileman Brothers & Elliott, Inc.*,[47] though only a couple of paragraphs long, augmented his objections to the dichotomy with an insistence that "paying money for the purposes of advertising involves speech"[48] . . . a statement that would take on added resonance in another set of cases in which money and speech intersect.

THE COURT'S WAR WITHIN: CAMPAIGN FINANCE

Regulations on the role money plays in American electoral politics date all the way back to the first decade of the 20th century. Alarmed at the way William McKinley's campaign majordomo, Mark Hanna, had overwhelmed the process with his innovative fundraising activities—and prodded by McKinley's trust-busting successor, Teddy Roosevelt—Congress passed the first major campaign finance law in 1907.[49]

45. *Id.* at 590 (Thomas, J., dissenting).

46. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); U.S. Dep't of Agric. v. United Foods, 533 U.S. 405 (2001); Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).

47. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997).

48. *Id.* at 504.

49. While it is understandable to view campaign finance regulation within the Progressive tradition that was just gaining serious traction in American political life in the first decade of the 20th century, the 1907 law, known as the Tillman Act, was a product less of good-government reformism, and more of hard-edged economic Populism. *See* Tillman Act of 1907, Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b (2000)). Its sponsor was South Carolina Senator "Pitchfork Ben" Tillman, a coarse and unrepentant racist whose primary motivation in his

Thereafter, a pattern emerged: Congress would pass major campaign finance law; the campaign professionals would find the loopholes; the loopholes would be ruthlessly exploited to the point that the law would be toothless, at which point Congress would pass new major campaign finance legislation, and the cycle would repeat. Periodically, the Supreme Court would examine these laws, but they did not engage the topic in a detailed and systematic way until their per curiam opinion in *Buckley v. Valeo*,[50] in which the Court invalidated significant portions of the 1974 amendments to the Federal Election Campaign Act (FECA) of 1971. In *Buckley*, the Court made several tactical decisions about money and politics that would play a dispositive role in its campaign finance jurisprudence for decades.

One such decision was to refrain from categorizing political money as "symbolic speech," which would have made it easier for restrictions on political money to pass constitutional muster.[51] Instead, the *Buckley* Court depicted political money as *pure speech*, making political money more resistant to regulation. Another decision the Court made was to bifurcate political money into expenditures and contributions, and craft different sets of rules for them.[52] Expenditures of money to create electioneering speech were deemed nearly untouchable by regulation;[53] contributions to candidates, on the other hand, were certainly expressions of political support but also potential minefields for corruption, and were consequently more susceptible to legitimate limitations.[54]

Neither of these tactical decisions was uncontroversial, and the Court struggled for coherence and internal comity over them for several years. Then, in the 1990's, open fissures on the Court were exposed in a public and highly dramatic way, and Clarence Thomas was at the center of the conflict.

In 1987, the Colorado Republican Federal Campaign Committee ("CRFCC") ran a radio ad on incumbent Democratic Senator Tim Wirth that would preoccupy the Court past the turn of the millennium. The ad was a direct attack on Wirth by name, strafing him for his policies on

political career was to preserve the political influence of his poor white Southern constituents. *See generally* STEPHEN KANTROWITZ, BEN TILLMAN AND THE RECONSTRUCTION OF WHITE SUPREMACY (2000).

50. Buckley v. Valeo, 424 U.S. 1 (1976).

51. See United States v. O'Brien, 391 U.S. 367 (1968), in which the Court laid out a four-part test for "symbolic speech" that provided it with some level of First Amendment protection while also enabling government to regulate the conduct if it was truly problematic to the public welfare.

52. *See* 424 U.S. at 20-21.

53. The 1974 FECA amendments had imposed a spending cap on federal candidates; *Buckley* threw this cap out.

54. *See generally* 424 U.S. at 26-38.

taxes, balanced budgets, and military funding.[55] Wirth and the Colorado Democratic Party lodged a complaint with the Federal Election Commission over the way the ad was funded, arguing that the standard limits on contributions to candidates—limits that apply to political parties—were not obeyed here. The ad had blown past the federal contribution limits, but CRFCC pointed out that this was perfectly acceptable, since at the time the ad ran, the Republican Party had not yet settled on a nominee that would challenge Wirth in the 1988 general election.[56] Without a known opponent, the Republicans argued, the ad could not be a contribution. The FEC, however, deduced that some opponent down the road would eventually benefit from this ad, and thus concluded that the ad was tantamount to a contribution and subject to federal limits; the Republicans, having circumvented those limits, were fined. But in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,[57] the Court threw out the fine, and harshly criticized the FEC's logic in imposing it in the first place.[58]

Colorado 1 was Clarence Thomas' first campaign finance rodeo, and he entered the fray with gusto. It is not an understatement, in fact, to suggest that Thomas played a pivotal and even dominant role in the escalation of conflict on the Court over the rules for—and constitutional status of—political money.

Immediately, Thomas pronounced himself highly dissatisfied with the *Buckley* framework, and specifically laid into that case's decision to treat contributions and expenditures differently. While he joined Stephen Breyer's 7-2 decision in part, Thomas also issued a separate opinion in which he adopted a position that had been espoused by Warren Burger in the original *Buckley* case, namely, that the distinction between contributions and expenditures was utterly nonsensical and should be eliminated:

55. *See* Charles Lane, *Court Backs Limits on Campaign Spending; Justices Cite Need to Curb 'Hard Money' Contributions*, WASHINGTON POST, June 26, 2001. p. A1 (containing text of the advertisement).

56. Petitioner's Brief at *3, Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604 (1996) (No. 95-489).

57. *Colo. Republican,* 518 U.S. 604. This case is known as "*Colorado 1*," because, as we shall soon see, the controversy over the anti-Wirth ad would return to the Court in 2001.

58. The FEC's position was so unsound as a matter of law that it prompted Burt Neuborne, usually an enthusiastic backer of campaign finance restrictions, to comment that "the FEC appears to have retained General Custer as its litigation consultant." Burt Neuborne, *One Dollar—One Vote: A Preface to Debating Campaign Finance Reform,* 37 WASHBURN L.J. 1, 38 (1997).

> I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits. The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy.[59]

Thomas also stated flatly that the entire premise of *Buckley*—that some regulations on political money were constitutionally acceptable—was deeply flawed: "Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment because they sweep protected speech within their prohibitions."[60]

In so doing, Thomas became the first Justice to declare open war on *Buckley v. Valeo*, at least from this direction. *Buckley* had had its critics on the Court prior to Thomas, but those who had voiced dissatisfaction with that decision objected because it did not allow enough regulation.[61] Thomas was the first to suggest that *Buckley* needed to go because it allowed *too much* regulation. Prior to this decision, even Antonin Scalia had been of the opinion that "*Buckley v. Valeo* should not be overruled, because it is entirely correct."[62] In *Colorado 1*, however, Scalia (and Rehnquist) signed onto Thomas' sentiments.

59. *Buckley*, 518 U.S. at 640 (Thomas, J., concurring in part and dissenting in part).

60. *Id.* at 642.

61. *See* Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 502-518 (1985) (White, J., dissenting); *Id*. at 518-521 (Marshall, J. dissenting); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 303-311 (1981) (White, J., dissenting); Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 502-518 (1985) (White, J., dissenting); *Id*. at 518-521 (Marshall, J. dissenting).

62. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 683 (1990) (Scalia, J., dissenting).

Four years later,[63] the simmering tensions on the Court about campaign finance boiled over, in *Nixon v. Shrink Missouri Government PAC*.[64] There, the Court upheld Missouri's low ceiling on campaign contributions as not violative of the *Buckley v. Valeo* framework, over the protest of candidates and donors who argued that the ceiling was so low that it impeded campaign speech. David Souter wrote for the Court, commanding a 6-3 majority.

What makes *Shrink Missouri* such a remarkable decision is the presence of trenchant attacks on the entire campaign finance constitutional framework from *both sides* of the issue. In his concurrence, John Paul Stevens emphatically contradicted one of *Buckley*'s central premises by declaring that "money is property; it is not speech."[65] Likewise, Stephen Breyer subtly suggested in his own concurrence that the time may have come to strike *Buckley* from the books and replace it with a structure that would tolerate more regulation of political money.

However, calls to overrule *Buckley* came not only from the concurring Justices, but also from the dissenting justices. Anthony Kennedy archly called that decision a "half-way house," charged that "*Buckley* has not worked," and declared, "I would overrule *Buckley* and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so."[66]

In his own dissent (which Scalia joined), Thomas was even more uncompromising than Kennedy. He shared Kennedy's distaste for *Buckley*, and agreed with him on the core of the problem. He did not, however, see a need to give Congress or any state legislature a second bite at the campaign finance apple:

63. In the interim, Thomas contributed another opinion about the First Amendment and the political process, albeit one that did not have campaign finance overtones. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court struck down a series of Colorado restrictions on the behavior of paid collectors for signatures on state ballot initiative petitions (such as residency requirements, ID badges, and funding disclosures). Although he agreed with the result, Thomas refused to join Ruth Bader Ginsburg's majority opinion, and instead contributed a solo concurrence. Ginsburg, Thomas averred, had replicated the mistake of *McIntyre v. Ohio Elections Commission*: rather than declare that the behavior of the signature collectors was core political speech that mandated the application of strict scrutiny, Ginsburg had applied some loose lesser standard and balanced the free speech rights of the signature collectors with the state's purported interest in protecting the integrity of the process. *See* 525 U.S. at 206.

64. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

65. *Id.* at 398 (Stevens, J., concurring).

66. *Id.* at 408-10 (Kennedy, J., dissenting).

> In the process of ratifying Missouri's sweeping repression of political speech, the Court today adopts the analytic fallacies of our flawed decision in *Buckley v. Valeo (per curiam)*. Unfortunately, the Court is not content to merely adhere to erroneous precedent. Under the guise of applying *Buckley*, the Court proceeds to weaken the already enfeebled constitutional protection that *Buckley* afforded campaign contributions. In the end, the Court employs a *sui generis* test to balance away First Amendment freedoms.
>
> Because the Court errs with each step it takes, I dissent. [O]ur decision in *Buckley* was in error, and I would overrule it. I would subject campaign contribution limitations to strict scrutiny, under which Missouri's contribution limits are patently unconstitutional.[67]

Thomas' dissent was the most comprehensive attack on the very notion of campaign finance laws' constitutionality that had ever been produced by the Supreme Court. Unlike his opinion in *Colorado 1*, which was focused only on the fatuities of the contributions-expenditures distinction, Thomas' *Shrink Missouri* dissent was a thorough deconstruction of every major principle justifying regulation that *Buckley* announced. And unlike Kennedy, whose critique left the door open for renewed attempts to constitutionally square the campaign finance circle, Thomas insisted that the entire gambit was illegitimate and irreparable.

As is the case in his commercial speech opinions, Thomas has been consistent over time in his treatment of campaign finance restrictions. Furthermore, just as he brooks no deviation from the absolutist idea that commercial speech is as immune from regulation under the Free Speech Clause as noncommercial speech, he repeatedly insists that any restrictions on campaign finance are constitutionally infirm. When the Court revisited the controversy over the Tim Wirth attack ad in 2001, Thomas once again maintained that restrictions on campaign finance (like restrictions on advertising) are direct challenges to First Amendment freedoms and should be subjected to strict scrutiny.[68] He also restated this position in a minor case, *Federal Election Commission v. Beaumont*,[69] before broadening his attack in the Court's gargantuan appraisal of the Bipartisan Campaign Reform Act (BCRA) of 2002.[70]

67. *Id.* at 410 (Thomas, J., dissenting).

68. *See* Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm'n, 533 U.S. 431, 465-66 (2001) (Thomas, J., dissenting) (hereafter known as "Colorado 2") (The case was necessitated by CRFCC's argument that even political party expenditures that are coordinated with candidates cannot be regulated. The Court rejected this argument).

69. Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 164-65 (2003) (Thomas, J., dissenting).

70. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

That legislation, popularly known as McCain-Feingold after the two senators who sponsored it, was a dramatic overhaul of the campaign finance system. Passed as a replacement for the crippled FECA, BCRA's major provisions included elimination of so-called "soft money" (the unlimited donations that could be made to political parties, instead of directly to candidates), rules for how "issue ads" could be financed when they are broadcast close to election day, increases in the contribution ceilings (which had remained static, unadjusted for inflation, since the 1970's), and creation of an equalization structure that would allow financially outgunned candidates to play by a more indulgent set of contribution rules when challenged by wealthy opponents dipping into their personal fortunes to fund their campaigns.[71] The law was several years in incubation, and upon its final passage was met with a myriad of legal challenges which were consolidated into one massive case, *McConnell v. Federal Election Commission*.[72]

After the case's tortuous journey through the lower federal courts,[73] the Supreme Court in *McConnell* upheld most of BCRA's new rules. While there were small parts of the decision with which Thomas concurred, his separate opinion was spiritually a dissent. And it was a notably angry one, at that: "[T]he Court today upholds what can only be described as the most significant abridgment of the freedoms of speech and association since the Civil War."[74]

It may be, in fact, that Thomas' anger got the better of him in this case. Testimony that Congress had solicited when formulating BCRA

71. *Id.*

72. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

73. BCRA contained an acceleration provision designed to facilitate a response from the Supreme Court in time for the 2004 election cycle, but this plan was thwarted by the unconscionable actions of the special panel of lower federal judges who had to hear the case first. From the start, it was patently obvious that the opinions of District Judges Colleen Kollar-Kotelly and Richard Leon, and Circuit Judge Karen LeCraft Henderson, would have little impact on the ultimate determination of BCRA's constitutionality; this panel was merely a necessary formalistic step on the path to the Supreme Court. Nevertheless, Henderson, Kollar-Kotelly, and Leon took a full five months after oral argument to issue their ruling, a delay that contributed considerable uncertainty to the campaigns and candidates who were all waiting to find out the operable rules for the upcoming elections. As bad as the delay was, the end product was exponentially worse: Henderson, Kollar-Kotelly, and Leon produced an opinion that was 1,638 pages long, and which required a four-page spreadsheet to summarize the specific holdings of each individual judge. *See generally* McConnell v. Fed. Election Comm'n, 251 F.Supp.2d 176 (D.D.C. 2003). The holdings would not have even an iota of constitutional importance once the Supreme Court weighed in. Given that it is a basic requirement of a judge to be understandable, and given that this should occur within a reasonable economy of words, a suggestion that Henderson, Kollar-Kotelly, and Leon committed a gross violation of their professional duties in this case would not be indefensible.

74. *McConnell,* 540 U.S. at 264 (Thomas, J., concurring in part and dissenting in part).

revealed that many of the largest and most active political donors had been making contributions to *both* the Democrat and the Republican in a given race.[75] To Congress, this signified that the contributions were less about the donor's expression of a political point of view, and more about a desire to insure that whoever won the election would owe the donor a favor . . . which would later be repaid in the form of access.

Thomas, however, had long insisted that campaign contributions were the expressions of the donor's political ideals, and not merely a tawdry transaction that was perhaps the smallest of steps beyond the payment of "protection money" to organized crime. Here, in the face of a literal mountain of contrary evidence, Thomas clung to that ideal, to a degree that defied logic:

> The two major parties are not perfect ideological opposites, and supporters or opponents of certain policies or ideas might find substantial overlap between the two parties. If donors feel that both major parties are in general agreement over an issue of importance to them, it is unremarkable that such donors show support for both parties. This commonsense explanation surely belies the joint opinion's too-hasty conclusion drawn from a relatively innocent fact.[76]

Until this case—and surely, even after it—Thomas' free speech jurisprudence had been marked by an elegant clarity of vision and polite but firm impatience with artificial distinctions. Here, however, Thomas simply blinded himself willfully to the realities of everyday politics, and to the implications of his own principles: if political contributions are an expression of ideological will and desire to see a preferred candidate win, then no person in his right mind would support both alternatives. The real commonsense explanation is that double-givers are doing something besides giving voice to a political idea via their gifts: they are buying influence with whomever may be in a position to transact it.

Not all of Thomas' work in his *McConnell* opinion was intellectually dubious, however. Interestingly, Thomas in *McConnell* pushed the envelope of his absolutism, and did so in a way that did not defy basic logic. BCRA had also imposed new requirements vis-à-vis the disclosure of campaign contributions, and fully eight members of the Court saw the disclosure rules as constitutionally permissible. Thomas, however, had by now arrived at an even more doctrinaire view of the First Amendment (perhaps because by now he had seen his views on

75. *See generally* Expert Report of Thomas E. Mann, Sept. 20, 2002, at TABS 5-6. *See also* McConnell v. Fed. Elec. Comm'n, 251 F.Supp.2d 176, 509 (D.D.C. 2003) (Kollar-Kotelly, J.)

76. *McConnell*, 540 U.S. at 271-72.

commercial speech and campaign finance fail to achieve enduring majorities on the Court). Alone among his colleagues, Thomas considered the disclosure rules to be violative of core free speech principles. Expanding his arguments from *McIntyre*, Thomas saw forced disclosure as yet another injury to the principle that individuals are allowed to express themselves anonymously.

It is a common observation that the intersection of money and speech makes application of the First Amendment significantly more complicated. This observation is not only borne out by simple logic, but it is manifested in the meandering Supreme Court case law on commercial speech and campaign finance. Yet amidst this jurisprudential incoherence, the work of Clarence Thomas stands out for its uncluttered lucidity.

OBSCENITY AND THE MEDIA

As disjointed as the Supreme Court's work on commercial speech and campaign finance has been, those lines of cases look like holistically consistent truisms when compared to the Court's work on obscenity. Perhaps more than any other set of cases, the Court's obscenity jurisprudence has been pockmarked by confusion, false starts, and course corrections. If ever there was a case law that would sorely test a Justice committed to consistency and simplicity, this would surely be it.

Yet even here, Thomas' simple approach persists. To be fair, Thomas arrived on the Court well after the major internecine battles on obscenity had been fought (the end result of those battles, one could argue, is that all of the Justices lost).[77] By the early 1990's, the Court seemed to have successfully retired the issue; unable to develop an enduring and persuasive definition of exactly what constituted obscenity, the Court simply moved on to other subjects. When the Court has dared to take up the topic of obscenity in the last two decades, they have not confronted obscenity on its face, but rather as a component in a hybrid situation, such as the extent of the Federal Communications Commission's regulatory authority,[78] or the way obscene material can be disseminated using new communicative technologies such as the internet.[79] In this respect, Thomas has had the good fortune of avoiding the byzantine dynamics of the obscenity issue on its own terms. The structure of the obscenity cases that have come before the Court in

77. *See, e.g.,* Miller v. California, 413 U.S. 15 (1973); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Roth v. United States, 354 U.S. 476 (1957).

78. *See* Fed. Commc'ns Comm'n v. Fox Television Stations, 129 S. Ct. 1800 (2009).

79. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

Thomas' era, in a sense, dovetailed conveniently with Thomas' habit of breaking cases down into their simplest components and proceeding from that point.

Simplicity, however, does not necessarily lead to consistency. And it is here, unlike in the campaign finance and commercial speech cases, that Thomas' jurisprudence evinces some minor wobbles. While most of his output in obscenity cases is of a piece with his overall constitutional libertarianism, there are moments when Thomas' desire for simplicity induces him to accept at least the concept of paternalistic regulation.

Thomas' first foray into the law of obscenity occurred in 1996's *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*,[80] in which the Court invalidated the Helms Amendment, a federal law that let cable operators ban "indecent" material from public access channels, and required that such material be scrambled if it is made available on their systems (though subscribers had to be allowed to request that the material be unscrambled). Although Thomas concurred with part of Stephen Breyer's main opinion,[81] his opinion was primarily a dissent.

At first glance, the position that Thomas takes here seems to be unusually censorial for him; he is in a way standing for a law that makes it harder for speech to travel freely. Yet a careful reading of Thomas' opinion demonstrates that it fits in rather snugly with his libertarian approach to free speech. As Thomas framed the case, the core question it posed was not whether indecent material could be restricted, but rather "how and to what extent the First Amendment protects cable operators, programmers, and viewers from state and federal regulation."[82] The main threat to individual rights was not the Helms Amendment; instead, the main threat was the other laws that government could promulgate in the absence of the Helms Amendment. Without this law, Thomas surmised, government could essentially force cable operators—private businesses—to offer speech to which they objected.[83]

In past cases, this possibility would have been accepted as unremarkable. It had been well-settled that government has more regulatory power over the broadcast airwaves than over print media. This power was justified by the finite broadcast spectrum (as opposed to the limitless universe of print). Absent governmental regulation,

80. Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n., 518 U.S. 727 (1996).

81. Specifically, Thomas agreed with Breyer's methodology in determining what constitutes obscene material. *See Denver Area Educ. Telecomms. Constortium*, 518 U.S. 727 at 812.

82. *Id*. at 812.

83. *See generally id*. at 820-823.

competition for desirable frequencies would result in broadcasts crowding each other out, rendering the airwaves useless to the public interest.[84] For decades, then, the Court had operated on the assumption that the different characteristic of broadcast media and print media required different approaches to regulation.

Ever the simplifier, Thomas questioned the validity of this assumption, and the utility of the distinction that gave rise to it. Just as he refused to countenance the false dichotomies of contributions and expenditures, or commercial and noncommercial speech, Thomas did not see any constitutional value in dividing up media into print and broadcast spheres; instead, he advised, all media should be treated the same . . . and should be regarded as heavily protected from governmental interference. "The text of the First Amendment makes no distinctions among print, broadcast, and cable media," he commented, "but we have done so."[85] The unique features of cable television should not make it more susceptible to government meddling, and to Thomas, the Helms Amendment (even though it was, technically, government action itself), was designed to keep government out of the media's business.

For those who would question the sincerity of Thomas' position here, and suggest that it is nothing more than a beard to enable governmental censorship of sexually-oriented material, consider his subsequent position in *United States v. Playboy Entertainment Group, Inc*.[86] In that case, the Court reviewed a law that, on its face, resembled portions of the Helms Amendment that had survived scrutiny in *Denver AETC*: it required that adult material be segregated to a separate channel, scrambled, and shown only during late evening hours when children were unlikely to be watching. This time, however, the Court deemed that the law had gone too far, and was restricting material that was merely indecent, and not obscene.

While the law's sponsors were probably hoping that their legislative net would sweep up both obscene material and indecent material, the Constitution only countenances bans on the former, and not the latter. Anthony Kennedy's majority opinion stressed this point, as did Thomas' concurrence.[87] Having joined the main opinion, Thomas evidently decided to emphasize his own distaste for governmental paternalism: "The 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government."[88]

84. *See* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279-80 (1933).

85. *Denver AETC*, 518 U.S. at 812.

86. United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

87. *See id*. at 811 (Kennedy, J.), 829 (Thomas, J., concurring).

88. *Id*. at 830 (Thomas, J., concurring).

However, in subsequent obscenity cases, Thomas has periodically catered to those very enforcement choices. While he has maintained his suspicions about governmental regulatory discretion, he has also at times deferred to established bureaucratic prerogatives. Most recently, in *Federal Communications Commission v. Fox Television Stations, Inc.*,[89] Thomas joined Antonin Scalia's opinion upholding the FCC's discretion to sanction broadcasters who allow the airing of "fleeting expletives."[90] For Scalia, this was a simple matter of administrative law: the FCC has been granted wide latitude to regulate the use of indecent language on television; in crafting the policy, the FCC adhered to all relevant administrative standards; and the policy was well-known to those outlets that would fall with its reach. Theoretically, a libertarian-to-the-nth-degree would not tolerate such bureaucratic paternalism, but by joining Scalia's opinion, Thomas was unwilling to directly challenge the FCC in this case.

Then again, as his concurrence revealed, Thomas' patience with FCC paternalism was by no means limitless. In fact, some time in the future we may look back on Thomas' opinion as a first step in the direction of a full-scale reappraisal of the very foundations of FCC regulations on broadcast content. Echoing his complaint from over a decade earlier in *Denver AETC*, Thomas reminded the Court that the distinctions between print and broadcast media were artificial ones, and were likely constructed for the sole reason of enabling governmental regulation over electronic communications that would be prima facie intolerable for print.[91]

Thomas then went a step further. Where Scalia's opinion had been exclusively hung on questions of administrative law—and had completely deemphasized any First Amendment questions—Thomas confronted the free speech dynamics of the case directly, and suggested in his opening paragraph that a broad reconsideration of two important cases might well be warranted in the near future.

> I write separately, however, to note the questionable viability of the two precedents that support the FCC's assertion of constitutional authority to regulate the programming at issue in this case. *Red Lion* and *Pacifica* were unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity.[92]

89. FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800 (2009).
90. *Id*. at 1809.
91. *See id*. at 1820 (Thomas, J., concurring).
92. *Fox Television*, 129 S. Ct. at 1820 (Thomas, J., concurring) (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); FCC v. Pacifica Found., 438 U.S. 726 (1978)).

Calling those two cases a "deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium,"[93] Thomas bemoaned the legal centrality the Court had assigned to "transitory facts,"[94] and signaled that he was "open to reconsideration of *Red Lion* and *Pacifica* in the proper case."[95]

Thomas' impatience in *Fox Television Stations* with the way technological realities can be deployed to alter the meaning and scope of the First Amendment was of a piece with his prior observations in the field. In 2002's *Ashcroft v. Free Speech Coalition*, Thomas concurred with the majority's decision to invalidate the Child Pornography Prevention Act, on the grounds that it seemed to be exploiting the advent of the internet and sophisticated computer graphics software as a means of criminalizing indecent speech that was clearly protected by the First Amendment.[96]

One month later, in *Ashcroft v. American Civil Liberties Union*,[97] Thomas authored a plurality opinion concerning a lower court injunction on the enforcement of the Child Online Protection Act (COPA) of 1998. Congress had passed COPA after the Court had thrown out its previous attempt to regulate the flow of indecent material over the internet, the Communications Decency Act, in *Reno v. American Civil Liberties Union*[98] as fatally overbroad. Here, as in *Denver AETC*, Thomas took a nuanced approach to the subject, appearing to tolerate, at least in spirit, some form of regulation of objectionable material while simultaneously fitting this regulatory indulgence into his overall philosophy on speech. In *Denver AETC*, the guiding principle that Thomas insisted he was safeguarding was freedom; specifically, the freedom of broadcasters not to be compelled to disseminate material they did not wish to disseminate.[99] In this case, the guiding principles for Thomas were his

93. *Id*. at 1820.
94. *Id*.
95. *Id*. at 1823.
96. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 259-60 (2002) (Thomas, J., concurring). The CPPA targeted so-called "virtual child pornography"—sexually explicit material that appears to involve children, but which is created via computer imaging; no actual live children are exploited or harmed to generate the material.
97. Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564 (2002).
98. Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).
99. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 816 (1996) ("It is the operator's right that is preeminent. . . . [W]hen there is a conflict, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion.") (Thomas, J., concurring in the judgment and dissenting in part).

devotion to simplicity of legal rules and an aversion for artificial distinctions that would enable over-regulation.[100]

The ACLU's primary objection to the law was its use of the customary "community standards" approach to determining obscenity.[101] That approach could conceivably work when the material is a magazine on a newsstand physically located in a town, but the internet, the ACLU maintained, took the very concept of community into a brand new dimension. Material available on the web is available to anyone with a connected computer. Adhering to the rote "community standards" approach could mean that one particular community which is maniacally disturbed by any sexually explicit material (including material on safe sex) could claim that its standards were violated by having that material available on the internet connections beamed into their homes, and could effectively impose its standards on the country at large. Because of the possibility that the customary approach could compel websites to conform to the standards of the most repressed community, the ACLU maintained that COPA's use of the community standards approach rendered it facially invalid.[102]

To Thomas, then, here was yet another attempt to capitalize on the allegedly unique vicissitudes of a communicative medium, and invoke them as a justification for changing the established rules of the game. Admittedly, the ACLU's gambit was an attack on established rules as a means of combating a speech restriction rather than justifying it, but in Thomas' eyes, the problem was no less acute. Rejecting the ACLU's argument that new technology must mean new rules, Thomas declared that the "community standards" approach to obscenity would stand, and that there was essentially nothing so distinctive about the internet that required treating it differently under the First Amendment than other communicative media.[103]

At the same time, though, Thomas left the injunction against COPA in place. While the new law was not nearly as overbroad as its deeply flawed predecessor, Thomas pointedly refused to rule on the overbreadth

100. *See id*. at 813-14 ("Our First Amendment distinctions between media, dubious from their infancy, placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was subject to the more onerous obligations shouldered by the broadcast media.").

101. That standard was announced in *Miller v. California*, 413 U.S. 15 (1973).

102. *See Reno*, 521 U.S. 844 at 877-78 ("Moreover, the "community standards" criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message").

103. *See id*. at 583.

question (and thus the injunction went undisturbed).[104] With the Court having disposed of the facial challenge to COPA, Thomas sent the case back down to the lower courts for a determination on whether the injunction was defensible on overbreadth grounds. After the lower court found that the law probably was fatally overbroad (and that success on the merits at trial was likely), that decision was appealed up the ladder to the Supreme Court, which upheld that conclusion in 2004 in an opinion written by Anthony Kennedy and joined by Clarence Thomas.[105]

CLARENCE THOMAS' PHILOSOPHY OF FREE SPEECH

Some who have studied Clarence Thomas' career have dismissed him as nothing new under the sun. In addition to the popular mythology that he is nothing more than a clone—or a lapdog—of his energetic conservative colleague Antonin Scalia,[106] there are those who depict Thomas as fundamentally an imperfect impersonation of long-gone judicial and political actors. Christopher Smith and Joyce Baugh, for example, have argued that "In many respects, Thomas' judicial philosophy mirrors the themes of the U.S. Supreme Court's critics during the middle decades of the twentieth century."[107] Thomas is also often derided as uncurious. Much is made of his devotion to silence during oral argument, with one recent observer pointing out that it has been over *three full years* since Thomas asked a question from the bench.[108]

As the first part of this article has shown, though, Clarence Thomas is a distinctive voice on the First Amendment. While his free speech

104. *See Ashcroft*, 535 U.S. at 585 (Thomas, J., dissenting).

105. *See* Am. Civil Liberties Union v. Ashcroft, 542 U.S. 656 (2004). Following that decision, the inevitable trial on the merits was held. COPA was indeed found to be overbroad. *See* Am. Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd*, 534 F.3d 181 (3d Cir. 2008); Mukasey v. Am. Civil Liberties Union, 129 S. Ct. 1032 (2009). Thus, the Court killed off COPA for good in early 2009, over a decade after the never-enforced law was first passed.

106. Of course, the well-documented empirical evidence—including similarity scores and paired votes—of Thomas' symbiosis with Scalia is more than mere mythology.

107. CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY 45 (2000).

108. *See* Adam Liptak, *Rare Glimpse of Thomas, from Bench to Den*, N.Y. TIMES, Apr. 14, 2009, at A11. Of course, Thomas' silence may simply be a manifestation of a belief that the limited time in oral argument really should be left to the lawyers to make their case, and not to the Justices to fulminate. "If I invite you to argue your case," he has said, "I should at least listen to you." ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 471 (1st ed. 2001).

Here too, Thomas shares something in common with Hugo Black, who was also not inclined to dominate oral arguments with his own interjections. When asked about this by Harry Blackmun, Black wryly responded, "if you don't ask many questions, then you will not ask many foolish questions." KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 311 (2007).

jurisprudence shares much with some of his predecessors and contemporaries, in many respects Thomas has advanced an uncommon and even iconoclastic vision. His absolutist posture on free speech renders him a unique presence on the present-day Court.

So what are the contours of Thomas' absolutism? Is Thomas simply Hugo Black's old wine in a new bottle?

In certain senses, there is little connection at the roots of the two men's absolutism. Consider one recent account of Black's philosophy:

> Black's absolutism, far from being a simplistic idolization of the amendment's words, was grounded in a sophisticated linking of normative views about the role of the judiciary with reflections on the assumptions implicit in the creation of constitutional texts as well as with a (quite underdeveloped) historical claim about the First Amendment's origins.[109]

Thomas, by contrast, has ruminated publicly about the role of courts in the American political system much less frequently than Black did. For Thomas, this subject is a periodically interesting avenue of exploration; for Black, this subject was the backbone of his entire professional code. Meanwhile, where Black's grasp of the original understandings behind the First Amendment may have been "underdeveloped," Thomas' disquisitions in this area are comprehensive and defining.[110]

Furthermore, while both men's legal philosophies are likely offshoots of their broader views on the role of government, they could hardly come from more different perspectives, especially in their worldview on the relationship between the state and the economy. Hugo Black, preternaturally suspicious of big business, was an ardent Senate champion of governmental efforts to spur economic recovery,[111] to the point that, in the words of a prominent biographer, "Hugo Black was a New Dealer before there was a New Deal."[112] Clarence Thomas, in contrast, is preternaturally suspicious of governmental attempts to induce

109. DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 259 (Stanford Law Books 2009) (2009).

110. Whether they are historically accurate is, of course, an entirely different matter. I merely mean here that Thomas has undertaken copious efforts to explore the intentions of the Framers and to work his conclusions about their intentions into his jurisprudence. To the extent that Black did this as well, he did so in a casual and at times assumptive manner. For Thomas, divining the Framers' intentions is the fulcrum of his entire jurisprudence.

111. Though he had his limits; Black was no fan of the National Recovery Act, the centerpiece of Franklin Roosevelt's legislative strategy that was shot down by a unanimous Court two years before Black arrived, in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *See also* NEWMAN, *supra* note 21, at 160.

112. NEWMAN, *supra* note 21, at 157.

individuals to make sacrifices for what government deems to be the greater economic good.

In fact, it would be entirely fair to describe Thomas as an acolyte of classic economic libertarianism.[113] Ayn Rand, in particular, is a recurring muse; as chairman of the Equal Employment Opportunity Commission, Thomas convened regular showings of the 1949 film version of Ayn Rand's *The Fountainhead* for his staff, a practice that he continues on the Court every year for his clerks.[114] Likewise, F.A. Hayek is a common and perhaps more prevalent inspiration. In a speech he gave several times in the mid-and-late-1990's, Thomas would follow up a reference to James Madison's *Federalist No. 10* declaration that government's main job is to protect "the diversity of faculties in men" with an immediate bow to Hayek for the idea that "the chief aim of freedom is to provide both the opportunity and the inducement to insure the maximum use of the knowledge that an individual can acquire."[115]

While it is clear that philosophies like those of Rand and Hayek are highly influential on Thomas' thinking, exactly how that influence operates is somewhat murky. Hayek saw regulation of the free market as a political act first and foremost; a means of backstopping a governing regime that could easily gravitate towards totalitarianism once the camel's regulatory nose was in the tent.[116] Thomas rarely echoes Hayek's apocalyptic pronouncements, but he often refers to governmental interference with property rights as the main obstacle to individuals' development, which was an intermediate prong in Hayek's overall philosophy.[117] The core question, though, is whether Thomas is preoccupied with the political consequences of economic regulation (as Hayek was), or the economic consequences of political regulation.

Consider Thomas' dissent in *Kelo v. City of New London, Connecticut*,[118] in which the Court upheld the controversial seizure of a

113. A reference to him as a political libertarian, however, would suffer from a massive internal contradiction; as Thomas himself has wondered aloud, "if I were a true libertarian I wouldn't be here in government." Bill Kauffmann, *Clarence Thomas*, REASON, Nov. 1987, at 31.

114. *See* MERIDA & FLETCHER, *supra* note 1, at 163.

115. *See* Clarence Thomas, *The James McClure Memorial Lecture in Law, Delivered By the Honorable Clarence Thomas,* 65 MISS. L.J. 463, 465 (1996); Clarence Thomas, *Victims and Heros* [sic] *in the "Benevolent State,"* 19 HARV. J.L. & PUB. POL'Y 671, 673 (1996); Clarence Thomas, *Personal Responsibility*, 12 REGENT U. L. REV. 317, 318 (2000) (citing FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960)).

116. *See generally* HAYEK, THE ROAD TO SERFDOM (1944).

117. *See* Kelo v. City of New London, Conn., 545 U.S. 469 (2005); *see also* United States v. James Daniel Good Real Property, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part and dissenting in part) ("Like the majority, I believe that 'individual freedom finds tangible expression in property rights.'").

118. *Kelo*, 545 U.S. at 469.

number of houses to make way for private economic development of the New London, Connecticut waterfront. Stressing the broad civic benefits of the waterfront development, the majority in *Kelo* saw the taking as a valid "public use" that allowed for the invocation of eminent domain. Most of Thomas' dissent proceeded along what are for him boilerplate grounds—he began with an exploration of what the Framers meant by the term "takings," and examined the ways in which the Takings Clause had been understood over time.[119]

But in the final section of his dissent, Thomas subtly questioned even the Framers' vision. The Framers clearly embraced governmental seizures of private property that would generate significant public benefits, as long as strict rules were followed. Yet even after tracing the Framers' toleration of these seizures, Thomas suggested this toleration was misguided:

> So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. *Allowing the government to take property solely for public purposes is bad enough*, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.[120]

This is as close as Thomas comes to a full-metal Hayekian viewpoint; he is suggesting here that the true danger is a government that does not respect boundaries, and that cannot be trusted to formulate good judgments.

At the same time, though, by stating his desire to protect poor communities which lack sufficient political clout, Thomas here sounded like at least an unreconstituted New Dealer, if not a Great Societitian. He also struck a note completely at odds with his previous takes on the influence that of wealth exerts on the political process.

In *McConnell*, for example, Thomas denounced arguments that campaign finance laws were justified as a means of leveling the political playing field between rich and poor, sarcastically insisting that:

> [t]he only effect . . . that the "immense aggregations" of wealth will have (in the context of independent expenditures) on an election is that they might be used to fund communications to convince voters to

119. *See id*. at 505-23 (Thomas, J., dissenting).
120. *Id.* at 521 (emphasis added).

> select certain candidates over others. In other words, the "corrosive and distorting effects" . . . are that corporations, on behalf of their shareholders, will be able to convince voters of the correctness of their ideas.[121]

Yet Thomas' dissents in *Kelo* and *McConnell* are perfectly consistent in one important way that illuminates his overall free speech philosophy. At its core, Thomas' economic libertarianism is a proxy for general disdain of governmental regulation. Thomas is a flaccid celebrant of markets, but an energetic critic of controls. To the extent that Thomas does embrace the free market, he does so only for its ability to nourish individual freedom and growth (as opposed to its ability to generate wealth and national progress).[122]

This philosophy explains his position on commercial speech. Thomas believes advertising is constitutionally valuable on its own terms, as information which facilitates economic decision-making by consumers.[123] Concomitantly, Thomas views governmental attempts to restrict advertising through a Hayekian lens as invasions of individual decisional autonomy with potentially darker political overtones. Indeed, Thomas's overall jurisprudence is representative of contemporary neoconservative hostility towards the regulatory state. One Thomas biographer has described Thomas' concurrence in *United States v. Lopez*[124] as reflective of "his true desire: launching a full-scale rebellion against the rulings of the New Deal era."[125] In this respect, Thomas is about as far removed from Hugo Black—the "New Dealer before the New Deal"—as someone could possibly be.

Their philosophical differences on economic matters notwithstanding, Hugo Black and Clarence Thomas occupy the common ground of a vision of the First Amendment that is pointedly resistant to incursions at its margins. Each has insisted that the authors of the First Amendment intended for it to be a breathtakingly broad provision, based

121. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 274 (2003) (Thomas, J., concurring in part and dissenting in part).

122. Put another way, on a continuum of 20th century economists, Thomas' libertarianism is much closer to George Stigler than to Arthur Laffer.

123. This is a particular note of dissonance between Thomas and Hugo Black. During the Court's long, slow journey from *Chrestensen* to *Virginia Pharmacy*, Black at one point sniffed that it was demeaning to apply the First Amendment to a merchant "selling pots." Breard v. City of Alexandria, 341 U.S. 622, 650 (1951) (Black, J., dissenting).

124. United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

125. THOMAS, *supra* note 1, at 505. This is not to say that Thomas' enmity for regulation is ever-present in his jurisprudence. In his concurrence in *F.C.C. v. Fox*, for example, Thomas questions the continuing validity of the technological justifications for the F.C.C.'s rules, *see* 129 S.Ct. at 1821-1822, but does not cross the Rubicon of questioning the F.C.C.'s institutional legitimacy (even though such a question would not have been inconsistent with his main argument).

on their immediate history with a British crown eager to silence dissent from an ocean away. Each has refused to tolerate internal tinkering with the rules of free speech, disdaining "'ifs,' 'buts,' or 'whereases,'" or any artificial tests designed to legitimate governmental intrusion into matters of conscience, or any suggestion that the right to free speech could be bargained away in exigent times.

While comparisons between Clarence Thomas and Hugo Black are easy to come by, it is much more difficult to locate Thomas' free speech jurisprudence along the traditional theoretical continuum of First Amendment analysis. Thomas clearly shares little commonality with the view, most famously advanced by Thomas Emerson, that "[t]he proper end of man is the realization of his character and potentialities as a human being," and thus, "freedom of expression is essential as a means of assuring individual self-fulfillment."[126] Emerson's perspective, which has been critiqued in some quarters as rationalizing self-indulgence with "an unseemly ring of hedonism,"[127] is far too disorderly and unencumbered by rules to be resonant in Thomas' uncomplicated schema.

Nor does Thomas appear to value the individual right to freedom of speech as a means of protecting non-mainstream ideas or individuals from being overrun by a stampeding majority. David Richards' "toleration model" depicts free speech as a control over not so much government, but rather over an inflamed democratic mob.[128] Drawing heavily from the work on John Hart Ely,[129] Richards argued that free speech safeguards "the democratic political process from the abusive censorship of political debate by the transient majority who has democratically achieved political power."[130] Thomas, however, does not speak much to the problem of tyranny of the majority.

If there is one traditional theory of free speech that is reflected in Thomas' jurisprudence, it is the work of Alexander Meiklejohn, an unsurprising observation considering the title of Meiklejohn's 1961 essay, "The First Amendment is an Absolute."[131] But it is Meiklejohn's landmark 1948 work, *Free Speech and Its Relation to Self-*

126. EMERSON, *supra* note 24, at 6.

127. RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 9 (1992).

128. *See generally* DAVID A. J. RICHARDS, *Free Speech As Toleration*, *in* FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY (W.J. Waluchow, ed., 1994).

129. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

130. RICHARDS, *supra* note 128, at 34.

131. Alexander Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245.

Government,[132] that gives us a pathway into Clarence Thomas' thinking. Meiklejohn argued that free speech is necessary in a democracy because it is the people, and not the institutional elite, that retain the real decisionmaking power on public affairs. In order the make those decisions properly, however, the people need reliable information to guide their collective thought processes: "The welfare of the community requires that those who decide issues shall understand them, and this in turn requires that . . . all facts and interests relevant to the problem shall be fully and fairly presented."[133]

Like Meiklejohn, Thomas sees free speech through a lens of purposiveness. It is not, as Emerson would posit, a good and an end in itself. Rather, free speech to Thomas and to Meiklejohn is designed to accomplish something: the facilitation of popular decisionmaking.

Meiklejohn's instrumentalism, however, was cabined by the boundaries of the democratic process. He saw free speech as merely an avenue via which a democratic polity could acquire the information that it required in order to make its choices in political affairs. Notably, Meiklejohn's original formulation of free speech did not account for artistic speech, which he deemed a purely private matter that did not merit First Amendment concern.[134]

Thomas similarly posits that free speech exists so as to allow for good decisions on public affairs, only he does not limit his conception of public affairs to politics. As his concurrence in *44 Liquormart* made clear, Thomas considers individual decision-making on private economic matters to be of equal import as individual decision-making on public political issues. To Thomas, governmental interference with private economic decision-making is irrevocably noxious—it is polluting the waters of freedom with unconscionable paternalism. Worryingly, Thomas saw this pollution as being countenanced by his own Court, and was not shy about chastising his colleagues over their apostasy:

> [Since *Central Hudson*], the Court has appeared to accept the legitimacy of laws that suppress information in order to manipulate

132. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), *available at* http://digicoll.library.wisc.edu/UW/subcollections/MeikFreeSpAbout.html.

133. MEIKLEJOHN, *supra* note 23, at 25.

134. Chastened by critics who characterized his theory as insufficiently speech-protective, Meiklejohn eventually shoehorned protection for artistic speech into his theory. His ultimate argument was that exposure to art and other forms of high-value private speech would make a person more well-rounded, which would in turn enable a person to be a better citizen, which would in turn lead to better democratic decisionmaking overall. *See generally* MEIKLEJOHN, POLITICAL FREEDOM (1960).

> the choices of consumers—so long as the government could show that the manipulation was in fact successful.[135]

One observer has commented that Thomas' opinion in *44 Liquormart* "was one of the staunchest defenses of economic liberty in the Court's history, and an opinion that no doubt would have pleased Ayn Rand immensely."[136]

More tellingly, Meiklejohn's instrumentalism was collective in nature—free speech enables a polity to make good decisions for its own governance. There is nothing collective at all in Thomas' instrumentalism. His focus on economic decisionmaking by consumers, in fact, is as relentlessly individualistic as any theory Thomas Emerson might advance. As the most recent chronicler of Thomas' jurisprudence has pointed out:

> Prior to Justice Thomas's dissent in *Glickman*, only one other case in Supreme Court history had used the words 'collectivization'/ 'collectivize.' . . . Thomas' use of them in *Glickman* demonstrates that *he is explicitly aware of the fundamental ethical/political distinction between individual rights* (e.g., freedom of speech) *and collectivism* (e.g., the government's de facto takeover of the fruit-growing industry)—and that, at least regarding free speech, he is unwilling to allow the individual rights (e.g., those of the fruit growers) to be subordinated to the government's perceived need for 'orderly' fruit markets.[137]

Perhaps it is best to say that where Meiklejohn's conception of free speech is yoked to participatory democracy, and where Emerson's conception is about self-actualization, and where Richards' conception is about safeguarded dissidence, Thomas' conception is simply a vindication of core libertarian principles: exalting individual autonomy, recognizing that human instincts for self-maximization can serve valid social ends, limiting governmental ability to interfere with self-maximization.

Thomas' libertarian streak is probably most pronounced in his campaign finance opinions. In his *Nixon v. Shrink Missouri Gov't PAC* dissent, he framed his assault on *Buckley v. Valeo* as follows:

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135. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 521 (1996) (Thomas, J., concurring).

136. THOMAS, *supra* note 1, at 524.

137. HOLZER, *supra* note 6, at 133-34. In this respect, Thomas fits in seamlessly on a current Court that has, in the eyes of many observers, bent over backwards to advance a free-market-friendly version of the Constitution that is determinedly receptive to the needs and wants of the business community. *See* Jeffrey Rosen, *Supreme Court, Inc*., NEW YORK TIMES MAGAZINE, March 16, 2008.

> Political campaigns are largely candidate focused and candidate driven. Citizens recognize that the best advocate for a candidate (and the policy positions he supports) tends to be the candidate himself. And candidate organizations also offer other advantages to citizens wishing to partake in political expression. Campaign organizations offer a ready-built, convenient means of communicating for donors wishing to support and amplify political messages. Furthermore, the leader of the organization—the candidate—has a strong self-interest in efficiently expending funds in a manner that maximizes the power of the messages the contributor seeks to disseminate.[138]

Additionally, his opinion for the Court in *Washington State Grange v. Washington State Republican Party*[139] can also be seen through a libertarian prism. Following the Court's invalidation of California's "blanket primary" in *California Democratic Party v. Jones*,[140] Washington state, which used a similar system, proposed new procedures. The new system in Washington would retain some characteristics of the old blanket primary—all candidates were placed into a big pool; voters could vote for any candidate regardless of their party affiliation; the top two vote-getters advanced to the general election—but would require that candidates list their party affiliations on the primary ballot, and forbid them from changing their affiliations between the primary and general elections. The state's Republican Party charged that the proposed system would violate their rights of free association, because the primary victors would be perceived to be the official standard-bearers of the party.

But stressing the freedom of individual choice, and the capacity of self-reliant voters to figure things out for themselves,[141] Thomas rejected this argument. Because this system does not select a party's nominee in any official way, associational rights are not really threatened:

> [R]espondents' assertion that voters will misinterpret the party-preference designation is sheer speculation. . . . There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is

138. Nixon v. Shrink Miss. Gov't PAC, 528 U.S. 377, 414-16 (2000) (Thomas, J., dissenting).

139. Wash. State Grange v. Wash. State Republican Party, 128 S.Ct. 1184 (2008).

140. Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

141. This is another link between Thomas and Meiklejohn. As the latter's biographer has pointed out, "For Meiklejohn, the only way to justify a faith in democracy as a form of self-government was to trust in the essential goodness of human beings, to believe in their ability to abide by shared rules of deliberation, to protect their dignity as free and morally responsible citizens." ADAM R. NELSON, EDUCATION AND DEMOCRACY: THE MEANING OF ALEXANDER MEIKLEJOHN 1872-1964, 269-70 (2001).

> the party's chosen nominee or representative or that the party associates with or approves of the candidate.[142]

It must be pointed out, though, that, Thomas has not quite been an absolutist in all free speech situations. Another characteristic that he shares with Hugo Black is that both men had their limits, but instead of expressing those limitations by shading certain things inside an area of free speech by using some sort of balancing test (such as saying that some commercial speech will be protected but some other commercial speech will not be protected), both Thomas and Black would operationalize their limitations in a meta-systemic way by declaring the First Amendment wholly inapplicable.

The most obvious synchronicity between Black and Thomas is in the area of student speech. In 1969, in *Tinker v. Des Moines Independent Community School District*,[143] the Court invalidated the suspension of two students who had worn armbands to school in protest of the war in Vietnam. Writing for a 7-2 Court, Justice Abe Fortas underscored the decision in a famous remark, "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[144]

Hugo Black, however, was one of the dissenters,[145] and voiced his displeasure in portentous terms:

> Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of

142. *Wash. State Grange*, 128 S.Ct. at 1193. Because Washington State Grange had been brought as a facial challenge to the new rules before they had ever been used, there was no evidence in the record that voters would be confused the way the Republicans alleged. *See id.* Thomas grudgingly conceded that evidence to this effect could emerge after the system had been in effect for a number of election cycles, but emphatically refused to make the assumption that it would happen, and invalidate the system on that ground. *See id.* at 1193-94.

143. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

144. *Id.* at 506.

145. Justice John Harlan was the other. *See generally id.* at 526 (Harlan, J., dissenting).

> a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins.[146]

So here was Hugo Black, insistent avatar of the notion that the Free Speech Clause brooked no exceptions, suddenly and crankily announcing that the First Amendment could be kept outside of the schoolhouse gate. His colleagues were shocked,[147] but perhaps they should not have been. For Black, this issue may have been less jurisprudential than personal. He was already bemoaning the decline of America's civic institutions and moral code, as this passage clearly indicates, and was assigning blame for that decline on ill-mannered young people who were rambunctiously protesting the actions of their elders. And as one of Black's biographers has pointed out, in the middle of the Court's deliberation in *Tinker*, Black's grandson was suspended by his high school for publishing and distributing an underground newspaper.[148] Justice Black was already increasingly distraught over the wave of transgressions being committed by America's youth. For him to discover that his own family was not immune from this development would have been undoubtedly traumatic, and it is not hard to imagine that this trauma affected his judgment in *Tinker*, which is an anomaly in his otherwise consistent expansiveness on First Amendment freedoms.

Although Fortas' dictum has endured as a classic constitutional soundbite, its value as governing law has ebbed with time. In the decades after *Tinker*, the Court backtracked markedly on the question of civil liberties in schools, and allowed school administrators to censor school newspapers,[149] suspend students for off-color remarks at a school assembly,[150] and compel students to undergo drug testing as a condition for participating in interscholastic athletics.[151]

146. *Id.* at 524-25 (Black, J., dissenting).
147. *See* NEWMAN, *supra* note 21, at 592.
148. *Id*.
149. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
150. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).
151. *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

This retrenchment reached its apex in 2007 in *Morse v. Frederick*.[152] Students at a high school in Juneau, Alaska were allowed to leave school one afternoon in early 2002 to watch the Olympic torch relay travel through town on its way to the Salt Lake City Olympics. As the torch passed by, a group of students (in an apparent effort to get on television) unfurled a giant banner with the words "BONG HiTS 4 JESUS" on it. The school's principal immediately ran over to the students and ordered them to remove the banner, on the grounds that it could be interpreted as advocating illegal drug use. One student, Joseph Frederick, refused this order, and was summarily suspended; he appealed this suspension all the way to the Supreme Court. But writing for a 6-3 Court, John Roberts upheld the suspension, on the grounds that school administrators have the authority to restrict speech contrary to the school's mission that is offered during school activities (and the excusal for attending the torch relay was considered to be a school activity).

While Roberts' opinion paid lip service to the *Tinker* idea that students do enjoy some degree of guaranteed civil liberties while in school, Thomas' solo concurrence took another line, and averred that "the standard set forth in *Tinker* . . . is without basis in the Constitution."[153] Thomas undertook a detailed examination of the history of public education in the United States, and concluded that at no point prior to *Tinker* were schoolchildren's rights ever deemed to trump the notion of *in loco parentis*, which assigned a virtual parenting function to school officials during the school day.

And like Hugo Black nearly forty years earlier, Clarence Thomas made a substantive appraisal of the intellectual capabilities of students, and concluded that they were lacking. Indeed, as with Black, Thomas saw student speech as nothing more than casual defiance. "Frederick asserts a constitutional right to utter at a school event what is either '[g]ibberish,' . . . or an open call to use illegal drugs," Thomas huffed. "To elevate such impertinence to the status of constitutional protection would be farcical."[154]

Clarence Thomas' determination to temper his vision of the First Amendment by declaring it inapplicable in schools is out of character

152. Morse v. Frederick, 551 U.S. 393 (2007). Given the Court's recent ruling in *Safford United Sch. Dist. No. 1 v. Redding*, *supra* note 17, however, it seems that the Court's retrenchment on student constitutional rights has been braked, at least for the moment. It is worth restating that in *Safford*, only Thomas was prepared to go the full Hugo Black route and give the school unfettered discretion to combat rumors of student possession of legal drugs.

153. *Id.* at 410 (Thomas, J., concurring).

154. *Id.* at 421.

vis-à-vis his normal free speech absolutism. But it is not the only exception.

THE OUTLIER: THE "OTHER" BLACK: *VIRGINIA V. BLACK*[155]

On August 27, 1998, a Ku Klux Klan rally was held at a farmhouse in rural southern Virginia. The Klansmen were there at the invitation of the owner of the farmhouse (who participated in the rally), which was located in a clearing some 350 yards away from the nearest road. At the end of the rally, a 25-foot-tall cross was set on fire. While the rally was visible to onlookers off in the distance, it had occurred on private property, and accounts of the rally indicated that the cross-burning was purely ceremonial; the traditional ending to a Klan gathering.

Under Virginia law, however, it was still illegal:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[156]

After a brief investigation, the leader of the rally, Barry Black, was arrested, and ultimately convicted and fined $2,500.

Back in 1992, in *R.A.V. v. City of St. Paul*,[157] the Court had invalidated a St. Paul municipal hate speech ordinance on the grounds that it was impermissible viewpoint discrimination. In that case—in which a band of allegedly intoxicated teenagers burned a cross in the front yard of a neighborhood black family—Antonin Scalia drew a distinction between criminalizing cross-burning as a civic expression of antipathy for the racism inherent in the message, and criminalizing acts of intimidation and harassment (of which cross-burning could certainly be an example).[158] St. Paul's poorly-written ordinance, however, represented the former.

The Virginia law, which defines cross-burning as intimidation, seemed at first glance to avoid the infirmity that doomed the St. Paul law. But in *Virginia v. Black*, the Court threw out Barry Black's conviction. Sandra Day O'Connor's main opinion made it clear that Virginia was perfectly within its authority to ban intimidating cross-burnings. Virginia could not however, assume that every cross-burning

155. Virginia v. Black, 538 U.S. 343 (2003).
156. *Id.* at 349.
157. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
158. *Id.* at 391-397.

is an act of intimidation. Tracing the history of the Klan, O'Connor determined that such an assumption was unwarranted: "As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself."[159] Virginia's law, via the "prima facie," clause, incorporated this very assumption, and did so with practical consequences, since it governed jury instructions.[160] Jurors receiving the "prima facie" instruction were essentially being told to assume that the cross-burning was illegal. In addition to creating a presumption which burdened the defendant and not the government with the task of rebutting it, the clause skewed prosecutions by effectively creating a hanging jury; inviting jurors to view cross-burning in only a negative and hurtful light.[161]

Virginia v. Black, with its record of a "non-intimidating KKK cross-burning," resembles a creative law professor's final exam hypothetical come to life. O'Connor's analysis of the situation was clearly correct. Unlike in *R.A.V.*, in which a black family was targeted and a message of hate and fear was planted on their front lawn, in *Virginia v. Black* no blacks (or any potential targets of the Klan's pathologies) were exposed to the cross-burning. This was clearly a mere ceremony, and it was clearly expressive conduct.

The decision in *R.A.V.* was unanimous; the decision in *Virginia v. Black* nearly so. There was one lone dissenter . . . Clarence Thomas.

For those who attended oral argument, Thomas' solo dissent was not an unanticipated development. During the presentation of Deputy Solicitor General Michael Dreeben, arguing in favor of the law's constitutionality, the normally-mute Thomas broke his silence:

> I indicated, I think, in the Ohio case that the cross was not a religious symbol and that it has—it was intended to have a virulent effect. And I—I think that what you're attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society . . . there was no communication of a particular message; it was intended to cause fear, and to terrorize a population.[162]

159. *Black*, 538 U.S. at 365-66.

160. *See* VA. CODE ANN. § 18.2-423 (1983), *invalidated by Black*, 538 U.S. 343.

161. *Black*, 538 U.S. at 366; *see also id.* at 385 (Souter, J., concurring).

162. *See* Transcript of Oral Argument, *Black*, 538 U.S. 343 (No. 01-1107), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_01_1107/argument (last visited Sept. 14, 2009); 2002 WL 31838589 at *23.

For a free speech absolutist such as Clarence Thomas, the decision in this case should have been obvious. Distasteful as Barry Black's behavior was, it was also expressive in nature. The cross-burning was part of the initiation ceremony for a group that is defined by a belief system (noxious though those beliefs may be to most people). And unlike in *R.A.V.*, there was no hated "target" in the vicinity; nobody at whom the burning cross was directed. Thomas, however, abandoned his usual absolutism, and pointedly declared that there is nothing expressive about cross-burning:

> I believe that the majority errs in imputing an expressive component to the activity in question. In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.[163]

Much as certain justices in 1989 would have preferred to declare that flag burning was simply an exception to the First Amendment and its partial protection of symbolic speech,[164] Thomas argued that the Court should disregard the communicative dimension of cross-burnings and empower state and local governments to call it as they saw it; intimidation, and nothing more:

> [T]his statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.[165]

163. *Black*, 538 U.S. at 388 (Thomas, J., dissenting). Here again is some (possibly attenuated) common ground with Hugo Black. Black dissented in *Street v. N.Y.*, 394 U.S. 576 (1969), in which the Court invalidated the conviction of a black veteran who had burned an American flag upon learning of the assassination attempt on civil rights activist James Meredith, and remarked "if they can do that to Meredith, we don't need no damn flag." *Street*, 394 U.S. at 579. Rejecting the majority's suggestion that Street had been convicted for his words, Black announced simply that flag-burning was not protected by the First Amendment . . . much in the same way that Thomas would declare that cross-burning was not protected by the First Amendment. *Compare Street*, 394 U.S. at 615 (Black, J., dissenting) *with Black*, 538 U.S. at 400 (Thomas, J., dissenting).

164. *See generally* Texas v. Johnson, 491 U.S. 397 (1989) (dissents of William Rehnquist (joined by Byron White and Sandra Day O'Connor) and John Paul Stevens).

165. *Black*, 538 U.S. at 394-95 (Thomas, J., dissenting).

This is obviously an instance in which Thomas' analysis should be subjected to critical examination, especially since he was making a provocatively counterintuitive argument that an action which Barry Black and his fellow Klansmen intended to be expressive—and certainly thought was expressive—was not expressive at all. In effect, Thomas bent reality so it would fit with his general philosophy about speech: as long as he could say that a ceremonial cross-burning is not expressive conduct, then he could tolerate laws which proscribe it; were he to concede that there is an expressive dimension to a ceremonial cross-burning, then he could not tolerate regulation of it while being consistent with his view of free speech. Unfortunately, none of the limited assessments of Thomas' jurisprudence address this.[166]

Just as Thomas' remarks during oral argument were unusual, the emotional tone of his written opinion was a departure from his accepted habits. A large portion of his opinion, like O'Connor's opinion, was devoted to a historical analysis of cross-burning. Unlike O'Connor's opinion, though, Thomas' opinion at times read as personal testimony on the horrors of the practice and what it portended. Coming from a man with a well-known zeal for privacy and equally-well-known disdain for infusing professional work with personal unburdenings, Thomas' written opinion in *Virginia v. Black* was just as out of character as his outburst during its oral argument. His opinion is such a dramatic departure for Thomas that it prompted one astonished observer to identify him as "the Justice in *Black* whose view most closely resembles that of the critical race theorists. . . ."[167]

Another commentator has offered up a different explanation for Thomas' role:

> Although Justice Thomas dissented from the *Black* Court's holding and judgment, he agreed with Justice O'Connor that the harms of cross burnings should be recognized and assessed by the Court in construing and applying the First Amendment. Far from a novel development, this interpretive approach is consistent with and is the latest in the line of Court decisions justifying the regulation of certain speech by reference to harm. This harm-valuation analytic, so prominent in Black and so conspicuously absent in *R.A.V.*, was a critical factor in *Black's* constitutional calculus. . . .[168]

166. The 2002 update of Scott Gerber's FIRST PRINCIPLES does not discuss *Virginia v. Black* at all; Holzer's 2007 book KEEPER OF THE FLAME merely reports on Thomas' gambit without offering any sort of critique, positive or negative.

167. Guy-Uriel E. Charles, *Colored Speech: Cross-Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575, 577 (2005).

168. Ronald Turner, *Cross Burnings and the Harm-Valuation Analytic: A Tale of Two Cases*, 9 BERKELEY J. AFR. L. & POL'Y 3, 30 (2007).

The problem, however, with describing Thomas' approach as a manifestation of a harm-valuation analytic is that this would be the only case in which he was cognizant of the harm dynamic. Indeed, in his sardonic concurrence in *Lorillard Tobacco*, Thomas dismissed Massachusetts' explanation that their restrictions on speech were justified by the damage that tobacco products can cause, at one point going so far as to speculate that such an argument could also be extended to alcohol and fast food.[169]

There may be one additional way to explain Thomas' free speech idiosyncrasies. Perhaps we can summarize his philosophy on speech as a rejection of balancing approaches to the First Amendment. Whereas other Justices are periodically prepared to concede that something is speech, but there is nevertheless some exception to the First Amendment that allows for it to be regulated, if Clarence Thomas believes that something *is speech*, then it is protected in a near-absolute fashion. Thomas' method of excepting things out of the First Amendment is simply to declare that the thing being litigated *is not really speech*. This methodology is apparent in *Virginia v. Black*, for example, and it is also a way to describe his solo dissent in a case early in his tenure, *Dawson v. Delaware*.[170]

In *Dawson*, an 8-1 Court threw out the death sentence given to a member of the Aryan Brotherhood prison gang on the grounds that introducing Dawson's membership in the gang at the sentencing phase of his murder trial was akin to punishing him for his beliefs, and thus violative of the freedom of association dimension of the First Amendment. Thomas, however, saw the introduction of Dawson's Aryan Brotherhood affiliation as merely an attempt by the prosecution to rebut Dawson's assertions of good character; it was evidence that he had engaged in illegal activity while in prison on a previous conviction, in contrast to his proffered claim of being a model prisoner.

While it is possible to explain *Virginia v. Black* and *Dawson v. Delaware* in a race-neutral way—in both cases, something that the other eight Justices saw as speech was, to Thomas, not speech at all—it is not insignificant that the times in which Thomas has opted to declare something to be "not speech" have both been cases in which the defendant's white supremacist attitudes have been a central concern. It should also be pointed out that in *Dawson*, Thomas regarded the defendant's racial beliefs as substantive evidence of poor character:

169. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 587-90 (Thomas, J., concurring).

170. Dawson v. Delaware, 503 U.S. 159 (1992) (Thomas, J., dissenting).

> The description of the Aryan Brotherhood as a "racist" prison gang conveyed additional information about Dawson's character. . . . Even if Dawson's white racist prison gang does not advocate "the murder of fellow inmates," a jury reasonably could infer that its members in one way or another act upon their racial prejudice.[171]

If we are trying to find a way to explain the times in which Thomas departs from his otherwise consistent First Amendment outlook as something other than a personal reaction to anti-black racism, his opinion in *Dawson* makes that task harder, not easier. In the end, it is difficult to avoid the conclusion that Thomas' work in the racially-charged case of *Virginia v. Black* is an outgrowth of his life experiences as an African-American man, experiences which induced him to depart from his normal techniques and perspectives in free speech cases.[172]

If Thomas was indeed operating within a personal-is-political epistemology in *Virginia v. Black*, as some have argued,[173] here would be at one final note of similarity between Thomas and Hugo Black. Just as Black seemed to inject something personal (his family life) into his dissent in *Tinker*, so too did Thomas infuse his entire thought process in *Virginia v. Black*—oral argument and written dissent—with his own personal life experiences. At a time in which the nomination of Sonia Sotomayor to the Supreme Court is generating alarm in politically conservative circles out of fear that she will be too willing to inject her personal worldview into her constitutional interpretation,[174] we can see that one of the lodestars of legal conservatism was not immune to the seductive pull of such a decisional rubric.

CONCLUSION

The famed civil libertarian Nat Hentoff, who ordinarily would not be expected to have a high opinion of Clarence Thomas or his

171. *Id*. at 173.

172. It must be pointed out that Thomas signed onto Scalia's majority opinion in *R.A.V.* More importantly, Thomas had written his own concurrence in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), in which the Court upheld a lower court directive for the Board to issue a permit for the Klan to display a cross during the holiday season at Columbus' Statehouse Plaza, which was a designated public forum (this was the "Ohio case" that Thomas mentioned to Michael Dreeben). *Pinette*, however, hinged on the Board's determination that displaying of any cross—Klan-proffered or otherwise—might have violated the Establishment Clause, and had refused to issue the permit on those grounds. However, in his separate concurrence, Thomas pointed out that "to the extent that the Klan had a message to communicate [via the cross] in Capitol Square, it was primarily a political one." *Id*. at 771.

173. *See generally* Charles, *supra* note 167.

174. *See* Peter Baker and Neil L. Lewis, *Sotomayor Vows 'Fidelity to the Law' as Hearings Start*, N.Y. TIMES, July 13, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm.html.

jurisprudence, has nevertheless acknowledged that Thomas' record on the First Amendment is emphatically speech-protective. "To the incremental surprise and perhaps discomfiture of some of his critics, Justice Clarence Thomas is growing harder to stereotype," Hentoff has commented. "[H]e has written as boldly and uncompromisingly in celebration of the First Amendment as did Justices William O. Douglas and William Brennan Jr. in days of yore."[175]

Thomas' free speech jurisprudence is not without its flaws, but it can fairly be said to be as exemplary as Hentoff describes it. While attitudinally similar to the absolutism of Hugo Black, and somewhat influenced by the instrumentalism of Alexander Meiklejohn, Clarence Thomas' work on free speech stands on its own as a distinctive and embracive reading of the First Amendment.

175. Nat Hentoff, *First Friend: Justice Clarence Thomas Has Written as Ardently in Defense of Free Speech as Liberal Icon William Brennan Jr. Ever Did*, L. TIMES, July 3, 2000, at 62.

APPENDIX: CLARENCE THOMAS OPINIONS DATA

Of Clarence Thomas' 432 opinions, there are 149 main opinions, 140 concurrences, 112 dissents (including dissents from denial of certiorari), and thirty-one concurrences-in-part-and-dissents-in-part. The total of 149 main opinions, which averages out to 8.76 main opinions per Term, places him at the bottom of the list of the five Justices who have been on the Court for the entire balance of Thomas' tenure:

Main Opinions Authored, 1991-92 Term Through 2008-09 Term

JUSTICE	MAIN OPINIONS	RATE PER TERM
John Paul Stevens	173	10.17
Antonin Scalia	170	10.00
Anthony Kennedy	158	9.29
David Souter	151	8.88
Clarence Thomas	149	8.76

In addition, William Rehnquist wrote 151 opinions between the start of the 1991-1992 Term and his death on September 3, 2005 (averaging just over ten main opinions per Term). Sandra Day O'Connor wrote 145 main opinions between the start of the 1991-1992 Term and her retirement effective date of January 31, 2006 (averaging exactly ten main opinions per Term).[176]

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44 Liquormart v. Rhode Island, 517 U.S. 484 (1996)
Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002)
Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)

176. If we include Ruth Bader Ginsburg and Stephen Breyer, we can see that Thomas' rate of writing main opinions is the lowest of any of the current Justices who have been on the Court for at least five years. Ginsburg has written 140 main opinions in her tenure on the Court, beginning with her arrival for the 1993-1994 Term, an average of 9.33 main opinions per Term; despite being on the Court for two fewer years than Thomas, she has only written nine fewer main opinions. Stephen Breyer, who arrived the following Term, has written 125 main opinions, an average of 8.92 main opinions per Term. Both of the newest Justices' main opinion rates are lower. John Roberts, who has just completed four full Terms on the Court, has written thirty-four main opinions, exactly 8.5 per Term. Samuel Alito's rate of main opinions is even lower, having written twenty-six main opinion in three and a half Terms (taking over the second half of the 2005-06 Term left over upon O'Connor's retirement), an average of 7.43 main opinions per Term.

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)
Northwest Austin Municipal Utility District #1 v. Holder, 557 U.S. ___ (2009)
Posadas de Puerto Rico v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986)
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
Randall v. Sorrell, 548 U.S. 230 (2006)
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367 (1969)
Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)
Rubin v. Coors Brewing Company, 514 U.S. 476 (1995)
Safford Unified School District #1 v. Redding, 557 U.S. ___ (2009)
Schechter Poultry Corporation v. United States, 295 U.S. 485 (1935)
Shaw v. Murphy, 532 U.S. 223 (2001)
Street v. New York, 396 U.S. 576 (1969)
Tennessee Secondary School Athletic Association v. Brentwood Academy, 551 U.S. 291 (2007)
Texas v. Johnson, 491 U.S. 397 (1989)
Thompson v. Western States Medical Center, 535 U.S. 357 (2002)
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)
U.S. Department of Agriculture v. United Foods, 533 U.S. 405 (2001)
United States v. O'Brien, 391 U.S. 367 (1968)
United States v. Playboy Entertainment Group, 529 U.S. 803 (2000)
Valentine v. Chrestensen, 316 U.S. 52 (1942)
Vernonia School District v. Acton, 515 U.S. 646 (1995)
Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976)
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