CLARENCE THOMAS: PROTECTOR OF THE CONSTITUTION

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Justice Clarence Thomas is rapidly emerging as the Court's strongest and most articulate voice in behalf of constitutional government. "Constitutional government" means government in accord with the United States Constitution as its makers wrote it, rather than as liberal Court activists would like to rewrite it.

Three recent opinions identify him as a leader rather than a follower of anyone else on the Court, and as a clear thinker who expresses his consistent logic so well that he has started to change the direction of the Court.

The first is his concurring opinion in the 7-2 decision in *McIntyre v. Ohio Elections Commission.* At issue was the prosecution of one woman (who died before the case reached the Supreme Court) for the crime of anonymously distributing leaflets opposing a proposed school tax levy.

It was a simple, one-page leaflet, composed and printed on her home computer, addressed to "Concerned Parents and Taxpayers." There was no allegation that her message was false, misleading or libelous.

The proposed school levy was defeated in two successive elections, but it finally passed on its third try. Five months later, the school administrators filed a complaint with the Ohio Elections Commission, which then invoked the Ohio law against Mrs. McIntyre.

The majority decision, written by Justice John Paul Stevens, came to the correct conclusion that the Ohio law was unconstitutional because anonymous pamphleteering has "an honorable tradition of advocacy and of dissent." But it is Justice Thomas's concurring opinion that asks and conclusively answers the only relevant question: Does the First Amendment's phrase "freedom of speech, or of the press," as intended by its writers, protect anonymous political leafletting? The answer is clearly yes.

The writers of our Constitution themselves engaged in the universal practice of publishing anonymous articles and pamphlets. The prime example is the *Federalist Papers,* the campaign arguments promoting ratification of the Constitution, which were published anonymously under the pseudonym "Publius."

Thomas cites a long list of famous early American revolutionaries and statesmen whose political writings were published anonymously. The writers of our Constitution obviously considered such activity to be part of the freedom of the press.

The original purpose of the right to write anonymously was to shield the writers from harassment by the British Crown. That reason is just as valid today to protect little old ladies from harassment by the arrogant public school monopoly determined to raise

taxes.

In *United States v. 'Lopez*, Chief Justice William Rehnquist wrote the decision for the 5-4 majority holding that the Commerce Clause in the U.S. Constitution does not give Congress the power to regulate possession of a gun in a local school zone. Gun possession has nothing to do with interstate commerce.

As Rehnquist points out, if Congress has the power to regulate any activities that "adversely affect the learning environment," that would mean giving Congress the power to regulate the educational process directly and even to "mandate a federal curriculum for local elementary and secondary schools." That would be intolerable.

Justice Thomas's concurring opinion is even better than Rehnquist's because Thomas traces how case law of the last 60 years "has drifted far from the original understanding of the Commerce Clause." Thomas points out that, when the government lawyer was asked during the oral argument if there were any limits to the Commerce Clause, he was at a loss for words.

Labelling the government's formulation of federal power "a blank check," Thomas calls on the Court to modify its Commerce Clause holdings (which he calls "an innovation of the 20th century") to make them more faithful to the U.S. Constitution.

The third case that lifts Clarence Thomas to a preeminent position of constitutional leadership is his brilliant 88-page dissent in *U.S. Term Limits v. Thornton*, in which he was joined by Rehnquist, O'Connor and Scalia. With meticulous scholarship, Thomas dissects the meandering majority opinion written by Justice Stevens, which overturned the laws of 23 states prescribing term limits for their Members of Congress.

Stevens's argument is based on the false notion that the states possess only those powers that the Constitution affirmatively grants to them or that they enjoyed before the Constitution was adopted. The Tenth Amendment is Thomas's authority for concluding that the states or the people can exercise all the powers that the Constitution does not affirmatively delegate to the Federal Government or prohibit to the states.

Nothing in the Constitution deprives the people of each state of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress . Since the Constitution is silent, Thomas writes, the states should be able to set their own requirements, as, indeed, they have constitutionally and historically done over the years in so many ways other than by term limits.

These three landmark opinions make clear why the left resorted to such unprecedented hysteria in its abortive effort to keep Clarence Thomas off the Supreme Court. All who care about the survival of the United States Constitution are grateful that they failed.