Thomas alone on campaign finance?

Justice Clarence Thomas is not afraid to go it alone at the Supreme Court. In _Citizens United v. Federal Election Commission_, the 2010 case striking down the law preventing business corporations from spending money from their general treasury on elections, the vote was 8-1 in favor of a disclosure law also challenged by the plaintiffs. Thomas also was alone in _Doe v. Reed_, a 2010 case upholding the ability of the state of Washington to make public the names of voters signing referendum petitions. Again in _Shelby County v. Holder_, the 2013 blockbuster case preventing Congress from enforcing a part of the Voting Rights Act which required states with a history of racial discrimination in voting to get approval before making changes in their voting rules, Thomas alone would have gone farther than the majority. While the majority struck the coverage formula of the act, leaving the preclearance provision standing in case Congress could enact a new constitutional coverage formula, Thomas was ready to strike preclearance, too. "By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision," he wrote.

But it was somewhat of a surprise last week when Thomas wrote only for himself in the _McCutcheon_ campaign finance case, depriving Chief Justice John Roberts of a majority opinion. _McCutcheon_ concerned the constitutionality of a federal law which limited the total amount of money that an individual could donate to all federal candidates for office, political parties, and certain political committees in a two-year period. Since the 1976 opinion of _Buckley v. Valeo_, the Supreme Court has reviewed challenges to spending limits under strict scrutiny, but challenges to campaign contribution limits under a laxer "exact scrutiny" standard.

Roberts, for four justices, wrote a plurality opinion striking down the law under the First Amendment. The opinion applied "exact scrutiny" and refused the request of Son. Mitch McConnell and others to apply strict scrutiny. "[W]e see no need in this case to revisit _Buckley_'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review." Thomas, for himself only, wrote that he would apply strict scrutiny to all campaign limits and presumably strike all of them down: "This case represents yet another missed opportunity to right the course of our campaign finance jurisprudence by restoring a standard that is faithful to the First Amendment."

Why was the solitary Thomas opinion a surprise given his willingness to go it alone in other cases? Because Justices Antonin Scalia and Anthony Kennedy in past cases have signed onto earlier Thomas opinions, including the 2001 case _FEC v. Colorado Republican Federal Campaign Committee_, arguing for the application of strict scrutiny to campaign contribution limits.

The loss of Scalia and Kennedy appears to be more about tactics and appearances than substance. As I explained in a recent article in Slate, Roberts’ plurality opinion in _McCutcheon_ used subtle means to reach almost the same outcome as that favored by Thomas. Rather than applying "exact scrutiny" in the typical lax way that the court has used in the past, the chief justice made that "exact" level of scrutiny "rigorous." Rather than apply a capacious definition of the state’s anticorruption interest to balance against First Amendment rights, the chief justice severely constricted the meaning of corruption to something akin to bribery. And the chief justice peppered his opinion with all kinds of dicta providing the means for challenging soft money limits on political funding.
party fundraising and ultimately all contribution limits.

This was vintage Roberts playing his long game. He would rather take two, or four, steps to go down the road rather than run down that road where Thomas is. But he and Thomas are on the same road and will usually end up in the same place.

When the chief justice first tried this go-slow tactic in the campaign finance area, in a case called Wisconsin Right to Life v. FEC, he was criticized severely by both Scalia from the right and Justice David Souter from the left for all but overturning old precedent upholding the corporate spending ban. Scalia said the chief justice was exhibiting “faux judicial restraint.” It took the next case in this area, Citizens United, for the chief justice to catch up on the road to Scalia, Kennedy and Thomas.

This time in McCutcheon, Scalia and Kennedy seemed willing to go along with some faux judicial restraint. If Thomas had his way, all campaign contribution limit laws would be subject to immediate challenge and would fall rather quickly. The gradualism of the chief justice means that’s a project that takes a few more years.

The chief justice’s gradualism also means that the court takes less public heat. It is hard to explain to the public how an opinion on aggregate contribution limits affects what’s left of campaign finance law. Lower court application of McCutcheon will take a few years, and the heat from the opinion will dissipate. Then, when the court is ready, it can deliver the knockout blow. It did that in both the voting rights area, first warning of the unconstitutionality of the act and then striking it and, in the WRTL-Citizens United sequence as to corporate spending in candidate elections.

Thomas has no interest in faux judicial restraint or a PR effort for the benefit of the court. But the other justices seem to be warming to the chief justice’s velvet glove.

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