

No Entrenchment: Thomas on the Hobbs Act, the *Ocasio* Mess, and the Vagueness Doctrine

Kate Stith

Time and again, we have seen that neither precedent nor a perceived need to achieve consensus on the Court can hold Justice Clarence Thomas back from pronouncing what he has found to be the best understanding of the Constitution and federal statutes. His decisions scrape away at what Ralph Rossum has called the “excrescence” of flawed precedent,¹ no matter how deeply entrenched. He looks beyond the entrenchment to the Constitution and history. Not surprisingly, his administrative law decisions and his decisions directly interpreting the Constitution receive the most attention. But the Justice’s deep commitment to not only thinking, but *rethinking* is also on display in the more prosaic criminal-law opinions I will discuss.

In Justice Thomas’s first term, the Court considered *Evans v. United States*,² in which it was called on to interpret the Hobbs Act’s prohibition on extortion “under color of official right.”³ Writing for the six-person majority in *Evans*, Justice Stevens determined that when Congress adopted the Hobbs Act in 1946, it believed it was codifying the common-law crime of extortion, as New York recently had done.⁴ And at common law, Stevens said, extortion required

1. RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION 12 (2014).

2. 504 U.S. 255 (1992).

3. Hobbs Act, 18 U.S.C. § 1951 (2012). Section (a) of the Hobbs Acts prohibits interference with interstate commerce through, *inter alia*, “extortion.” Section (b)(2) defines extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”

4. 504 U.S. at 264.

only that a public official accept a payment made in return for official acts; there was no requirement that the official initiate or induce the payment, which was the issue that had split the circuit courts.⁵ Therefore, said Justice Stevens, mere acceptance of money or property, knowing it was intended to be a bribe, constitutes Hobbs Act extortion.⁶

Justice Thomas's dissent was powerful and persuasive. The majority, he said, got the common law wrong, and hence got the Hobbs Act wrong.⁷ The Justice took on not just the issue that had split the circuit courts—whether the public official had to have induced the bribe, or whether just taking a bribe is enough for conviction. Neither taking nor inducing was enough, Justice Thomas said, because the Hobbs Act did not prohibit bribery.⁸ It criminalized a different wrong: extortion. Citing nineteenth-century and early twentieth-century cases, he showed that the common-law offense of official extortion required not only that the official obtained a payment, but also that he obtained the payment under a “false pretense of official right to the payment.”⁹ Neither receiving a bribe nor inducing a bribe was enough. The official had to dupe the payor into thinking that the official was *due* the payment. Indeed, the very words of the Hobbs Act say that: the statute defines official extortion as “the obtaining of property from another . . . under color of official right.”¹⁰

The difference between Justice Thomas's interpretation and that of the majority is not merely of linguistic, historical, or academic interest. Justice Thomas showed that the Court's interpretation effectively eliminated the longstanding distinction between bribery and extortion. But this distinction is important. Bribery is a crime committed by both the bribe payor and the bribe receiver; when a bribe is paid, both the payor and the recipient may be prosecuted. Extortion, on the other hand, is a crime in which the payor is the *victim* of the official, not his accomplice or confederate.¹¹ Perhaps most importantly (though not noted by Thomas, likely because the point was not critical to his analysis): extortion under color of official right is surely the more heinous

5. *Id.* at 264-65.

6. *Id.* at 265-66.

7. *Id.* at 278 (Thomas, J., dissenting).

8. *Id.* at 283. Justice Thomas went on to conclude: “The Court, therefore, errs in asserting that common-law extortion is the ‘rough equivalent of what we would now describe as ‘taking a bribe.’” *Id.* (quoting *id.* at 260 (majority opinion)).

9. *Id.* at 282; see *id.* at 281-84, 284 n.4.

10. 18 U.S.C. § 1951(b)(2) (2012).

11. *Evans*, 504 U.S. at 283-84 (Thomas, J., dissenting).

crime, for it instantiates both corruption *and* coercion.¹² Indeed, the maximum sentence for conviction of Hobbs Act extortion has always been *twenty* years in prison, whereas the four principal federal bribery statutes at the time the Hobbs Act was enacted had a maximum penalty of *three* years in prison (plus disqualification from holding office).¹³ Justice Thomas noted that the majority's interpretation gave license to federal prosecutors to prosecute state and local officials (and those who pay them off) for bribery, under the guise of prosecuting them for extortion.¹⁴

Let me add a footnote. Beginning with its first bribery law in 1789, Congress had clearly and consistently limited federal criminalization of bribery only to the bribing of federal officials.¹⁵ There is nothing in the legislative history of

12. Moreover, the Hobbs Act prohibits both extortion and an even more serious form of coerced procurement of money: robbery. The operative language of the Hobbs Act has not changed since it was non-substantively revised in 1948; 18 U.S.C. § 1951(a) provides in full:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined . . . or imprisoned not more than twenty years, or both.

13. Compare Hobbs Act, 18 U.S.C. § 420(e) (1946) (non-substantively revised and codified in 1948 at 18 U.S.C. § 1951(a) (Supp. 1947-1949)), with *id.* § 91 (“Bribery of United States officer”), *id.* § 207 (“Official accepting bribe”), *id.* § 199 (“Accepting bribe by Member of Congress”), and *id.* § 200 (“Offering bribe to Member of Congress”). When these and other federal bribery laws were consolidated in 1962 into a new provision, 18 U.S.C. § 201 (Supp. 1959-1963), the maximum prison sentence was increased to (and remains) fifteen years in prison (plus disqualification from holding office).

14. See *Evans*, 504 U.S. at 287 (Thomas, J., dissenting) (“The Court chooses . . . the interpretation that maximizes federal criminal jurisdiction over state and local officials.”). Thomas noted that a single sentence of a 1972 decision from the Third Circuit, *United States v. Kenny*, 462 F.2d 1205, 1229, *cert. denied*, 409 U.S. 914 (1972), had introduced the conflation of Hobbs Act extortion by official right, on the one hand, and the crime of bribery, on the other. See *Evans*, 504 U.S. at 290-91 (Thomas, J., dissenting) (concluding that “*Kenny* obliterated the distinction between extortion and bribery, essentially creating a new crime encompassing both”). As Judge Noonan, cited by Justice Thomas, *id.* at 291, explained in his encyclopedic and meticulous examination of the history of bribery law:

As effectively as if there were federal common law crimes, the court in *Kenny* . . . amend[ed] the Hobbs Act and br[ought] into existence a new crime—local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun.

JOHN T. NOONAN, JR., BRIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA 586 (1984).

15. The first federal law to address bribery provided for only civil penalties. See Act of July 31, 1789, ch. 5, § 35, 1 Stat. 29, 46-47 (providing that bribery of customs officers would result in disqualification from office with both parties subject to being fined). The bribery provision

the Hobbs Act that suggests that in 1946 (or in 1934, when Congress first prohibited affecting interstate commerce by extortion under color of official right) Congress thought it was making all state and local bribery a federal crime.¹⁶ The words of the Hobbs Act prohibition were far more limited, setting federal prosecutors loose only on those non-federal officials who obtained payment under *the pretense of official right*.

Justice Thomas's early, virtually ignored, dissent in *Evans* was prescient. Twenty-four years later, in *Ocasio v. United States*,¹⁷ the majority opinion by former United States Attorney Samuel Alito followed *Evans*' logic to hold that indeed the victim of an extortion under color of official right—the citizen paying the official—could be prosecuted as a co-conspirator of the official who takes the payment.¹⁸ To be clear, as strange as it sounds, *Ocasio* held that a Hobbs Act “victim” can “conspire” in his own extortion.¹⁹

of the Crimes Act of 1790 prohibited federal judges from receiving bribes, and provided, in addition to disqualification, for a fine and imprisonment “at the discretion of the court.” Crimes Act of 1790, ch. 9, § 21, 1 Stat. 112, 117. The offense of “extortion . . . under, or by colour of his office,” applicable only to federal officials, was added in the Crimes Act of 1825, ch. 65, § 12, 4 Stat. 115, 118. The principal statute prohibiting bribery of federal officials is now 18 U.S.C. § 201 (2012), which was enacted in its current form in 1962. *See* Act of Oct. 23, 1962, Pub. L. No. 87-849, § 1(a), 76 Stat. 1119-20 (codified as amended at 18 U.S.C. § 201); *see also supra* note 13. Also in the early 1960s, Congress enacted the Travel Act of 1961, Pub. L. No. 87-228, 75 Stat. 498 (codified as amended at 18 U.S.C. § 1952 (2012)), which includes state bribery law as a predicate offense. It was not until 1984 that the Federal Program Bribery statute, Crime Control Act of 1984, Pub. L. No. 1104, 98 Stat. 1837 (codified as amended at 18 U.S.C. § 666 (2012)), came into force. The latter explicitly reaches instances of bribery by any agent of a recipient of federal funds; the statute is targeted at, *inter alia*, state and local corruption. But federal prosecutors know that “extortion” has connotations of coercion, and even violence, that are not present in the term “bribery.” It is thus not surprising that state and local bribery schemes are often charged not under the federal program bribery statute but as Hobbs Act extortion. *See, e.g., United States v. Silver*, 184 F. Supp. 3d 33 (S.D.N.Y. 2016) (denying motion for acquittal notwithstanding the verdict of guilty as to, *inter alia*, two Hobbs Act counts of extortion under color of official right), *vacated on other grounds*, No. 16-1615-CR, 2017 WL 2978386 (2d Cir. July 13, 2017).

16. The relevant provisions of the 1946 Hobbs Act “did not make any significant change in the section referring to obtaining property ‘under color of official right’ that had been prohibited by the 1934 [Anti-Racketeering] Act.” *Evans*, 504 U.S. at 262. Justice Stevens later remarked that the legislative history of the Hobbs Act was “sparse and unilluminating with respect to the offense of extortion.” *Id.* at 264.
17. 136 S. Ct. 1423 (2016).
18. *Id.* at 1436. The defendant, a local police officer, was prosecuted for violating the Hobbs Act and for conspiring to violate the Hobbs Act, in violation of 18 U.S.C. § 371, after he accepted payments from automobile body shops in return for referring accident victims to the shops. He challenged his conspiracy conviction, “contending that, as a matter of law, he c[ould] not be convicted of conspiring with the [bribe payors] to obtain money from them under color of official right.” *Id.* at 1427. The Court rejected this contention, relying on *Evans*. *Id.* at 1434 (“The subtext of [Ocasio’s] arguments is that it seems unnatural to prosecute bribery on the

In his *Ocasio* dissent, Justice Thomas reprised his *Evans* dissent. History, he explained again, was on the side of the defendant, because extortion and bribery are different crimes.²⁰ Interestingly, Justice Breyer, who had not been on the Court when *Evans* was decided, filed a concurring opinion in *Ocasio*, forthrightly admitting that he “agree[d] with the sentiment expressed” in Justice Thomas’s dissenting opinion that *Evans* “may well have been wrongly decid-

basis of a statute prohibiting ‘extortion,’ but this Court held in *Evans* that Hobbs Act extortion ‘under color of official right’ includes the ‘rough equivalent of what we would now describe as “taking a bribe”’ (citing and quoting *Evans*, 504 U.S. at 260)). Justices Kennedy, Ginsburg, Breyer, and Kagan joined the majority opinion. Justice Sotomayor filed a separate dissenting opinion, in which Chief Justice Roberts joined, that relied on the Hobbs Act’s language prohibiting obtaining property “from another.” *Id.* at 1440 (Sotomayor, J., dissenting). Justice Breyer’s concurring opinion is discussed *infra* text accompanying notes 21–22.

19. *Ocasio*, 136 S. Ct. at 1436. The decision noted that it did not reach the question whether a “color of right” extortion victim (the bribe payor) may be prosecuted as an accomplice to a Hobbs Act violation committed by the person engaged in extortion (the bribe recipient), pursuant to 18 U.S.C. § 2(a) (2012). *Ocasio*, 136 S. Ct. at 1432 n.6. But the decision went on to note that the Government’s brief had cited cases for the proposition that the bribe payor “may be guilty of [color of official right] Hobbs Act extortion as an aider and abettor.” *Id.* The federal mens rea standard for accomplice liability is close to, if not equivalent to, the “specific intent” required for conspiracy liability. *See id.* at 1430. As reported in DANIEL C. RICHMAN, KATE STITH, & WILLIAM J. STUNTZ, *DEFINING FEDERAL CRIMES* 469–70 (2014), all federal Courts of Appeals have adopted some version of “Learned Hand’s classic language in *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), . . . [explaining that] ‘the government must prove that the defendant . . . “participate[d] in [the criminal venture] as in something he wishe[d] to bring about, and [sought] by his actions to make it succeed.’” It is hard to find daylight between this high standard of mens rea required for accomplice liability and the mens rea required for conspiratorial liability. *Ocasio*, 136 S. Ct. at 1432, 1435, reiterates the conspiracy standard enunciated in *Salinas v. United States*, 522 U.S. 52, 63–64 (1997): conspirators must “share a common purpose” and pursue “the same criminal objective.” Hence, at least as matters now stand, *Ocasio* foretells the Court also holding that bribe payors can be found guilty of the substantive crime of Hobbs Act extortion. Again, as strange as it sounds, this would mean the extortion victim is guilty of his own extortion.

More portentously, the decision may foretell reconsideration of what constitutes a criminal conspiracy, at least as regards the Hobbs Act, *see infra* text accompanying notes 23–29. There may also be, waiting in the wings, reconsideration of whether foreign officials may be prosecuted for conspiracy to receive bribes the giving of which was in contravention of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78dd-1 to 78dd-3, 78ff (2012). *See* Michael F. Dearington, *Ocasio v. United States: The Supreme Court’s Sudden Expansion of Conspiracy Liability (and Why Bribe-Taking Foreign Officials Should Take Note)* (Feb. 27, 2017) (unpublished manuscript) (on file with author); Shu-en Wee & Daniel Richman, *Bribery Conspiracies, Foreign and Domestic: Ocasio v. United States and Its Implications for FCPA Complicity Theories*, COMPLIANCE & ENFORCEMENT (Aug. 15, 2016), http://wp.nyu.edu/compliance_enforcement/2016/08/15/bribery-conspiracies-foreign-and-domestic-ocasio-v-united-states-and-its-implications-for-fcpa-complicity-theories [<http://perma.cc/NE85-AS2B>].

20. *Ocasio*, 136 S. Ct. at 1437 (Thomas, J., dissenting).

ed.”²¹ But Justice Breyer said that he felt constrained to “take *Evans* as good law.”²² Justice Thomas, of course, would not and does not let an erroneous prior construction of a federal statute stand in the way of getting it right twenty-four years later.

Ocasio’s majority opinion raises a host of troubling issues. The decision not only continues the *Evans* conceit that color-of-right extortion is merely bribery, but also suggests the expansion of federal prosecutorial authority to charge commercial-extortion victims in the private sector with conspiracy to violate the Hobbs Act.²³ Perhaps most importantly, *Ocasio* may have thrown a monkey wrench into the settled understanding of what constitutes an “agreement” in federal conspiracy law. The opinion denies that its holding will mean that every color-of-right-extortion bribe payor is also a conspirator in her own extortion.²⁴ But it is in this discussion that the majority unsettles our longstanding understanding that conspiracy agreements may be entered into unenthusiastically.²⁵ The majority distinguishes between a conspiratorial agreement, on one hand, and the “minimal ‘consent’” required to trigger liability under the Hobbs Act, on the other hand.²⁶ As an example, the majority says that “mere acquies-

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21. *Id.* (Breyer, J., concurring). Breyer went on to note that “[t]he present case underscores some of the problems that *Evans* raises.” *Id.*
 22. *Id.* *Ocasio* had not sought to have *Evans* overruled, and counsel conceded at oral argument that he took the holding in *Evans* “as a given.” *Id.* (quoting Transcript of Oral Argument at 20, *Ocasio*, 136 S. Ct. 1423 (No. 14-361)). “That being so,” said Breyer, “I join the majority’s opinion in full.” *Id.*
 23. In addition to extortion “under color of official right,” the Hobbs Act prohibits extortion “induced by wrongful use of actual or threatened force, violence, or fear.” Hobbs Act, 18 U.S.C. § 1951 (2012). *See also supra* note 3. These provisions apply to private-sector, as well as public-sector, extortion. *See, e.g., United States v. Capo*, 817 F.2d 947, 954 (2d Cir. 1987) (en banc) (holding that threats of economic harm are extortionate when “the defendant purports to have the power to hurt the victim in economic terms and fear is induced.”) (quoting *United States v. Brecht*, 540 F.2d 45, 51 n.11 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977))). The *Ocasio* Court did not limit its holding to conspiracy to violate the “color of right” prong of the Hobbs Act. Indeed, Justice Alito seemingly went out of his way to suggest that voluntary payments made by “a store owner . . . to gang members” to ensure they would not “trash the store” could—assuming the evidence showed that the store owner voluntarily entered into this cost-of-doing-business arrangement with the gang members—be guilty of conspiracy to extort herself. *Ocasio*, 136 S. Ct. at 1435.
 24. *See Ocasio*, 136 S. Ct. at 1435.
 25. *See, e.g., Phillip E. Johnson, The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1164 (1973) (“[T]he term ‘agreement’ may connote anything from firm commitment to engage in criminal activity oneself to reluctant approval of a criminal plot to be carried out entirely by others.”).
 26. *Ocasio*, 136 S. Ct. at 1435; *see also id.* at 1432 (“[W]hen [a] person’s consent or acquiescence is inherent in the underlying substantive offense, something more than bare consent or acquiescence may be needed to prove that the person was a conspirator.”).

cence” in a demand for payment by a local health inspector, whereby a restaurant owner agrees to pay “reluctantly,” does not constitute a conspiracy.²⁷

Really? Many conspiratorial agreements may be entered into “reluctantly” or with “mere acquiescence.” For instance, a smitten lover who only “reluctantly” agrees to murder his paramour’s spouse is nonetheless guilty of conspiracy to commit murder. Likewise, a person who only reluctantly agrees to provide opioids to his friend’s addicted sister because she is undergoing withdrawal symptoms is nonetheless guilty of conspiracy to distribute narcotics. Justice Breyer, in his concurrence, recognizes the problem wrought by Justice Alito’s attempt to distinguish reluctant consent from reluctant conspiratorial agreements. As to the restaurant-payor scenario, Justice Breyer notes “the difficult distinction between the somewhat involuntary behavior of the bribe payor and the voluntary behavior of the same bribe payor”²⁸ Likewise, former New York prosecutor and U.S. District Judge Sonia Sotomayor asks in her dissent, with apparent consternation:

When does mere “consent” tip over into conspiracy? Does it depend on whose idea it was? Whether the bribe was floated as an “official demand” or a suggestion? How happy the citizen is to pay off the public official? How much money is involved? Whether the citizen gained a benefit (a liquor license) or avoided a loss (closing the restaurant)? How many times the citizen paid the bribes? Whether he ever resisted paying or called the police?²⁹

The bottom line: *Evans* was wrong. Rather than try to follow its logic, and thereby fouling adjacent areas of criminal-law doctrine, the Court should have, as Justice Thomas argued, cut out the tumor.

Two other Thomas criminal-law opinions likewise make a good pair and reveal Justice Thomas’s disposition to rethink first principles. In *City of Chicago v. Morales*,³⁰ decided in 1999, the plurality held that Chicago’s new antiloitering ordinance was unconstitutionally vague and therefore deprived persons of liberty without due process of law. Justice Thomas’s dissent said the notion of a constitutional right to loiter “withers when exposed to the relevant history.”³¹ He showed that loitering laws have existed at least since the Norman Conquest and were commonplace both at the Founding and when the Fourteenth

27. *Id.* at 1436.

28. *Id.* at 1437 (Breyer, J., dissenting).

29. 136 S. Ct. at 1445 (Sotomayor, J., dissenting).

30. 527 U.S. 41, 64 (1999) (plurality opinion).

31. *Id.* at 103 (Thomas, J., dissenting).

Amendment was ratified.³² But the creation of a new constitutional right was not his only concern. He also criticized the holding that the ordinance was unconstitutionally vague. Quoting from Justice White's dissent in *Kolender v. Lawson*, Justice Thomas said, "any fool would know" what conduct was reached by the statute.³³

Sixteen years later, in *Johnson v. United States*,³⁴ we find Justice Thomas not just disputing the supposed vagueness of a single statute, but casting doubt on the entire vagueness doctrine.³⁵ This time, his turn to history took him all the way back to sixteenth-century England. Through four centuries, English and American courts dealt with vague statutes³⁶ by applying a rule of strict construction similar to today's rule of lenity.³⁷ They did not reach out to nullify whole provisions as unconstitutional. Indeed, the so-called "vagueness doctrine" – which involves striking down, rather than narrowly construing, a provision of law – did not make its first appearance in the Supreme Court until 1914.³⁸ Justice Thomas noted that the doctrine "shares an uncomfortably similar history with substantive due process, a judicially created doctrine lacking any basis in the Constitution."³⁹

The vagueness doctrine represents another instance in which Justice Thomas takes a very different approach than Justice Scalia.⁴⁰ Justice Scalia wrote the majority opinion in *Johnson*, which struck down the so-called residual clause of the Armed Career Criminal Act (ACCA) on vagueness grounds.⁴¹

32. *Id.* at 102-04.

33. *Id.* at 112 (quoting *Kolender v. Lawson*, 461 U.S. 352, 370 (White, J., dissenting)).

34. 135 S. Ct. 2551 (2015).

35. *Id.* at 2563-64 (Thomas, J., concurring).

36. *Id.* at 2567 ("The problem of vague penal statutes is nothing new. The notion that such laws may be void under the Constitution's Due Process Clauses, however, is a more recent development.").

37. *Id.* ("Before the end of the 19th century, courts addressed vagueness through a rule of strict construction of penal statutes, not a rule of constitutional law.").

38. *See id.* at 2570 (discussing *International Harvester Co. of America v. Kentucky*, 234 U.S. 216 (1914), and *Collins v. Kentucky*, 234 U.S. 634 (1914)).

39. *Id.* at 2564. More generally, Thomas was concerned that the Court had used the vagueness doctrine to strike down an array of duly enacted statutes, including that at issue in *Morales*, the policies of which Court majorities disapproved. *Id.* at 2566-67, 2571-72.

40. *See generally* William H. Pryor, Jr., *Justice Thomas, Criminal Justice, and Originalism's Legitimacy*, 127 YALE L.J. F. 173 (2017), <http://www.yalelawjournal.org/forum/justice-thomas-criminal-justice-and-originalisms-legitimacy> [<http://perma.cc/S3C6-6LQL>].

41. 135 S. Ct. at 2563. The ACCA provides for a higher prison term for defendants with three prior convictions for, *inter alia*, a "violent felony." 18 U.S.C. § 924(e)(1) (2012). The statutory definition of "violent felony" specifically mentions burglary, arson, extortion, and the use of explosives, and then provides that any crime that "otherwise involves conduct that pre-

Justice Thomas concurred in the judgment on other grounds,⁴² thereby leaving “for . . . another day” whether the entire vagueness doctrine is unfounded in the Constitution.⁴³

The path of least resistance is all too easy to take. In the law, that often translates into a reflexive reliance on precedent. Justice Thomas is not so tempted. In each and every opinion, he forces us to engage with the principle and history that lie beyond past decisions—whether or not he once agreed with their conclusions.⁴⁴ That commitment to intellectual honesty is no doubt one of his most profound and enduring contributions to the law.

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sents a serious potential risk of physical injury to another” is also included. § 924(e)(2)(B)(ii). The just-quoted provision has become known as the ACCA’s “residual clause,” which the Court in *Johnson* struck down as impermissibly vague under the Due Process Clause of the 14th Amendment. 135 S. Ct. at 2563.

42. Thomas judged one of the defendant’s previous convictions, possession of a sawed-off shotgun, not to come within the statutory definition of a “violent felony.” 135 S. Ct. at 2563-66 (Thomas, J., concurring).

43. *Id.* at 2566.

44. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 520-21 (2000) (Thomas, J., concurring) (acknowledging that a precedent he joined was incorrectly decided).