SPEAKING OUT ON JUSTICE THOMAS

DAVID R. STRAS

Speaking Out on Justice Thomas

The Honorable David R. Stras

One of my fondest memories and greatest honors was having Justice Thomas swear me in as a judge. He did it not once, but twice, first when I joined the Minnesota Supreme Court over a decade ago and then again when I became a judge on the United States Court of Appeals for the Eighth Circuit. The first time, he handed me what has now become a prized possession: a copy of my oath with a handwritten note on it. "David," he wrote, "this is YOUR oath. Always do your best to live up to it with dignity, honor, honesty, + respect." His message was clear: be your own judge and stick by your firmly held principles, no matter what they are. Ask any former clerk, and he or she will tell you that Justice Thomas embodies those values better than anyone.

I have always strived, as Justice Thomas instructed me that day, to be my own judge, but his guidance has become a part of who I am. One of the most important traits he imparted to me is courage. As judges, we are asked to make tough decisions, but it is our job to ignore the noise and make the right call, not just sometimes or usually, but all the time, no matter how unpopular it may be.

Justice Thomas has never been afraid to take a stand. Regardless of where textualism and originalism may take him, his overriding goal is just to find the right answer, even if it means stepping back and reconsidering his own positions.[1] Although there are many areas in which his refreshingly honest brand of writing has shaped American law, the word limits in this symposium require me to choose only one. My choice is the First Amendment, because it is the area of law where his influence on me perhaps stands out the most.

[1] *See* Almendarez-Torres v. United States, 523 U.S. 224 (1998); Mathis v. United States, 136 S. Ct. 2243, 2258–59 (2016) (Thomas, J., concurring) ("I have urged that *Almendarez-Torres* be reconsidered.").

The First Amendment protects many of our most cherished values, including religious liberty, a free press, and the right to peaceably assemble.[2] But its prohibition on "law[s] . . . abridging the freedom of speech" is arguably the most important.[3] From his earliest days on the Supreme Court, Justice Thomas has been a staunch defender of the freedom of speech.[4]

One example is how he approaches questions about commercial speech. The First Amendment, the Supreme Court has long held, "accords . . . lesser protection to commercial speech than to other constitutionally guaranteed expression."[5] Even though the text of the Constitution talks generically about "speech," the Court has drawn what it calls a "commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[6] This extra-textual gloss has led the Court to apply a form of intermediate scrutiny called the *Central Hudson* test to laws abridging commercial speech,[7] rather than the more robust strict scrutiny that applies to other types of content-based laws.[8]

---

[2] *See* U.S. CONST. amend. I.

[3] *Id.*

[4] *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (Thomas, J.) (holding that a prohibition on displaying alcohol content on beer labels violated the First Amendment); Reed v. Town of Gilbert, 576 U.S. 155 (2015) (Thomas, J.) (striking down a town's sign code that "impose[d] content-based restrictions on speech"); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (Thomas, J.) (holding that burdensome notice requirements imposed on crisis pregnancy centers violated the First Amendment).

[5] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563 (1980).

[6] *Id.* at 562 (internal quotation marks omitted).

[7] *Id.* at 566 ("For commercial speech [to be protected] . . . , it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

[8] *See* Edenfield v. Fane, 507 U.S. 761, 767 (1993).

Justice Thomas has always been skeptical of splitting the First Amendment in this way. His view, after tracing its original public meaning, is that content-based restrictions on commercial speech should receive strict scrutiny. In *44 Liquormart*, for example, he questioned whether "commercial speech is [really] of lower value than noncommercial speech," given that there is no "philosophical or historical basis for" it.[9] Then, turning the conventional view of commercial speech on its head, he expressed doubt about whether the government had *any* interest in keeping consumers "ignorant in order to manipulate their choices in a marketplace."[10] So rather than rely on *Central Hudson*'s "test," which he thought was "very difficult to apply with any uniformity,"[11] Justice Thomas would have simply held the state's interest to be "*per se* illegitimate."[12] Fascinated by Justice Thomas's unique take on commercial speech, I discussed his concurrence in one of my earliest academic pieces.[13]

Little did I know that liquor-advertising rules would make an appearance on my docket years later. In *Missouri Broadcasters Association v. Schmitt*,[14] I was asked to decide whether Missouri's "tied-house laws," which impose a series of advertising restrictions on producers, distributors, and retailers of alcohol, unconstitutionally abridged the freedom of speech.[15] The restrictions ranged from requiring producers and distributors to list multiple retailers in their advertisements

---

[9] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

[10] *Id.* at 518.

[11] *Id.* at 527.

[12] *Id.* at 518.

[13] *See* Jim Chen & David R. Stras, *Thomas, Clarence*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 542 (Roger K. Newman ed., 2009) (articulating how Justice Thomas "marshaled extensive historical evidence to support his contention that content-based restrictions on commercial speech should be subject to strict scrutiny").

[14] 946 F.3d 453 (8th Cir. 2020).

[15] *See id.* at 457.

to forbidding retailers from advertising discounted prices outside of their establishments.[16] The majority opinion applied the *Central Hudson* test, exactly like the Court did in *44 Liquormart*.[17]

Just like Justice Thomas, I was skeptical of this approach. In my view, Missouri's tied-house law did more than just regulate speech, it compelled it.[18] By requiring producers and distributors to list multiple retailers if it decided to mention just one,[19] Missouri's law "compel[led] associational speech"[20] and should have been subject to at least exacting scrutiny, if not strict scrutiny, under *Janus v. American Federation of State, County & Municipal Employees, Council 31*.[21] There is little doubt that Justice Thomas's concurrence in *44 Liquormart* laid some of the groundwork for my own concurrence in *Missouri Broadcasters*.

Justice Thomas has also pushed us to think about anonymous speech in a more principled way. At a basic level, the Supreme Court has long protected "an author's decision to remain anonymous."[22] Among its many rationales for doing so is the need "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[23] Using policy-based rationales like this one, the Court has generally invalidated restrictions on anonymous speech, no matter the form it takes.[24]

---

[16] *See id.*; *see also id.* at 463 (Stras, J., concurring).

[17] *Id.* at 460.

[18] *Id.* at 463 (Stras, J., concurring).

[19] *Id.* (citing MO. REV. STAT. §§ 311.070.1, 311.070.4(10)).

[20] *Id.* (emphasis omitted).

[21] 138 S. Ct. 2448, 2464–65 (2018).

[22] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995).

[23] *Id.* at 357.

[24] *See* Talley v. California, 362 U.S. 60 (1960) (holding that an ordinance prohibiting the distribution of anonymous handbills violated freedom of speech and of the press); *McIntyre,* 514 U.S. 334 (holding that an Ohio law prohibiting the distribution of anonymous campaign literature violated the First Amendment); Watchtower Bible and Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150 (2002) (holding that an ordinance requiring individuals to "register[] with the

For most of the Supreme Court, *McIntyre v. Ohio Elections Commission* was just another anonymous-speech case in a long line of them.[25] Relying on years of precedent, the Court held that a state law that prohibited the distribution of anonymous campaign literature violated the First Amendment.[26]

For Justice Thomas, the case was an opportunity to return to first principles. "Instead of asking whether an 'honorable tradition' of anonymous speech ha[d] existed throughout American history, or what the 'value' of anonymous speech might be," as his colleagues had done, his view was that the Court should "determine whether the phrase 'freedom of speech, or of the press,' as *originally understood*, protected anonymous political leafletting."[27] After doing the hard work of digging into Founding-era sources, Justice Thomas concluded that the "weight of the historical evidence" showed that "the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion."[28]

Anonymity stood at the forefront of a case that I would consider more than twenty years after *McIntyre*. Shortly after I joined the Eighth Circuit, I was assigned the majority opinion in *Calzone v. Summers*,[29] which required us to decide, en banc, the constitutionality of a law that required certain individuals "who act[ed] for the purpose of attempting to influence" legislative activities to register as lobbyists,[30] which had the effect of "reveal[ing] [their] identit[ies] and divulg[ing] [their] activities."[31] Though Missouri claimed that its law promoted transparency, my view

---

mayor" before "engag[ing] in door-to-door advocacy" violated the First Amendment).

[25] 514 U.S. 334.

[26] *Id.* at 336, 357.

[27] *Id.* at 359 (Thomas, J., concurring) (emphasis added).

[28] *Id.* at 371.

[29] 942 F.3d 415 (8th Cir. 2019) (en banc).

[30] *Id.* at 419 (quoting MO. REV. STAT. § 105.470(5)(c)).

[31] *Id.* at 423.

was that this interest did not overcome Calzone's interest in petitioning the government anonymously[32]—a right that, as Justice Thomas persuasively showed, existed all the way back to the Founding era.[33] Missouri's law, in other words, could not constitutionally be applied to Calzone.[34]

Excuse the pun, but Justice Thomas puts his money where his mouth is in his own work, too. One of my most memorable professional experiences was when he and I disagreed about a case during my clerkship. I cannot say what our disagreement was about, but I *can* say that I spent more than thirty minutes trying to persuade him to consider other possibilities. As those who know Justice Thomas might guess, I was unsuccessful. In fact, he told me afterward that I had "persuaded" him of something: that his own view was correct.

Though I did not get the answer I wanted that day, he taught me two important lessons, both rooted in the First Amendment. The first is the importance of standing up and advocating for my own views, even if I alone hold them. The second is the importance of listening. Despite disagreeing with me, Justice Thomas was willing to listen because he knew it would sharpen his own views. Those lessons stick with me to this day.

For these and so many other lessons, I am indebted to Justice Thomas. During his thirty years on the Court, *he* has embodied the values of dignity, honor, honesty, and respect—the words he wrote on my oath more than a decade ago. I can only hope to live up to them. Here's to one of my heroes, and one of the giants of the law.

---

[32] *Id.* at 425.
[33] *See McIntyre*, 514 U.S. at 371 (Thomas, J., concurring).
[34] *See Calzone*, 942 F.3d at 424.