

**“BE NOT AFRAID”**

JAMES C. HO

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In his three decades of service as a member of the Supreme Court of the United States, Justice Clarence Thomas has made countless contributions to the development of American law. But his greatest influence on our nation transcends any one particular area of jurisprudence. Perhaps the best way to capture Justice Thomas’s most important impact on the judiciary—and to celebrate his thirty-year anniversary on the Court—is to recognize the twenty-year anniversary of an address he delivered to the American Enterprise Institute. See Clarence Thomas, *Be Not Afraid* (Feb. 13, 2001), available at <http://www.aei.org/publication/be-not-afraid>.

His remarks should be mandatory reading for anyone who wishes to ascend to the bench—as it is for each of my incoming law clerks. Justice Thomas not only defends originalism as the touchstone of sound judging—more importantly, he explains why originalism requires not only intellect, but also character.

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We all know that Justice Thomas is an originalist. And his remarks two decades ago certainly offered a powerful case for respecting the text and original understanding of the Constitution and the timeless wisdom of our nation’s Founders reflected in our governing charter.

Moreover, in the years that followed those remarks, Justice Thomas’s originalist vision for our Constitution has at least by some appearances begun to achieve widespread consensus. As well as it should. Because originalism shouldn’t be controversial. Originalism isn’t conservative or liberal. It isn’t a commitment to any particular result or policy. It’s simply a commitment to a process. It’s about asking the right questions—not about predetermining what the answers to those questions must be. It’s about robust debate—a debate that is not rigged to reach a particular outcome, or to favor one party or another, but one that allows us to faithfully follow our principles to their appropriate and logical conclusion.

It’s also, at bottom, a commitment to intellectual honesty. A promise that we will engage with one another honestly, charitably, and in good faith about the law, about the Constitution, and about the proper meaning of words and provisions.

And lest we forget, every federal judge swears an oath to uphold the Constitution—so being an originalist is really just part of the job description. Because being an originalist just means being faithful to what you’re interpreting.

It should be hard to argue with any of this. So we should be pleased but perhaps not surprised that, about a decade after Justice Thomas’s remarks, Justice Elena Kagan embraced originalism during her Supreme Court confirmation hearing. As she stated: “Sometimes [our Founders] laid down very specific rules. Sometimes they laid down broad principles. Either way

we apply what they say, what they meant to do. So in that sense, we are all originalists.” *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States*, S. HRG. 111–1044, at 62 (2010).

Justice Ruth Bader Ginsburg echoed that sentiment the following year, stating that “I count myself as an originalist too.” Ariane de Vogue, *Justice Ginsburg Speaks About Gender Equality*, ABC NEWS, Nov. 18, 2011.

And Doug Kendall, the founder and president of the Constitutional Accountability Center, channeled that same spirit that same year, when he called on his fellow progressives to “embrace the original text of the Constitution and endorse a vision of the document in which the bedrock rules and principles contained in it do not lose their meaning over time.” Doug Kendall & Jim Ryan, *The Case for New Textualism*, DEMOCRACY, Summer 2011, at 67.

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So what’s the problem, then? If there is this broad consensus about originalism, at least as an intellectual matter, why do originalists continue to face headwinds?

It’s because the central challenge for originalism today is not a matter of intellect, but a matter of intimidation. The biggest obstacle for originalists is not the lack of intellectual ability to uncover the right answer, but the courage required to stand up for it.

And it is on this point that Justice Thomas’s remarks resonate most powerfully. Speaking not just as a judge but “as a citizen who . . . is concerned because too many show timidity today precisely when courage is demanded,” he shared insights from his first decade on the Court.

“Judges do not cease to be human beings when they go on the bench. In important cases, it is my humble opinion that finding the right answer is often the least difficult problem. Having the courage to assert that answer and stand firm in the face of the constant winds of protest and criticism is often much more difficult.”

He then quoted Alexander Hamilton, who wrote in Federalist No. 78: “It would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.” And he observed that “the trait that Hamilton singles out—fortitude—is fundamental to my philosophy of life, both as a judge and, more fundamentally, as a citizen of this great nation.”

In theory, the work of a judge should be straightforward, simple, even boring. But in reality, it is not. “A judge who strictly adheres to the rules of impartiality and judicial restraint is likely to reach sound conclusions. But as I’ve said, reaching the correct decision itself is only half the battle. Having the courage of your convictions can be the harder part.”

“In my humble opinion, those who come to engage in debates of consequence, and who challenge accepted wisdom, should expect to be treated badly. . . . Even if one has a valid position, and is intellectually honest, he has to anticipate nasty responses aimed at the messenger rather than the argument. The objective is to limit the range of the debate, the number of messengers, and the size of the audience. The aim is to pressure dissenters to sanitize their message, so as to avoid being subjected to hurtful ad hominem criticism. Who wants to be calumniated? It’s not worth the trouble.”

But “by yielding to a false form of ‘civility,’ we sometimes allow our critics to intimidate us. As I have said, active citizens are often subjected to truly vile attacks; they are branded as mean-spirited, racist, Uncle Tom, homophobic, sexist, etc. To this we often respond (if not succumb), so as not to be constantly fighting, by trying to be tolerant and nonjudgmental—i.e., we censor ourselves. This is not civility. It is cowardice, or well-intentioned self-deception at best.”

“The Founders warned us that freedom requires constant vigilance, and repeated action.” “[We] must stand undaunted. That is required. And, that should be expected. For, it is bravery that is required to secure freedom.”

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I want to spend a few moments dwelling on one particular sentence from his remarks: “If we are to be a nation of laws and not of men, judges must be impartial referees who defend constitutional principles from attempts by particular interests (or even the people as a whole) to overwhelm them.”

Justice Thomas is of course far from alone in invoking the metaphor of the “impartial referee” to describe the work of judging. Chief Justice John Roberts famously observed that “[j]udges are like umpires. Umpires don’t make the rules, they apply them.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, S. HRG. 109–158, at 55 (2005).

It is a powerful and evocative metaphor—and in more ways than one.

Anyone who watches sports is well familiar with the phenomenon of home field advantage. In a fascinating book called *Scorecasting*, the authors devote an entire chapter to the topic of home field advantage. See TOBIAS J. MOSKOWITZ & L. JON WERTHEIM, *SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON* (2011). Based on extensive analysis, they conclude that home field advantage is a very real phenomenon, that the leading cause of home field advantage is the sound of the hometown crowd, and that the sound of the crowd can have a surprisingly profound impact on the psychology of the referees.

The lesson they draw is a simple one: Most people don’t like to be booed. And as it turns out, most refs are no different.

As the authors explain: “We’re convinced that the vast majority of, if not all, officials are upstanding professionals, uncorrupted and incorruptible, consciously doing their best to ensure fairness. . . . They are not, however, immune to human psychology, and that’s where we think the explanation for home team bias resides.” SCORECASTING, *ante* at 157.

Here’s the authors’ key insight: “When humans are faced with enormous pressure—say, making a crucial call with a rabid crowd yelling, taunting, and chanting a few feet away—it is natural to want to alleviate that pressure.” *Id.* at 159. “Psychology finds that social influence is a powerful force that can affect human behavior and decisions *without the subjects even being aware of it.*” *Id.* at 157.

The book chronicles numerous studies involving a wide range of sports. But I think this one is my favorite: In a study conducted in 2001, one group of referees watched recorded soccer games with the sound on—while the other group watched with the sound muted. The group watching the game in silence called a relatively greater number of penalties against the home team, and a relatively fewer number of penalties against the away team—presumably because they were not influenced by the booing of the home crowd. *Id.* at 163-64. *See also The 12th man: Why is Brazil expected to have an advantage when they play at home during the FIFA World Cup?*, THE ECONOMIST, June 13, 2014.

What’s more, studies have demonstrated greater referee bias when the game is close. And they have identified statistically meaningful advantages across a wide range of sports. In baseball, home teams strike out less—and walk more—than away teams. In football, away teams are penalized more than home teams—particularly when the penalty results in a first down for the offense. The authors also found similar effects in basketball, soccer, and hockey. SCORECASTING, *ante* at 136-67. And they concluded that “referee bias from social influence not only is present but is *the leading cause of the home field advantage.*” *Id.* at 165.

Interestingly, the COVID-19 pandemic has given us a chance to test this hypothesis in the real world. Due to pandemic lockdowns, we now have experience running professional soccer games without crowd noise. And it turns out that the authors of *Scorecasting* are right: “Without crowds, referees penalise home teams as much as away teams.” *Empty stadiums have shrunk football teams’ home advantage*, THE ECONOMIST, July 25, 2020.

So if we take seriously the Chief Justice’s metaphor that we should view judges like we do umpires—and it is a wonderful metaphor—we also need to be aware, and wary, of what that metaphor foretells.

Americans are passionate about our sports teams. We’re also passionate about our politics. In sports and politics alike, we need judges who have not only the intellect but also the fortitude to be impartial—no matter how angry the crowd. We need judges who are not afraid of being booed.

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Winston Churchill once said that “courage is rightly esteemed the first of human qualities, because . . . it is the quality which guarantees all others.” WINSTON CHURCHILL, GREAT CONTEMPORARIES 211 (James W. Muller ed., 2012) (1937). No one in high office today embodies the fortitude of the former Prime Minister better than Justice Thomas.

The British persevered through the early days of World War II inspired by Churchill’s fighting spirit, immortalized by the enduring maxim: Keep Calm and Carry On. Channeling that same spirit today, Justice Thomas calls upon all of us to push forward, no matter how fierce the headwinds, with his simple exhortation: Be Not Afraid.