The Dog That Didn't Bark In The Night: SCOTUS's NIFLA v. Becerra And The Future Of Commercial Speech

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The U.S. Supreme Court last week issued its long-awaited opinion in *National Institute of Family and Life Advocates v. Becerra*. In a 5-4 decision authored by Justice Clarence Thomas, the Court held that a California law requiring licensed pro-life counselling clinics to direct their clients to abortion providers likely violated the clinics' free speech rights under the First Amendment. Like the famous dog that didn't bark in the night,[*] however, Justice Thomas's majority opinion in *NIFLA* is far more revealing for what it *doesn't* say than for what it does say.

Justice Thomas relies on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) as the basis for deciding *NIFLA*. His analysis begins by distinguishing "between content-based and content-neutral regulations of speech." Content-based regulations, he explains, "target speech based on its communicative content." Such laws are presumptively unconstitutional and may survive a First Amendment challenge only by withstanding strict scrutiny (that is, by being "narrowly tailored" to accomplish a "compelling government interest"). Few speech regulations can satisfy that test.

Justice Thomas goes on to explain why requiring the petitioner-clinics to convey a particular message is a content-based regulation of speech. "By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the [California law] plainly 'alters the content' of petitioners' speech."

In deciding whether to apply strict scrutiny to the challenged California law, the Court could have taken a more conventional approach. The Court could, for example, have simply declared the California law a classic example of viewpoint discrimination, which always receives strict scrutiny. By singling out pro-life clinics for unique burdens it imposed on no other clinics, the State of California misused its police powers to advance one side in a debate. As Justice Kennedy notes in his eloquent concurrence, such viewpoint discrimination would seem "inherent in the design and structure" of the law. But Justice Thomas did not go that route.

More importantly, the Court could have simply relied on its typical categorical approach to speech regulation to justify strict scrutiny. The State of California had argued that the law was justified as a regulation of commercial speech, subject to (at most) intermediate scrutiny. The petitioner-clinics countered that because they are nonprofits offering free or low-cost services, the burdened speech at issue was not, strictly speaking, commercial speech (i.e., speech that "invites a commercial transaction") but was entitled to full First Amendment protection. Yet *NIFLA* never squarely resolves that debate; curiously, the term "commercial speech" appears only once in Thomas's opinion, in a throw-away line and bracketed by ironic quotation marks.

US Supreme Court Associate Justice Clarence Thomas sits for an official photo with other members of the US Supreme Court in the Supreme Court in Washington, DC, June 1, 2017. / AFP PHOTO / SAUL LOEB (Photo credit should read SAUL LOEB/AFP/Getty Images)

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Instead, having announced that *Reed*'s presumptive prohibition against content-based regulations governs the outcome in *NIFLA*, Justice Thomas goes on to dismiss two narrow exceptions to *Reed*: (1) mandating purely factual and noncontroversial disclosures for advertisements under *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985) and (2) regulating professional conduct, which regulation may incidentally burden speech. After carefully explaining why neither of those exceptions applies in this case, Justice Thomas makes a truly remarkable statement: these are the *only* exceptions to strict scrutiny review for content-based regulations of professional speech.

"Outside of the two contexts discussed above—disclosures under *Zauderer* and professional conduct—this Court's precedents have long protected the First Amendment rights of professionals." And again, just in case there were any doubt: "This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking."

Palpably missing here—the dog that didn't bark—is any acknowledgment, much less discussion, of the Court's longstanding exception to strict-scrutiny review for commercial speech. After all, many garden-variety commercial-speech cases, including those to reach the Supreme Court, concern laws regulating the speech of *professionals* (lawyers, doctors, pharmacists, etc.). Yet Justice Thomas never mentions the intermediate scrutiny required by *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. 557 (1980)—not even to dismiss it as yet another inapposite exception to *Reed*'s general rule. Why not? What can we make of this glaring omission?

One radical possibility: *Central Hudson*'s commercial-speech distinction is a dead letter.

Remember, *Reed* proscribes content-based restrictions. But it is difficult to imagine a more glaring example of a "content-based" speech regulation than one aimed solely at something called "commercial speech." It is impossible to know whether speech qualifies as "commercial" without first scrutinizing its content.

This fact has not been lost on First Amendment litigators. Because *Reed*'s broad prohibition seemingly applies to *all* content-based regulation of speech (commercial or not), some have argued that *Reed* should be understood to jettison the intermediate-scrutiny standard of *Central Hudson*. Though this argument has, so far, had very little purchase with the lower federal courts, Justice Thomas's decision in *NIFLA* is certainly consistent with that fulsome reading of *Reed*.

It is also consistent with the clear trajectory of Supreme Court jurisprudence, which has been to increase the First Amendment protection accorded to commercial speech. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), marked the last time the Court applied *Central Hudson*; but there it did so only half-heartedly as a stalking horse for a more rigorous (but unarticulated) "heightened scrutiny" standard. Authored by Justice Kennedy, *Sorrell* cautioned that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." Yet such paternalistic commercial-speech laws have taken over more and more of the regulatory landscape in the years since *Sorrell* was decided.

The notion that Justice Thomas may be trying to kill *Central Hudson* will not come as a surprise to anyone familiar with his First Amendment jurisprudence. Justice Thomas has long "disagree[d] with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (Thomas, J., dissenting). And he has steadfastly rejected the view that commercial speech "could be censored in a variety of ways for any variety of reasons" or that it resides in a "subordinate position in the scale of First Amendment values." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in the judgment).

More recently, Justice Thomas reiterated that he "continue[s] to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, *whether or not* the speech in question may be characterized as 'commercial.'" *Matal v. Tam*, 137 S. Ct. 1744, 1769 (2017) (Thomas, J., concurring in part and concurring in the judgment) (emphasis added).

While no other Justices have explicitly signed on to Justice Thomas's repeated calls to abolish the commercial-speech exception to strict scrutiny, *NIFLA* suggests the possibility that he may be quietly persuading others on the Court to follow his lead. If so, *Reed*'s content-based framework, combined with *Sorrell*'s demand for heightened scrutiny, may well be on the way to eradicating any commercial/non-commercial speech distinction under the First Amendment.

[*] In Sir Arthur Conan Doyle's "The Adventure of Silver Blaze," the fact that a dog didn't bark the night a race horse was stolen from its stable is a crucial clue that allows Sherlock Holmes to identify the horse's late trainer as the thief:

> Det. Gregory (Scotland Yard): "Is there any other point to which you would wish to draw my attention?"
>
> Holmes: "To the curious incident of the dog in the night-time."

Det. Gregory: "The dog did *nothing* in the night-time."

Holmes: "*That* was the curious incident."

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