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## Speech and the Self-Governance Value

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# SPEECH AND THE SELF-GOVERNANCE VALUE

Brian C. Murchison\*

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## INTRODUCTION

What divides the justices of the Supreme Court in a number of contemporary cases involving speech at the core of the First Amendment? The near uniformity of vision that sparked the Court's renovation of libel law in *New York Times Co. v. Sullivan*<sup>1</sup> in the 1960s, its barricade against prior restraint in the 1970s,<sup>2</sup> and its philosophy of openness in the access-to-court cases of the 1980s and 1990s<sup>3</sup> has fragmented

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<sup>1</sup> 376 U.S. 254 (1964).

<sup>2</sup> See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>3</sup> E.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

dramatically, yet the sources of the Court's intellectual divisions over free speech are strangely elusive. A debate is in full force, but it is barely audible — or composed in a hidden language. So the question is: Halfway through the first decade of a new century, "Where do we find ourselves?"<sup>4</sup> What accounts for the 7–2 split in *McIntyre v. Ohio Elections Commission*,<sup>5</sup> where a citizen successfully invoked the First Amendment to avoid penalties for distributing anonymous handbills in violation of state law? And what differences prompted the Court's 6–3 split in *Bartnicki v. Vopper*,<sup>6</sup> where a radio host escaped liability for broadcasting an intercepted cell phone conversation? Why did the Court divide 5–4 in *Republican Party of Minnesota v. White*,<sup>7</sup> where the majority upheld a judicial candidate's claim that state limitations on campaign comments violated his freedom of speech? And did the differences in these cases have any bearing on those in *McConnell v. Federal Election Commission*,<sup>8</sup> where another 5–4 configuration upheld limitations on issue advocacy in federal campaigns?

Some might shrug off the questions, attributing disagreements on the Court to ideology and isolating a "liberal" understanding of free speech and a "conservative" rejoinder. But political tags are not necessarily illuminating in speech cases. Consider, for example, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,<sup>9</sup> where the Court ruled without dissent that a St. Patrick's Day parade is a "form of expression"<sup>10</sup> and that private organizers have a First Amendment right to exclude would-be participants who wish to convey a message (in that case, a message about sexual orientation) different from the organizers' own.<sup>11</sup> Ideology, sexual or otherwise, seemed a non-factor. Still, even if *Hurley* confounds explanation-by-ideology, what are we to make of the groupings of justices in the four cases before us — *McIntyre*, *Bartnicki*, *White*, and *McConnell*? Justices considered left-of-center tended to vote together in those cases, as did justices considered right-of-center, but the significance of the groupings is murky at best. Neither bloc aligned consistently with pro- or anti-speech results: Justices in the left-of-center bloc voted *against* the speech-based challenges in *McConnell* and *White*, but *for* speech-based challenges in *Bartnicki* and *McIntyre*, and justices in the other bloc followed the opposite course (although Justice Thomas deserted his bloc in *McIntyre*). Moreover, even within

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<sup>4</sup> RALPH WALDO EMERSON, *Experience*, in EMERSON'S ESSAYS 292, 296 (1926) (noting that the "evanescence and lubricity of all objects, which lets them slip through our fingers then when we clutch hardest, [is] the most unhandsome part of our condition"); Sheldon Wolin, *The Liberal/Democratic Divide*, 24 POL. THEORY 97, 117 (1996) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

<sup>5</sup> 514 U.S. 334 (1995).

<sup>6</sup> 532 U.S. 514 (2001).

<sup>7</sup> 536 U.S. 765 (2002).

<sup>8</sup> 540 U.S. 93 (2003).

<sup>9</sup> 515 U.S. 557 (1995).

<sup>10</sup> *Id.* at 568.

<sup>11</sup> *Id.* at 573.

blocs, justices often filed separate opinions. For example, Justice Breyer concurred with the left-of-center justices in *Bartnicki* but on far narrower grounds, and Justice Kennedy concurred with the right-of-center justices in *White*, but on far broader grounds. And Justice O'Connor, after joining Justice Breyer's rationale in *Bartnicki*, filed a concurrence with the right-of-center bloc in *White* before migrating to the left-of-center bloc in *McConnell*.

Can doctrine explain what ideology cannot? Each of the four cases was a battle over the meaning of precedent and the choice and application of legal tests, perhaps illustrating Justice Scalia's point that an abundance of doctrinal categories in First Amendment jurisprudence has led to "disuniformity" of analysis, even to "ineffable" calculations in individual cases.<sup>12</sup> But is doctrinal haggling the best explanation we can venture for divisions in these cases? Surely that question points to the further problem of what drives a justice's choice of frameworks. For this, we must examine what Ronald Dworkin has called the judge's sense of "some overall *point or purpose* to the Amendment's abstract guarantee of 'freedom of speech or of the press.'"<sup>13</sup>

This Article's premise is that at the heart of the cases is the "democratic participation" or "self-governance" value of the First Amendment. Although tradition holds that four values underpin the guaranties of liberty of speech and press — self-realization, truth-seeking, democratic participation, and social adaptability<sup>14</sup> — judges most often invoke the third. Some aspects of the self-governance value are familiar. Its political and moral premise is that "governments derive 'their just powers from the consent of the governed'"<sup>15</sup> — that in a democracy the citizen is sovereign. Its core assumptions about human nature are that individuals have the capacity to sort through ideas and exchange views in a common reasoning process, and that they grow and find fulfillment at least in part by involvement in public decisions, whether as voter, candidate, demonstrator, discussant, or reader. The value's practical embodiment is a legal rule: Citizens possess an enforceable right to speak openly about political, social, and moral issues and to receive the perspectives of others without inessential constraint. Judges have invoked this value in speech cases throughout the nation's history, but beyond its familiar core, the value's meaning is unsettled.

This Article posits that the Court's recent divisions in speech cases are traceable to differing elaborations of this value. Part I examines the value's most enduring legal sources — colonial lawyer Andrew Hamilton's classic oration in the *Zenger*

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<sup>12</sup> Antonin Scalia, *A House with Many Mansions: Categories of Speech Under the First Amendment*, in *THE CONSTITUTION, THE LAW, AND FREEDOM OF EXPRESSION, 1787–1987*, at 9, 18–19 (James Brewer Stewart ed., 1987).

<sup>13</sup> Ronald Dworkin, *The Coming Battles Over Free Speech*, 39 N.Y. REV. OF BOOKS 55, 56 (1992) (reviewing ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1992)).

<sup>14</sup> See generally Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

<sup>15</sup> *Id.* at 883 (quoting THE DECLARATION OF INDEPENDENCE).

trial,<sup>16</sup> and judicial opinions of Justices Louis D. Brandeis,<sup>17</sup> William J. Brennan, Jr.,<sup>18</sup> and Lewis F. Powell, Jr.<sup>19</sup> Although these writings emphasize different substantive dimensions of the value, they share a focus on respecting the individualism of the citizen by strongly protecting expressive freedom. However, they give surprisingly little attention to the participatory nature of citizenship, and they underappreciate the role of speech in addressing the estrangement of citizens who have abandoned, or suspect they have been abandoned by, politics.

The Article posits that a process account of the self-governance value would address these gaps. Unlike the traditional substantive account, a process perspective focuses on citizenship less as a mark of individualism and more as an interactive, speech-driven dynamic in the setting of modern democracy. Even cases that gave rise to the traditional model contain hints of a process approach on two analytic tracks: first, on the level of society at large — as speech and press freedoms interact to promote public-regarding thought and action — and second, on the level of the citizen — as expressive freedoms enable the disengaged individual to respond in a personal way to the call of public questions.

Parts II and III develop these two tracks by turning outside the law to highly relevant sources of insight: political philosophy and world literature. First, in probing the contours of the primary, society-wide speech process, the Article incorporates new thinking on the political meaning of freedom, particularly the concepts of negative and positive liberties. Building on Isaiah Berlin's famous treatment of this seeming dichotomy,<sup>20</sup> Maria Dimova-Cookson has conceptualized the two forms of liberty as aspects of a dialectic of citizenship, defined as moral agency.<sup>21</sup> Part II seeks to harmonize her account of "liberty writ large" and the law's own implicit process account of speech.

Then, to explore a secondary speech process, centered in the realm of individual civic consciousness, Part III compares three versions of a literary treatment of citizenship, alienation, and the (sometimes) saving dynamic of language: the classical story of the Greek warrior Philoctetes, who in the bitter aftermath of abandonment by his countrymen faces a decision about whether to rejoin them in the taking of Troy. The Article considers the story's ancient treatment by Sophocles<sup>22</sup> and subsequent

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<sup>16</sup> In 1735, Hamilton represented printer John Peter Zenger in the famous New York trial. See JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL* (Stanley Nider Katz ed., 1963) (1736).

<sup>17</sup> *Whitney v. California*, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

<sup>18</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256–92 (1964).

<sup>19</sup> *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850–75 (1974) (Powell, J., dissenting).

<sup>20</sup> ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969) [hereinafter BERLIN, *Two Concepts*].

<sup>21</sup> Maria Dimova-Cookson, *A New Scheme of Positive and Negative Freedom: Reconstructing T.H. Green on Freedom*, 31 *POL. THEORY* 508 (2003).

<sup>22</sup> SOPHOCLES, *PHILOCTETES*, in *GREEK DRAMA* 151 (Moses Hadas ed., R.C. Jebb trans., Bantam Classic ed., 1982) (1965).

versions in our time by poet/dramatist Seamus Heaney, who saw in it a lesson relevant to the cycle of bloodshed and distrust in Ireland,<sup>23</sup> and British novelist Paul Scott, who invoked the story to enlarge his chronicle of India's separation from Britain.<sup>24</sup> In each, language plays a central role in the partial healing of the outsider and in the complex progress of the larger social unit. The narratives suggest at least three elements of a speech process related to self-governance: a *systemic* element, in which law establishes fundamental conditions for freedom of speech in public life; a *communal* element, in which law protects a largely unhindered flow of information to provide connective tissue among citizens; and an *identity-forming* element, in which law immunizes the expression of citizens as they seek secure footing in both public and private aspects of their lives. For some citizens, the speech process will culminate in a life as much concerned with action as with dialogue — deeds *in* the public interest flowing from conversation *about* it.

Part IV circles back to the quartet of cases that began the inquiry and to the original question: What divides the justices in recent First Amendment cases? The Article proposes that the justices are implicitly working toward a process account of the self-governance value and that they differ in gauging how speech affects the undertaking of moral agency. In an era of ingrained skepticism about political life, moral agency ultimately relates to the formation and development of a civic role, understood as a concept of self-giving with surprising effects for the citizen: the discovery of a renewed public commitment, on the one hand, which amounts, on the other, to a complex form of individual growth.

## I. THE SUBSTANTIVE ACCOUNT OF THE SELF-GOVERNANCE VALUE

### A. *The Traditional Model*

Before considering the potential contributions of a *process* account of the self-governance value of speech, we consider the traditional *substantive* account. From colonial times to the present, legal thinkers have stressed different aspects of civic personality that expressive liberty advances. The vivid declarations of these thinkers have breathed rhetorical life into the concept of expressive liberty and have produced strong intellectual foundations for specific legal rules.

Each of the four voices examined in Part I.A emphasizes a distinct dimension of speech as it relates to the person-within-the state: speech as a shield against tyranny; speech as a component of the democratic self; speech as a sign of dignity, defined as one's claim to full membership in society; and speech as an instrument of political control. Although these elements of the traditional account create a composite portrait

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<sup>23</sup> SEAMUS HEANEY, *THE CURE AT TROY: A VERSION OF SOPHOCLES' PHILOCTETES* (The Noonday Press 1991) (1990).

<sup>24</sup> PAUL SCOTT, *THE RAJ QUARTET* (3d prtg. 1978).

of the individual as we would like to imagine her in contemporary democratic society, the portrait is arguably incomplete. Lacking the dimension of the interactive dynamic and moral responsibility of citizenship, the traditional account leaves doubts about how well it captures political life as actually lived.

### 1. Self-Preservation

The definition of speech values began with lawyers, and one of the earliest exponents on our soil was a Philadelphian, Andrew Hamilton. Forty years before the Revolutionary War, Hamilton famously substituted for John Peter Zenger's disbarred attorneys and defended the New York printer against a charge of seditious libel.<sup>25</sup> In a remarkable argument to bench and jury, Hamilton addressed the citizen's freedom to speak out about "the conduct of men in power,"<sup>26</sup> drawing on a range of sources to justify a finding of not guilty.<sup>27</sup> Although the case arose in a monarchical colonial society,<sup>28</sup> and Hamilton's address was not a direct call for democratic self-rule, his articulation of the "right[] and privilege[]"<sup>29</sup> to use truthful, hard-hitting, defamatory speech concerning official conduct was an important step in the substantive development of the self-governance value of speech.

Hamilton began with theory — natural law — although he did not linger there. He declared that "the right of complaining or remonstrating" men in power for unjust acts is a "natural right,"<sup>30</sup> and that denial of the freedom to voice truthful complaints about "the conduct of men in power" produces a form of slavery.<sup>31</sup> He argued:

[I]t is natural, it is a privilege, I will go farther, it is a right which all freemen claim . . . they have a right publicly to remonstrate the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in

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<sup>25</sup> Lincoln Barnett, *The Case of John Peter Zenger*, AM. HERITAGE, Dec. 1971, at 33, 34 (recounting details of Zenger trial, including disbarment of his attorneys for challenging the authority of the presiding judges to hear the case).

<sup>26</sup> ALEXANDER, *supra* note 16, at 87 (quoting Hamilton in his argument to the court).

<sup>27</sup> Hamilton was "perhaps the best legal mind in America." Barnett, *supra* note 25, at 39. A "former attorney general of Philadelphia, former speaker of the Pennsylvania assembly, former vice-admiralty judge, a member of London's Gray's Inn, an independent in politics and religion, and versatile enough to have been one of the architects of Independence Hall," Hamilton "'had art, eloquence, vivacity, and humor, was ambitious of fame, negligent of nothing to ensure success, and possessed a confidence which no terrors could awe.'" *Id.* (quoting the son of a Zenger associate).

<sup>28</sup> GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 11 (Vintage Books 1993) (1991).

<sup>29</sup> ALEXANDER, *supra* note 16, at 83 (quoting Hamilton).

<sup>30</sup> *Id.* at 84.

<sup>31</sup> *Id.* at 87.

authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.<sup>32</sup>

This argument reflected background beliefs, arising in the British Enlightenment and prevalent both at home and in the colonies,<sup>33</sup> that human reason possessed the capacity to know itself and the universe,<sup>34</sup> and that individual conscience was well-equipped to judge the rightness of governmental conduct.<sup>35</sup> But natural law assertions, then as now, have a way of losing steam,<sup>36</sup> and Hamilton quickly moved on, turning to the historical evidence of society's protection of critical public utterance. He reminded the court of the demise of the Star Chamber, the "spirit of liberty" of the Glorious Revolution of 1688–89,<sup>37</sup> and the political liberty at the heart of the British Constitution.<sup>38</sup> Against this backdrop of evolving freedom, Hamilton portrayed Zenger's prosecution as an example of arbitrary state power,<sup>39</sup> comparable to the political tyranny that radical Whigs were protesting in England. Swift to condemn the king's ministers for inflicting real or imagined harms on liberties secured by the

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<sup>32</sup> *Id.* at 81. Professor Emerson notes that "freedom of discussion in public affairs serves an important function regardless of whether the political structure of a nation is democratic or not." Emerson, *supra* note 14, at 883.

<sup>33</sup> CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 27 (Vintage Books 1959) (1942).

<sup>34</sup> *Id.* at 41. See also RALPH KETCHAM, *FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION* 22 (1993) (describing the Enlightenment, particularly seventeenth-century scientists who in deploying the scientific method "presumed they could thus understand and explain the entire physical universe").

<sup>35</sup> BECKER, *supra* note 33, at 62. Ketcham describes natural law as associated with religious thought by some, and with secular philosophy by others. KETCHAM, *supra* note 34, at 13.

<sup>36</sup> As John Hart Ely put it, "The advantage . . . is that you can invoke natural law to support anything you want. The disadvantage is that everybody understands that." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 50 (1980).

<sup>37</sup> ALEXANDER, *supra* note 16, at 90 (quoting Hamilton). See KETCHAM, *supra* note 34, at 8. Ketcham noted:

The great "settlements" that attended the Glorious Revolution (1688), the oath of the king to "govern . . . according to the statutes of Parliament agreed on and the laws and customs of the same," the Bill of Rights, and the Toleration Act all emphasized the idea of a fixed if unwritten constitution to which all branches of government would conform.

*Id.* (omission in original).

<sup>38</sup> ALEXANDER, *supra* note 16, at 80 (quoting Hamilton); BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 53 (Vintage Books 1970) (1968) (noting that "[t]he veneration of the British constitution, defined as mixed government precisely as it was in England, was a commonplace in America from the earliest years of the eighteenth century."); WOOD, *supra* note 28, at 13 (noting that "[a]lthough few Englishmen and no Englishwomen could vote for representatives, they always had the sense of participating in political affairs.").

<sup>39</sup> ALEXANDER, *supra* note 16, at 99 (quoting Hamilton).

Glorious Revolution, the Whigs insisted that the diffusion of power in English society was insufficient.<sup>40</sup> Arguing in this tradition, Hamilton stressed that the underlying value of speech was self-protection from tyranny.<sup>41</sup> Speech was a shield “against the arbitrary demands and illegal impositions of the times in which [citizens] lived.”<sup>42</sup>

At the same time, Hamilton implied that speech served to strengthen the social ethic. When citizens criticize unjust acts of rulers, he argued, they advance the cause of “common justice” and thus seek to “prevent the destruction of their fellow subjects.”<sup>43</sup> And not only did speech have a public value in this sense, it was also a vehicle for collective self-definition. When Hamilton asked the court why the English law of seditious libel should apply in the colonies, his point was that the colonists — “borderland people,” in Bernard Bailyn’s phrase,<sup>44</sup> with native-born goals and values — would find a framework of their own for regulating debate.<sup>45</sup> Speech and press in the New World would have social importance beyond that of the English experience.

Hamilton, however, fell short of an account of speech as *self-governance*. These intimations aside, he did not address speech as an everyday instrument for building a society with other citizens, and he demanded a rule that would immunize only provably truthful facts. Although in colonial politics he was a force for structural change, particularly for a strengthened legislative body,<sup>46</sup> his oration in *Zenger* did not cast

<sup>40</sup> WOOD, *supra* note 28, at 18, 22.

<sup>41</sup> See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 491 (1983); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528–38.

<sup>42</sup> ALEXANDER, *supra* note 16, at 98 (quoting Hamilton).

<sup>43</sup> *Id.* at 80 (quoting Hamilton). Note, too, Hamilton’s reference, already quoted, to the citizen’s effort, through speech, “to put their neighbors upon their guard against the craft or open violence of men in authority.” *Id.* at 81 (quoting Hamilton).

<sup>44</sup> BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* 8 (2003).

<sup>45</sup> See KETCHAM, *supra* note 34, at 22. Ketcham noted that the Enlightenment involved a resolute search for new facts and new principles that would propel the rational progress of humankind to previously unknown heights. European settlers in North America not only took this outlook with them to the New World . . . but once there they found an environment unsuited to rigid orthodoxies but welcoming to the new, the untried, and the unformed.

*Id.* For analysis of a twentieth-century example of viewing politics as “the pursuit of . . . intimations,” in the sense of a playing out of tradition that does not point in a single direction, see PAUL FRANCO, MICHAEL OAKESHOTT: AN INTRODUCTION 94–99 (2004) (noting that for Oakeshott, “every tradition contains within itself a multiplicity of different, and sometimes colliding, intimations.”).

<sup>46</sup> BURTON ALVA KONKLE, *THE LIFE OF ANDREW HAMILTON 1676–1741: “THE DAY-STAR OF THE AMERICAN REVOLUTION”* 117–18 (1941) (detailing Hamilton’s role in strengthening the Pennsylvania House of Representatives in 1737).

speech as a form of non-defensive participation or fulfillment of duty. A more expansive account of speech's place in the social ethic would require grounding in popular sovereignty, not natural law, and it would trace a clearer line between personal and public effects of expressive liberty. Hamilton focused on individuality and self-protective expression, and although he mentioned the public benefits of speech and the joint quest to attain them, he offered little indication of how the two aspects of speech might intersect.

Of course, his main goal was to win the case. Soon after Hamilton concluded, the jury members whom he had urged "to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or estates of their fellow subjects,"<sup>47</sup> acquitted Zenger. The jury's verdict modeled the action extolled by Hamilton: individual mind brought to collegial decision-making. The court did not disturb the verdict.

Hamilton's oration went through fourteen printings before 1791; one scholar calls it "the most widely known source of libertarian thought in England and America during the eighteenth century."<sup>48</sup> Its principal theme, that the citizen possesses a wide scope of liberty to question, criticize, even humiliate, public officials, envisioned one form of power — state power that "bears down all before it and brings destruction and desolation wherever it comes"<sup>49</sup> — in conflict with another form, the shielding force of accusatory speech. Hamilton thus provided a crucial first element of the *substance* of what would become the self-governance value, a considerable achievement in 1735.

## 2. Tolerance

In contrast, sovereignty was at the heart of Justice Louis D. Brandeis's concurrence in *Whitney v. California*,<sup>50</sup> a second leading statement on the value of speech. Written at the end of the First Amendment's first decade as a modern legal concept, the concurrence may be "the most important essay ever written, on or off the bench, on the meaning of the first amendment."<sup>51</sup> While Hamilton's oration had sprung from a natural rights orientation and presaged American Revolutionary thought, Justice Brandeis's concurrence invoked "[t]hose who won our independence"<sup>52</sup> and reflected on their accomplishment: the concept of citizen sovereignty as the basis of government. Ten

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<sup>47</sup> ALEXANDER, *supra* note 16, at 93 (quoting Hamilton).

<sup>48</sup> LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 130 (1985).

<sup>49</sup> ALEXANDER, *supra* note 16, at 98 (quoting Hamilton).

<sup>50</sup> 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

<sup>51</sup> Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (1988). Dean Smolla praises the opinion as "one of the great majestic stirring tributes to freedom of expression." RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 106 (Vintage Books 1993) (1992).

<sup>52</sup> *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

years before *Whitney*, Judge Learned Hand in *Masses Publishing Co. v. Patten*<sup>53</sup> had written that the “right to criticise” government actions is “the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority.”<sup>54</sup> Brandeis gave lasting voice to Hand’s theme.

*Whitney* addressed the constitutionality of a criminal conviction under a state sedition law enacted in 1919, as the frenzy generated by the Russian Revolution became the Red Scare.<sup>55</sup> Whitney had assisted the organization of the Communist Labor Party of California and thus was part of a group that advocated “the desirability of a proletarian revolution by mass action at some date necessarily far in the future.”<sup>56</sup> As Brandeis put it, “[T]he accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely.”<sup>57</sup> Brandeis could not agree with the Court’s majority that Whitney’s participation was beyond the protection of the First and Fourteenth Amendments.<sup>58</sup>

The stature of Brandeis’s opinion comes from the sheer force of its language, ideas, and doctrine. First, Brandeis’s arresting style exemplified the power of speech to capture the complexities of political life. In compelling cadence, he faulted political complacency: “[T]he greatest menace to freedom,” he wrote, “is an inert people . . . .”<sup>59</sup> He praised expressive participation in self-rule, extolling “[t]hose who won our independence” for their convictions “that public discussion is a political duty” and that “silence coerced by law” is unacceptable.<sup>60</sup> Second, Brandeis brought ideas to First Amendment adjudication, particularly specifications of values driving the concepts of speech and press, including self-development, the search for truth, and democratic

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<sup>53</sup> 244 F. 535 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917).

<sup>54</sup> *Id.* at 539. On the *Masses* case and Judge Hand’s communications with Justice Holmes about the proper scope of the First Amendment under the Espionage Acts of the World War I period, see LOUIS MENAND, *THE METAPHYSICAL CLUB* 426–31 (2001).

<sup>55</sup> ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* 114 (1988); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 237–38 (2004).

<sup>56</sup> *Whitney*, 274 U.S. at 379 (Brandeis, J., concurring).

<sup>57</sup> *Id.* at 373.

<sup>58</sup> *Id.* at 379. Brandeis, however, concurred in the conviction on grounds that the state had presented evidence of conspiracy, by members of another organization, to commit serious present crimes, and had shown that Whitney’s own organization was involved. *Id.* Smolla strongly criticizes Brandeis for not dissenting. SMOLLA, *supra* note 51, at 105–06.

<sup>59</sup> *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

<sup>60</sup> *Id.* at 375–76. Declaring that “[f]ear of serious injury cannot alone justify suppression of free speech and assembly,” Brandeis noted that “[m]en feared witches and burnt women,” *id.* at 376, echoing John Stuart Mill’s statement in *On Liberty* that man’s “servility” to masters and gods “gives rise to perfectly genuine sentiments of abhorrence; it made men burn magicians and heretics,” JOHN STUART MILL, *ON LIBERTY & THE SUBJECTION OF WOMEN* 10 (Wordsworth Classics 1996) (1859).

participation.<sup>61</sup> He thus recognized the “intensely individualist[ic]”<sup>62</sup> role of speech and its necessity to the “good citizen.”<sup>63</sup> Finally, he sketched a doctrinal framework, a test of whether governmental action constrains more speech than is demonstrably necessary.<sup>64</sup> The influence of the *Whitney* concurrence has been considerable.<sup>65</sup>

Brandeis had more in mind, however, and his opinion suffered from a competition of ideas. As noted, one goal was to affirm the centrality of the citizen, whose liberty of thought he pronounced “indispensable to the discovery and spread of political truth.”<sup>66</sup> In later passages, however, he shifted focus from reasons supporting a speaker’s freedom to reasons commanding tolerance among those in power. Professor Blasi has argued that Brandeis’s ultimate interest in *Whitney* was just this — the spread of tolerance. According to Blasi, Brandeis sought to extol civic courage — not the courage of dissenters to test a majority’s views, but the courage of *receivers* of unpopular speech to develop “a healthy mentality regarding change.”<sup>67</sup> Thus, in urging First Amendment-based protection for the “thought, hope and imagination” of dissidents, Brandeis’s point was that “[i]f the marginal, powerless members of the community retain some semblance of spirit, the *mainstream* is more likely to sustain its own vitality.”<sup>68</sup> Blasi hails Brandeis for espousing the view that the essence of the self-governance value is “its contribution to the character of the political community, particularly the character of those who possess the power to regulate.”<sup>69</sup> This conclusion comports with a more general aspiration of Brandeis: that he “would strive to interpret [the] outsider’s needs and concerns to the insiders of the day, to dissolve social boundaries by inspiring sympathy and fellow feeling on both sides.”<sup>70</sup>

However, Brandeis’s shift in focus ultimately marred his most famous opinion. By stressing that the value of expressive liberty depends primarily on the good it does for the character of the powerful, Brandeis diverged from his initial concern, the value of speech as the citizen’s engine of critical thought about society and his place (or lack of place) in it. If Brandeis’s main subject was tolerance, he missed the chance to probe the complex effects of the tolerated activity on the citizen, especially the citizen who is at odds with mainstream society and wounded by anger or isolation. More broadly, if the practices of citizenship are regarded negatively as activities obliging tolerance, rather than positively as activities embodying the nation’s

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<sup>61</sup> *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

<sup>62</sup> BURT, *supra* note 55, at 11.

<sup>63</sup> *Id.* at 14.

<sup>64</sup> *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring) (stating that “[i]n order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated”).

<sup>65</sup> Blasi, *supra* note 51, at 682–83.

<sup>66</sup> *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

<sup>67</sup> Blasi, *supra* note 51, at 691.

<sup>68</sup> *Id.* at 676 (emphasis added).

<sup>69</sup> *Id.* at 679–80.

<sup>70</sup> BURT, *supra* note 55, at 87.

commitment to self-governance, it is hard to see how the law's guaranties can remain vital. Like lawyer Hamilton's emphasis on self-preservation, Brandeis's focus on the equanimity of the powerful arguably left his account incomplete.

### 3. Dignity

Forty years after *Whitney*, the Court's decision in *New York Times Co. v. Sullivan*<sup>71</sup> cast additional light on the self-governance value of speech. At issue was a fundraising advertisement that listed brutalities suffered by civil rights demonstrators at the hands of Alabama police in the late 1950s.<sup>72</sup> A state police commissioner, using the strict liability action for libel, sued the *New York Times* for running the advertisement, which included, among other misstatements, an erroneous charge that police had tried to starve protesting students by padlocking a university cafeteria.<sup>73</sup> The police commissioner also sued four black clerics whose names appeared on the advertisement as sponsors. After the commissioner prevailed in the state courts, the issue in the U.S. Supreme Court was whether the libel tort met the dictates of the speech and press clauses of the First Amendment. Writing for the Court, Justice Brennan likened the tort to the infamous Sedition Act of 1798<sup>74</sup> and identified "the central meaning of the First Amendment" with James Madison's statement that "the censorial power is in the people over the Government, and not in the Government over the people."<sup>75</sup> The Court surmised that speakers facing the prospect of strict liability for false, defamatory statements would steer clear of public speech, including comments that they believed to be true but not provably so.<sup>76</sup> The Court, therefore, required that a public official suing a citizen-critic prove clearly and convincingly that the published statement was false and that the speaker either knew it was false or had serious doubts about its truth.<sup>77</sup> The majority declined to follow a bolder argument that the First Amendment absolutely forbids any sort of libel action brought by a public official against a critical speaker.<sup>78</sup>

The *Sullivan* decision followed Brandeis in grounding First Amendment freedoms in popular sovereignty.<sup>79</sup> Yet Justice Brennan departed from Brandeis's focus on

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<sup>71</sup> 376 U.S. 254 (1964).

<sup>72</sup> *Id.* at 257–58.

<sup>73</sup> *Id.* at 259.

<sup>74</sup> *Id.* at 273.

<sup>75</sup> *Id.* at 273–74, 282.

<sup>76</sup> *Id.* at 278 (stating that in a strict liability regime, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive").

<sup>77</sup> *Id.* at 279–80 (formulating "actual malice" test).

<sup>78</sup> See *id.* at 293–97 (Black, J., concurring); *id.* at 297–305 (Goldberg, J., concurring).

<sup>79</sup> The opinion earned contemporaneous praise as "the best and most important [opinion] ever produced in the realm of freedom of speech." Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 194.

tolerance among those in power; the civil rights context of the case suggested that more immediate First Amendment goals were more pressing. For Brennan, the self-governance value underscored the importance of autonomy of citizen-critics (here, the press and the black clerics) to speak, and of others in the public to hear,<sup>80</sup> consistent with the nation's "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>81</sup>

Underlying Brennan's approach was an emphasis on the dignity of the citizen. In a subsequent libel case, *Herbert v. Lando*,<sup>82</sup> after quoting Brandeis's statement that "[t]hose who won our independence . . . valued liberty both as an end and as a means,"<sup>83</sup> Brennan wrote:

Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity. This is particularly so in a democracy like our own, in which the autonomy of each individual is accorded equal and incommensurate respect.<sup>84</sup>

Here Brennan echoed the writings of political thinker Alexander Meiklejohn.<sup>85</sup> In the years before *Sullivan*, Meiklejohn had urged a theory of self-governance for speech cases, arguing that "freedom to govern . . . implies and requires what we call 'the dignity of the individual.' Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."<sup>86</sup> Invoking "the dignity of a governing citizen,"<sup>87</sup> Meiklejohn argued that the First Amendment should absolutely prohibit libel suits brought against speakers for attacking the fitness of public candidates.<sup>88</sup>

In non-judicial writings twenty years after *Sullivan*, Justice Brennan took up Meiklejohn's theme and explicitly identified "the essential dignity and worth of each

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<sup>80</sup> "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions . . ." *Sullivan*, 376 U.S. at 269 (alteration in original) (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941)).

<sup>81</sup> *Id.* at 270.

<sup>82</sup> 441 U.S. 153 (1979).

<sup>83</sup> *Id.* at 183 (Brennan, J., dissenting in part) (alteration and omission in original) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

<sup>84</sup> *Id.* at 183 n.1.

<sup>85</sup> See, e.g., William J. Brennan, Jr., Comment, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

<sup>86</sup> Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

<sup>87</sup> *Id.* at 257.

<sup>88</sup> *Id.* at 259.

individual” as the lynchpin of American citizenship.<sup>89</sup> He stated that “[r]ecognition of broad and deep rights of expression and of conscience reaffirm the vision of human dignity” by facilitating public debate and encouraging the development of political convictions.<sup>90</sup> “The constitutional vision of human dignity,” Brennan wrote, “rejects the possibility of political orthodoxy imposed from above; it respects the rights of each individual to form and to express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite.”<sup>91</sup> Brennan’s notion of dignity exerted profound influence on the decisions of the Supreme Court as later justices took up the theme of autonomy and its implications for diverse areas of law.<sup>92</sup>

However, even a concept of dignity is limited as a touchstone for the self-governance value of speech. The self of Brennan’s model is an autonomous agent. To be sure, the model’s premises are salutary: the agent merits respect, based as much on the agent’s potential to engage in self-determination as on her actual achievement of identity, and free expression embodies one aspect of the respect accorded by the Constitution. But over-emphasizing the political and moral independence of the person can lead to a view of the person as removed from others — free, self-determining, yet a separate soul, living in isolation. Even though Brennan contemplates encounters among citizens through “uninhibited, robust, and wide-open” speech,<sup>93</sup> his adjectives suggest the risk of people speaking past each other. In this way, democratic consciousness can suffer slippage: from dialogue based on equal respect to potentially uncompromising debate among subjects who view each other warily from havens of walled-off “dignity.” The problem is that an exclusive focus on dignity can impede interactive dialogue among citizens who presumptively make room for each other’s speech and attempt to engage it. Stephen K. White, considering contemporary liberalism’s core value of respect for others, raises a similar question about the range of openness and receptivity to others that a dignity-based understanding of democracy, by itself, can be expected to produce.<sup>94</sup> White suggests that a dignity model can breed “wariness, self-protection, and uneasiness” among citizens as they

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<sup>89</sup> William J. Brennan, Jr., *Reason, Passion, and “The Progress of Law”*, 10 CARDOZO L. REV. 3, 15 (1988).

<sup>90</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 442–43 (1986).

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (sexuality); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (speech); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (abortion).

<sup>93</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>94</sup> STEPHEN K. WHITE, *SUSTAINING AFFIRMATION: THE STRENGTHS OF WEAK ONTOLOGY IN POLITICAL THEORY* 146–49 (2000) (discussing theorist William Connolly’s critique of political liberalism as providing insufficient moral motivation for an ethic of receptivity to new groups trying to enter a democratic culture’s political mainstream).

encounter emerging voices in a democratic culture.<sup>95</sup> The dignity model of self-governance, despite its obvious merit in emphasizing equal rights, is thus incomplete insofar as it omits reflection on the nature of participation itself. It stresses the dignity that is the basis of the right, rather than a dignity that could flow from its exercise.

#### 4. Control

A fourth substantive strand of the self-governance value — the value of speech as an instrument of democratic control — achieved prominence through the decisions of Justice Lewis F. Powell, Jr. Like Justices Brandeis and Brennan, Justice Powell began with popular sovereignty. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, he reiterated the primacy of “‘meaningful dialogue of ideas concerning self-government,’”<sup>96</sup> and in *Gertz v. Robert Welch, Inc.*, he affirmed *Sullivan*’s point that “‘we protect some falsehood in order to protect speech that matters.’”<sup>97</sup> However, the similarities ended there. Brandeis and Brennan viewed speech as related to civic being: for Brandeis, speech was integral to human personality, and for Brennan, going the next step, speech was integral to human dignity, a sign of membership in society. Powell, on the other hand, focused on speech as an instrument of civic action: Speech *enabled*. But Powell saw that many other attributes of personality impart an enabling capacity, and in cases where other attributes, like reputation or privacy, clashed with speech, Powell strove to accord each of them the weight commanded by common sense and tradition. His approach resembled Andrew Hamilton’s emphasis in *Zenger*, viewing speech as a means — for Powell, one of many — to a civic end.

Powell’s approach was most visible in *Saxbe v. Washington Post Co.*, where news reporters challenged the constitutionality of a Federal Bureau of Prisons rule prohibiting press-initiated interviews of prisoners.<sup>98</sup> A majority of the Court found no First Amendment issue to consider, reasoning that the rule was “no more than a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate.”<sup>99</sup> In a dissent joined by Justices Brennan and Marshall and later cited by Justice Brennan,<sup>100</sup> Justice Powell invoked

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<sup>95</sup> *Id.* at 148. See also Stephen K. White, *Three Conceptions of the Political: The Real World of Late Modern Democracy*, in *DEMOCRACY AND VISION: SHELDON WOLIN AND THE VICISSITUDES OF THE POLITICAL* 173, 187–88 (Aryeh Botwinick & William E. Connolly eds., 2001) [hereinafter *DEMOCRACY AND VISION*].

<sup>96</sup> 472 U.S. 749, 760 (1985) (plurality opinion) (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Ore. 1977)).

<sup>97</sup> 418 U.S. 323, 341 (1974).

<sup>98</sup> 417 U.S. 843 (1974).

<sup>99</sup> *Id.* at 849.

<sup>100</sup> *E.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 n.3 (1980) (Brennan, J., concurring in judgment); *Herbert v. Lando*, 441 U.S. 153, 189 (1979) (Brennan, J., dissenting).

"the societal function of the First Amendment in preserving free public discussion of governmental affairs."<sup>101</sup> Noting that "the press performs a crucial function in effecting the societal purpose of the First Amendment" by "enabling the public to assert meaningful control over the political process,"<sup>102</sup> Powell equated the right of control with the people's prerogative "to consider and resolve their own destiny."<sup>103</sup>

However, a broad statement of the self-governance value did not lead Powell to agree that reporters had a right of access to inmates of their choice (even though the record of the case signaled the necessity of inmate interviews for adequate news coverage of prisons).<sup>104</sup> Rather, he resisted "chasing the right-of-access rainbows that an advocate's eye can spot in virtually all governmental actions," and framed the issue as whether the government regulation would have a "palpable impact on the underlying right of the public to the information needed to assert ultimate control over the political process."<sup>105</sup> He reasoned that although the Bureau's flat ban was overbroad, the case-by-case approach desired by reporters was simply not necessary to ensure "ultimate control" by citizens "over the political process." Powell showed sympathy for an intermediate rule permitting some access to inmates but not requiring individualized consideration of all requests.<sup>106</sup>

Powell's concept of the self-governance value of speech as the capacity to "resolve one's destiny" and thus assert "ultimate control over the political process" would have widened the freedoms of press and speech beyond what the *Saxbe* majority was willing to consider. Moreover, Powell's legal framework was more generous to speech and press interests than what the Court later devised in *Richmond Newspapers*<sup>107</sup> and other access cases.<sup>108</sup> Focusing in *Saxbe* almost entirely on functional arguments, Powell paid little heed to the prison setting's lack of historical openness. At the same time, however, the "control" model generated a legal rule of only limited reach. Not

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<sup>101</sup> *Saxbe*, 417 U.S. at 862 (Powell, J., dissenting).

<sup>102</sup> *Id.* at 863.

<sup>103</sup> *Id.* at 862.

<sup>104</sup> *Id.* at 872.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 873-74. For a brief but incisive account of Justice Powell's approach to adjudication in a "profoundly polarized" legal culture, particularly his effort to reach "Solomonic results" through decisions "that honored the legitimacy of two opposing positions and that sought to ensure that the adjudicatory losers did not leave court feeling disenfranchised and abandoned by the legal system," see J. Harvie Wilkinson III, *The Powellian Virtues in a Polarized Age*, 49 WASH. & LEE L. REV. 271, 271-273 (1992). "For Powell, compromise was not only a necessary feature of a collegial institution; it was a desirable response to a pluralistic society." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 561 (1994).

<sup>107</sup> 448 U.S. 555 (1980) (finding that the First Amendment guarantees the press and public a qualified right of access to criminal trials).

<sup>108</sup> E.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (finding that the First Amendment guarantees the press and public a qualified right of access to preliminary hearings in California criminal cases); *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (finding a First Amendment-based, qualified right of access to jury selection proceedings in criminal cases).

many government actions, it seems, can deprive citizens of “ultimate control” over the political process. “Control” analysis suggests that a constraint of First Amendment liberties will survive as long as it serves a reasonable end, has a meaningful connection to that end, and does not preclude citizens from otherwise speaking out. Powell’s moderate solution in *Saxbe* thus resembled the proffered rule in *Zenger*. As discussed in Part I, Andrew Hamilton urged that the right to defame government authorities extended to provably true statements but not beyond, not even to innocently published falsity.<sup>109</sup> In both cases, some level of “control” through speech was preserved — but marginally. Whether defined in Powell’s or Hamilton’s terms, freedom of speech generated rules that preserved fundamental sovereignty but left considerable room for restrictions.<sup>110</sup>

The control strand of self-governance, then, was a mixed proposition. Although Powell’s application of the concept was often sufficient to displace outdated doctrine, his affinity for balancing allowed for small or maddeningly ambiguous change. Moreover, like Hamilton, Brandeis, and Brennan, he gave little indication of the relationship between his framework and citizenship. If control is a principle of action, it is not self-evidently dialogic in nature. And absent the collective force of dialogue, it is hard to see how speech could amount to control in any strong sense.

The traditional model of the substantive account of self-governance thus combines elements of survival (Hamilton), integrity (Brandeis), membership (Brennan), and power (Powell). It imagines the citizen from perspectives of being and doing: the inherent value of the person as a citizen relates to the second and third elements, and the capacity for action affecting the world relates to the first and fourth. Expression embodies the citizen’s fundamental dignity as participant in public matters, and the state’s tolerance embodies its grasp and appreciation of that dignity. Freedoms of speech and press also mark out a citizen’s range of action, facilitating leverage over the political process, and bolstering the individual’s ability to resist state action when necessary.

But questions remain. In regarding the citizen chiefly as an undivided consciousness with interest and capacity to participate in public life, is the account adequate to the complexities of political experience? To be sure, it places the citizen in a

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<sup>109</sup> See *supra* text accompanying notes 25–47.

<sup>110</sup> Powell’s “control” approach figured prominently in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The question was whether the First Amendment requires that a non-public figure establish actual malice in a libel case involving a matter of public concern. *Id.* Powell’s decision for the Court held that the First Amendment does not tolerate application of the strict-liability tort, but that a *Sullivan*-like rule, saddling the plaintiff with the burden of proving actual malice, would take constitutional requirements too far. *Id.* Powell settled on an intermediate approach, as in *Saxbe*: the plaintiff must prove negligence in order to obtain damages for actual injury, and actual malice in order to receive presumed or punitive damages. *Id.* In terms of “control,” *Gertz* reserved for citizens “ultimate” (even if not very expansive) control over their ability to receive news by freeing the media from strict liability for reports about private figures enmeshed in public matters.

value-laden context, and it acknowledges that the citizen encounters not only political disagreement in that world but also impediments to participation, whether from the prejudices of other citizens or restrictions of the state. However, the account remains incomplete on at least two counts. First, it lacks a strong sense of the citizen as other than an autonomous agent receiving information, dutifully making judgments in the privacy of the mind, and tracing steps toward a voting booth on election day. Where is the agent's "constructive engagement"<sup>111</sup> with other citizens, the labor of finding vocabularies of debate, compromise, or dissent, and the experience of using those vocabularies with others to pursue visions of the good society? Second, the account neglects the phenomenon of alienation, particularly the contemporary citizen's internal conflicts over whether to engage in the social conversation at all. Think of certain commonly-held perceptions of contemporary conditions: that the individual has no more than minimal impact on major social decisions;<sup>112</sup> that mass media outlets, owned by a diminishing number of powerful entities and seemingly resistant to local input, dominate national debate;<sup>113</sup> and that a modern democracy's reliance on a "high degree of cohesion" to generate popular participation works against a philosophy of tolerance, pushing instead "toward exclusion" of groups who are new to the majority culture or who otherwise feel estranged from the way a state defines itself.<sup>114</sup> Add to these tensions the lessons framed by novelists that even democratic participants risk becoming versions of the tyrannies they oppose,<sup>115</sup> and that those who dedicate themselves to civic duty can stumble into lives of illusion.<sup>116</sup> The traditional substantive

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<sup>111</sup> White, *supra* note 95, at 181.

<sup>112</sup> Charles Taylor, *The Dangers of Soft Despotism*, in THE ESSENTIAL COMMUNITARIAN READER 47, 47 (Amitai Etzioni ed., 1998) (citing "the familiar sense" that "[t]he average citizen feels power to be at a great distance and frequently unresponsive to him or her").

<sup>113</sup> *Id.* at 47–48 (noting that, due to media concentration, "[o]ther views, other ways of posing [political] questions, other agendas cannot get a hearing").

<sup>114</sup> Charles Taylor, *A Tension in Modern Democracy*, in DEMOCRACY AND VISION, *supra* note 95, at 79, 81.

<sup>115</sup> For example, in *The Plague*, Albert Camus depicts a rampant epidemic and the range of characters that face the question of whether to flee or to assist in caring for victims and setting up quarantines. One character, Tarrou, recalls other "plagues" that he had experienced in his life. As a youth, he had witnessed his father, a prosecutor, furiously calling for the death penalty in a criminal case. Tarrou rebelled and joined a political movement against capital punishment. However, he encountered individuals within the movement who exhibited the same pitiless, violent mentality he had seen in his father. Committing himself to peaceful public service, Tarrou remained wary of the tendency of even well-intentioned, "innocent" individuals to contribute to violence. ALBERT CAMUS, *THE PLAGUE* 229–30 (Stuart Gilbert trans., 1948).

<sup>116</sup> English novelist Kazuo Ishiguro writes of professional men and women who completely commit themselves to an ideal of public service but tragically fail to stamp the ideal with an individual perspective and therefore become prisoner to it. *E.g.*, KAZUO ISHIGURO, *WHEN WE WERE ORPHANS* (Vintage Int'l 2001) (2000); KAZUO ISHIGURO, *THE REMAINS OF THE DAY* (Vintage Int'l 2003) (1988).

account of the self-governance value arguably neglects these problems of democratic consciousness, omitting treatment of the citizen as a participant humanly struggling with a system, with political ideas, with anxieties of disagreement, and with the complexity of language.<sup>117</sup>

### *B. New Versions*

Recent commentaries by J.M. Balkin<sup>118</sup> and Cass Sunstein<sup>119</sup> attempt to steer the substantive account in new directions. Focusing on the role and impact of the Internet, these scholars ground expressive freedoms in a world of ever-increasing technological possibilities.

#### 1. Cultural Production

Balkin urges that we stop thinking of the value of speech in the “far too limited” sense of “government and democratic deliberation,”<sup>120</sup> and that we broaden the concept considerably to focus on “‘culture’ . . . the collective process of meaning-making in a society.”<sup>121</sup> As he puts it, “If free speech is about democracy, it is about democracy in the widest possible sense, not merely at the level of governance, or at the level of deliberation, but at the level of culture.”<sup>122</sup> Balkin refers to ordinary citizens who, if certain intellectual property rules fall to the First Amendment, could deploy Internet technology to appropriate a range of materials for cultural commentary.<sup>123</sup> The consistency of intellectual property law with the First Amendment is a problem well worth addressing,<sup>124</sup> but why should its answer require displacing the self-governance value as the driving force of the First Amendment? Besides raising questions of necessity, the turn from self-governance to “cultural production” promises little for

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<sup>117</sup> The traditional substantive account thus lacks the nuance of Stephen Macedo’s understanding of liberalism. Macedo recognizes the value of “‘situated autonomy’” and notes that “[l]iberal autonomy is not a matter of transcending contingency or of inhabiting a world beyond our own; it is not a matter of standing outside one’s community . . . . The autonomous individual is a socially embedded individual . . . .” STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 216, 218–19 (1990).

<sup>118</sup> Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

<sup>119</sup> CASS SUNSTEIN, *REPUBLIC.COM* (2001).

<sup>120</sup> Balkin, *supra* note 118, at 34.

<sup>121</sup> *Id.* at 36.

<sup>122</sup> *Id.* at 34.

<sup>123</sup> *Id.* at 1.

<sup>124</sup> Balkin is highly critical of the Supreme Court’s decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding Copyright Term Extension Act). The Court, in his view, failed to recognize “that ever-expanding property rights in patent, trademark, and copyright adversely affect freedom of expression.” Balkin, *supra* note 118, at 27 n.46.

the invigoration of participation in specifically political affairs.<sup>125</sup> In fact, the argument that we should de-emphasize “government and democratic deliberation” and thus cancel the symbolic primacy of specifically political speech as the constitutional “core,” may well result in a moral loss for the First Amendment, if citizens are led to equate even mundane forms of “cultural production” with the demands and risks of issue-oriented or election-oriented political participation. Particularly now, with intense debate in this country over issues of war, peace, security, terror, and other life-or-death issues, displacing the focus on self-governance with emphasis on “cultural production” appears ill-timed, if not counter-productive.

## 2. Information Consumption

For Sunstein, an unregulated Internet offers no expressive panacea: the citizen he describes is at bottom a consumer, enabled by Internet technology to retreat to a chosen sanctuary of filtered news and information.<sup>126</sup> There the citizen can bypass contact with other points of view and avoid all challenges to his own perspective, which then risks turning ever more extreme.<sup>127</sup> Sunstein thus proposes a regulation requiring “partisan” websites to provide links to opposing views.<sup>128</sup> Such a rule, he argues, will enhance the citizen’s store of information and thus his freedom to transcend self-interest. However, it is hard to see how the rule would overcome the obtuseness of the sanctuary-seeking citizen Sunstein describes, and ultimately both the problem he portrays<sup>129</sup> and the solution he offers<sup>130</sup> seem trivial. In the end, it

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<sup>125</sup> Compare Professor Hill’s concern that “the broadening of the freedom of expression has tended to diffuse it. As expression is channeled in other directions — to the pursuit of the aesthetic, the hedonic, even the erotic — the expressive energies of society arguably are scattered in a thousand different directions,” neglecting political, social, and economic realms of communal life. J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 578 (2004).

<sup>126</sup> SUNSTEIN, *supra* note 119, at 60 (noting that the internet threatens civic engagement by enabling citizens to confine themselves to “more and louder echoes of their own voices”).

<sup>127</sup> *Id.* at 71. Citizens in effect create their own newspapers, “The Daily Me,” servicing their own interests and catering to their pre-formed political tastes.

<sup>128</sup> *Id.* at 187.

<sup>129</sup> “Sunstein forgets, or simply ignores, the real world, which will always impinge on media choices and will always provide the public sidewalks that he fears will disappear in cyberspace.” Dan Hunter, *Philippic.com*, 90 CAL. L. REV. 611, 640 (2002) (reviewing SUNSTEIN, *supra* note 119).

<sup>130</sup> Opining that Sunstein’s proposal “begins looking a little foolish in the details,” Professor Hunter asks, “Who determines what website is the opposite of the partisan sites? How is this enforced?” *Id.* at 667. Professor Powe notes that under a regulatory regime based on Sunstein’s plan, a website’s choice of links could be manipulative, designed to show itself as “sweet reasonableness incarnate” by providing links only to sites espousing positions at ideological extremes. L.A. Powe, Jr., *Disease and Cure?*, 101 MICH. L. REV. 1947, 1958 (2003) (reviewing SUNSTEIN, *supra* note 119).

is unlikely that citizenship — defined as the habit of public-regarding involvement in specifically political affairs — would be promoted by either the augmented negative liberty sought by Balkin for his citizen of culture or the dubious positive liberty sought by Sunstein for his citizen-consumer.

### 3. Toward a Process Approach

Robert Post suggests the basis of a different approach, a “‘participatory’ theory” of the First Amendment.<sup>131</sup> He contrasts a Meiklejohnian perspective, which he says is concerned with “collective processes of decision making,”<sup>132</sup> with a “participatory perspective,” which he considers dominant in First Amendment jurisprudence and which aims to enable citizens to “experience their authorship of the state.”<sup>133</sup> In Post’s view, “a necessary precondition for this experience” is “that a state be structured so as to subordinate its actions to public opinion”; to this end, “a state [must] be constitutionally prohibited from preventing its citizens from participating in the communicative processes relevant to the formation of democratic public opinion.”<sup>134</sup> By highlighting the *experiential* nature of citizenship and referencing “communicative processes,” Post points beyond existing thought on First Amendment values and intimates a need to explore the operation of a speech *process* in a modern democracy. Perhaps the substantive account of the self-governance value can be supplemented by one that attends to the workings of unfettered speech on the civic education and political maturation of citizens.

Others point this way as well. Justice Stephen Breyer’s Madison Lecture in 2002 advocated an approach to constitutional adjudication centered on “active liberty,” the classical concept of “citizen participation in government.”<sup>135</sup> To advance participation, courts following Breyer’s lead would consciously focus on “real-world consequences” — especially consequences for participation — of decisions interpreting the Constitution’s guaranties of liberty.<sup>136</sup> A consequentialist approach, then, lends itself to thinking about speech as a dynamic that, depending on its context and rules, can either encourage or discourage citizens from joining the political conversation. For Breyer, recognition of the importance of citizen participation requires a flexible approach to adjudication: a wise recognition in campaign finance reform cases, for example, “that important First Amendment-related interests lie on both sides of the constitutional equation.”<sup>137</sup>

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<sup>131</sup> Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2367 (2000).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2368.

<sup>134</sup> *Id.*

<sup>135</sup> Stephen Breyer, Lecture, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 246 (2002).

<sup>136</sup> *Id.* at 249.

<sup>137</sup> *Id.* at 253.

But what more would an experiential approach to the self-governance value of speech entail? Two of the cases discussed earlier contain hints. In *Whitney*, Justice Brandeis repeatedly considered “[t]hose who won our independence” and what speech must have meant for them.<sup>138</sup> He listed lessons that the American colonists learned about “fear,” “repression,” and “silence,” lessons they could only have been taught by first-hand experience.<sup>139</sup> Then he pointed to what they ultimately “valued,” “believed,” “recognized,” and “knew” about liberty,<sup>140</sup> particularly liberty of speech, and finally to the action they ultimately pursued: “independence by revolution.”<sup>141</sup> In effect, something happened between the experience of “fear” and the advent of “knowledge.” Brandeis’s logic appears to be that, during this interval, the bedraggled colonists discovered the saving significance of expression for their shared identity as seekers of independence and self-rule. But Brandeis did not elaborate on the full nature of the experience of mental change.

Similarly, Brennan’s opinion in *Sullivan* contains hints of a speech process. According to his opinion, the *Times* and the clerics required freedom from the chilling effect of the common law in order to trigger “uninhibited, robust, and wide-open” speech among citizens at large.<sup>142</sup> He thus contemplated a society-wide process of speech from one precinct galvanizing thought and speech in other precincts. In discussing the clerics, Brennan made a second point: that a different sort of process can take place on the individual level. Skirting the clerics’ claim that they did not authorize the disputed advertisement, Brennan in effect imagined that they did authorize it, although without actual malice.<sup>143</sup> According the same strong privilege to these non-media critics of government, Brennan intimated that strong speech (other than calculated lies) protesting official conduct merited protection as a way for profoundly alienated individuals or groups to reclaim their citizenship — or at least to take worthwhile first steps of reconnection with society.

But these are only intimations of a process account, glimpses between the lines of celebrated decisions. We need to turn to other disciplines for a firmer understanding of how the experience of public speech can inform the self-governance value.

## II. A PRIMARY PROCESS APPROACH: SPEECH AND MORAL AGENCY IN SOCIETY

A process account of the self-governance value would not displace the substantive account but would fill a considerable gap by addressing the dynamic of citizenship. To fill the gap convincingly, the process account must uncover a link between citizenship and the chief components of the First Amendment relevant here: liberty and language.

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<sup>138</sup> *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring).

<sup>139</sup> *Id.* at 375–77.

<sup>140</sup> *Id.* at 375.

<sup>141</sup> *Id.* at 377.

<sup>142</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>143</sup> *Id.* at 286.

In a recent article, Maria Dimova-Cookson engagingly probes an old dichotomy.<sup>144</sup> Her starting point is Isaiah Berlin's 1958 lecture, in which he famously contrasted negative and positive liberties, identifying the former as freedom from interference by others, and the latter as freedom to be one's own master.<sup>145</sup> Berlin's point was that arguments for positive liberty can mask an illiberal agenda: tampering with human beings by trying to control individual behavior, all in the name of their true selves.<sup>146</sup> Exploring the thought of philosopher T.H. Green (1836–1882), Dimova-Cookson aims to make the dichotomy irrelevant,<sup>147</sup> showing a relation between the two kinds of freedom and, therefore, the proper function and value of each. She artfully explains the roots of negative liberty and offers a far less menacing view of positive liberty. But her real contribution is to posit a dialectic between these two forms of freedom.

In Dimova-Cookson's account, the nature of freedom "differs according to the nature of the object which the man makes his own, or with which he identifies himself."<sup>148</sup> As the individual grows or changes in his "notion of the good," his concept of freedom changes.<sup>149</sup> In the personal realm, "juristic" freedom is the power to do what one desires, whereas "true" freedom derives from the "pursuit of self-perfection" or growth beyond desire.<sup>150</sup> Dimova-Cookson identifies true freedom with moral action, defined as action that is good for oneself as well as for others.<sup>151</sup> Juristic freedom, on the other hand, pertains to ordinary action — conduct performed for one's own good, "not necessarily to the exclusion of the good of others but not necessarily to its inclusion."<sup>152</sup> The person "experience[s] juristic freedom in the pursuit of ordinary good," and she experiences "'true' freedom in the pursuit of moral good."<sup>153</sup> As Dimova-Cookson explains, "moral action entails the cost of sacrificing one's ordinary good"<sup>154</sup> and "cultivating the will to do the 'right things.'"<sup>155</sup> This cultivation involves "giv[ing] up doing what [one] likes in the name of achieving something of higher value."<sup>156</sup> But ordinary action is not to be denigrated; indeed, in Dimova-Cookson's thought, departing from Green, the freedoms associated with ordinary and moral actions are engaged in a dialectic, such that each is a worthy end

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<sup>144</sup> See generally Dimova-Cookson, *supra* note 21.

<sup>145</sup> BERLIN, *Two Concepts*, *supra* note 20, at 118, 123, 132.

<sup>146</sup> *Id.* at 132–33.

<sup>147</sup> Dimova-Cookson writes that it is her purpose to "redefine" the "duality in the usage of freedom" in a "non-contradictory way." Dimova-Cookson, *supra* note 21, at 510.

<sup>148</sup> *Id.* at 512 (quoting T.H. Green, *On the Different Senses of Freedom*).

<sup>149</sup> *Id.* at 517.

<sup>150</sup> *Id.* at 513.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 514.

<sup>154</sup> *Id.* at 515.

<sup>155</sup> *Id.* at 516.

<sup>156</sup> *Id.* at 515.

in itself. Thus, “[a] moral action always has an agent and a recipient,” and when an agent engages in moral action and produces a moral good, the recipient receives an ordinary good and can do with it what she wants.<sup>157</sup> The actor’s moral good is an end in itself, but so is the ordinary good that he provides the recipient, because it amounts to an expansion of the recipient’s own freedom.<sup>158</sup>

Negative and positive freedoms are a subset of this other pair of freedoms.<sup>159</sup> Whereas juristic and true freedoms pertain to life’s personal sphere, negative and positive freedoms pertain to the political sphere,<sup>160</sup> the locus of the self-governance value. Positive freedom is the power to take moral action in the public realm; “it is concerned specifically with contributions to the common good . . . .”<sup>161</sup> As another scholar puts it, without “active participation and ability to in some degree subordinate private to public perspective, one [isn’t] really free. Rather, one [is] in the bondage of self-love, narrow-mindedness, and social indifference.”<sup>162</sup> Positive freedom, then, is a “capacity to in some measure look at public problems and opportunities from an enlarged point of view attentive to the good of the country as a whole.”<sup>163</sup> Dimova-Cookson’s contribution is to place this unsurprising definition of positive liberty in a surprising process with negative liberty, which corresponds to juristic liberty in the personal realm and is defined as a qualified freedom of rights-bearing citizens “to do as [they] like” in the political realm, including the freedom “to pursue private ends” and to decide against “mak[ing] the common good [their] own.”<sup>164</sup> She depicts a “process of interaction”<sup>165</sup> between these two forms of liberty. An actor’s exercise of positive liberty is a moral action — in the sense of a contribution to social welfare<sup>166</sup> — and produces a moral good for the actor himself, a sense of “achievement and personal liberation.”<sup>167</sup> Equally important, it can produce an ordinary good for its recipient, an increase in opportunities to “develop[] . . . capacities”<sup>168</sup> for choice-making within the rules of the society. The process perspective suggests that beneficiaries of moral action “could become contributors to the common good . . . in due course.”<sup>169</sup>

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<sup>157</sup> *Id.* at 516.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 518.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 521.

<sup>162</sup> KETCHAM, *supra* note 34, at 40.

<sup>163</sup> *Id.* at 43.

<sup>164</sup> Dimova-Cookson, *supra* note 21, at 524–25.

<sup>165</sup> *Id.* at 518.

<sup>166</sup> Dimova-Cookson writes that “[p]ositive freedom means fulfilling your social duties; it means acting with concern for the welfare of your society.” *Id.* at 520. In the same vein, she adds, “[P]ositive freedom (like ‘true’ freedom) is based on a voluntary sacrifice of juristic freedom . . . .” *Id.* at 521.

<sup>167</sup> *Id.* at 522.

<sup>168</sup> *Id.* at 517.

<sup>169</sup> *Id.* at 520.

Dimova-Cookson, therefore, posits a relation in which an increase in a person's negative liberty provides a groundwork for the possible exercise of moral agency (positive freedom), with the effect of contributing to an increase in negative liberty among recipients of the moral action, who may develop increased capacity for their own moral action, and so on. In this sense, citizenship is a function of liberties-in-process. Dimova-Cookson sees that citizenship means the development and exercise of moral agency, the exercise of positive liberty in service of the public good,<sup>170</sup> and that moral service enlarges the scope of freedom of others to live as they will within the legal constraints of organized society.

This framework can help us understand more deeply the value of freedom of speech in *Sullivan*. In tracing the First Amendment's history to its origins, quoting James Madison on the sovereignty of the people, and locating a "central meaning" in the historical defeat of the Sedition Act, Justice Brennan saw the constitutional protection of speech and press as an exercise of positive liberty by "the people" through their first representatives. Arising from a commitment to an Enlightenment ideal of independence, which advanced an ethos of individuality, this prescription for liberty was essentially negative in statement and meaning ("Congress shall make no law . . ."). In creating the actual malice standard and reducing the common law's regulatory scope, *Sullivan* enforced the prescription by widening the negative liberty of those it termed citizen-critics of official conduct. By limiting impediments to the flow of social information on "major public issues of our time," the Court imagined a communicative relation between citizen-critics and members of the public, where one kind of freedom creates conditions for another. The implication was that greater liberty of dissemination would contribute to the moral agency of speech-recipients generally. With increased information and commentary, many recipients would have additional reason to reflect on public matters, alone or dialogically, and to make moral choices accordingly, casting votes or taking other measures aimed at realizing a common good. These choices would be exercises of positive liberty, set in motion by the law's recognition of greater negative liberty for speech on public matters.

On this reading, *Sullivan* contemplates a dynamic that centers on the flow of information and a process of interactive freedoms. We can call this the "language/liberty dynamic," or the "social process" account of the self-governance value of speech. It arises from a conviction that the First Amendment, as it dissolves constraints on public discourse, lays a foundation for exchange about public matters as well as for other moral action by recipient-members of the public. Responses by recipients can amount to exercises of positive liberty, in some cases aimed at removing legal and societal constraints on those held back by unjust rules or prejudice, thus expanding the negative liberty of the latter.

What does a schema of liberties-in-process capture about freedoms of speech and press and their connection to self-governance? First, the schema strives for a

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<sup>170</sup> As Dimova-Cookson explains, "To be positively free means to act as a conscientious citizen for the welfare of your society." *Id.* at 528.

more accurate description of modern democracy by de-emphasizing the citizen's isolation as seeker or molder of political truth, and by recognizing the person as actually situated — whether with fellow living citizens, historical predecessors, future generations, citizens of other countries, or simply other minds whom the citizen must encounter to make sense of public questions. The model reinforces that democracy concerns not only political consciousness but civic being — which is being-with — although surely being-with can involve conflict and its often imperfect resolution. Second, the schema helps us (a) to see that more than one form of liberty is often in play in speech controversies, (b) to define those forms carefully, and (c) to grasp that each form, negative as well as positive, has value. Third, the schema adds to our understanding of citizenship. It conceptualizes citizenship as the exercise of an opportunity to work for the public good, however difficult the latter is to define. And the schema lends itself to this Article's argument that speech and press freedoms, as elaborated by American courts, exist to facilitate (even if not to coerce) the citizen's arrival at that moment of opportunity. Finally, the schema helps us discern the logic behind the creation of legal rules concerning speech and press.

However the schema does not explain everything. Although it can help us see how a legal rule based on negative liberty might be justified by hopes of its generative effect on positive liberty, the schema does not help us see how legal lines should be drawn. *How much* negative liberty will aid the desired dynamic? Can too much of it inhibit a recipient's moral agency? These questions suggest that the legal rulemaking project limits the schema with a causative principle, a factor related to motivating the speech process. For that we turn again to *Sullivan*. Recall that Justice Brennan was unwilling to go as far as Justices Black, Douglas, and Goldberg, who insisted that the First Amendment accorded citizen-critics absolute immunity from libel suits brought by public figures. Why did Brennan and five others resist? Why did they not expand the negative liberty of the *Times* and of the black clerics as far as the three concurring Justices thought it should go? Although he may not have put it in these terms, Brennan clearly saw that the dialectic of positive and negative liberty could only "work" if trust were built into the process. In this context, trust refers to good-faith understanding and acceptance, on the part of citizen critics and the public at large, of each player's social role in the speech dynamic. A rule of absolute immunity for citizen-critics, freeing them to inject intentionally or recklessly false, defamatory statements into political debate without accountability, would seriously undermine the functioning of the dynamic. Expanding the citizen-critic's negative liberty to that degree would, in all likelihood, drastically reduce the exercise of positive liberty expected of the public at large. The risk would be too great that a system warranting no practical reliance on the accuracy of public speech and providing no penalty for willful misrepresentation would work against moral agency, that is, sustained public participation. The desired interaction of liberties, then, seems to require an underlying force of trust, a human element providing motivation for

the moral agency at the heart of the process account. The same element can be found in the Court's speech jurisprudence in privacy and access settings.<sup>171</sup>

These cases exhibit a consistent sense of what political trust entails in the context of speech by citizen-critics of government, most often in the form of the institutional press. In each, the Court acted in a rulemaking role, creating analytic frameworks that extend the negative liberty of the institutional press and project benefits of that extended negative liberty for the citizen. Each implies not only that the chosen legal framework will encourage increased dissemination of information on public matters but also that the citizen's opportunities to exercise the moral responsibility of civic participation — in one form or another — will increase. The Dimova-Cookson-based process model suggests a dynamic of liberty, as explained above, which in the case law amounts to a dynamic of *opportunity* for civic engagement. The model could also be described as a model encouraging *arrival* — the arrival of citizens at a place of active involvement in civic life, in whatever form or forms they choose.

But what of cases that do not primarily involve the institutional press, cases that implicate citizens facing a political, social, and media-saturated culture quite different from the one that gave rise to *Sullivan* and its progeny? The latter cases and the process model they imply remain vital, to be sure, but new problems afflict the political environment, and First Amendment litigation increasingly focuses on situations not directly related to the institutional press. A case from the late 1990s examined the meaning for citizens of a state law ostensibly designed to protect them from baser features — mud-slinging and mendacity — of contemporary politics.

The case is *Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee*,<sup>172</sup> decided en banc by the Washington Supreme Court. Dedicated to truth-in-politics, the statute imposed penalties on persons who, acting with actual

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<sup>171</sup> In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the Court considered the constitutionality of a criminal statute requiring a newspaper to obtain a court's permission before publishing the name of a juvenile involved in juvenile proceedings. *Id.* Although the institutional press sought full immunity from state regulation for truthful publication, the Court discerned a narrower rule in the Court's precedents: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103. The Court's curious inclusion of an element related to the press's method of gathering news (that it be "lawfully obtained") makes sense from the perspective of maintaining public confidence in the press and thus safeguarding the potential for sparking civic participation by readers. Much the same could be said of the Court's access jurisprudence. The first prong of the Court's framework for determining the existence of a qualified right of access to a particular proceeding is whether the proceeding historically has been open to the public. *See, e.g., Press-Enterprise Co. v. Superior Court (II)*, 478 U.S. 1, 8 (1986). This prong is a useful limiting principle but also serves as a surrogate for considerations of public trust. Publication based on newsgathering in historically open venues is more likely to engender public confidence and thus spark public participation than publication based on questionable intrusions into places or proceedings that are historically closed.

<sup>172</sup> 957 P.2d 691 (Wash. 1998) (en banc).

malice, sponsored false political advertising.<sup>173</sup> If the concurring justices in *Sullivan* sought to protect more political speech than the libel tort had protected previously, the Washington statute in *Vote No* took the opposite approach: it *criminalized* more speech than libel law had ever subjected to sanctions. But the drafters claimed good intentions. As Justice Talmadge (who voted to uphold the law) pointed out, the statute merely sought to rid state elections of calculated lies.<sup>174</sup> Justice Talmadge noted the law's context: "the increasing nastiness of modern American political campaigns," the "'win at any cost' attitude involving vilification of opponents and their ideas," in short, the advent of a "new type of campaign" that "has caused too many of our fellow citizens to turn away from participation in the political process."<sup>175</sup> Talmadge could find no protection in the First Amendment for intentional falsity in political campaigns and found the statute a narrowly tailored vehicle to serve a compelling state interest.<sup>176</sup>

His analysis did not prevail. The majority noted that "the First Amendment operates to insure the public decides what is true and false with respect to governance,"<sup>177</sup> and that "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . ."<sup>178</sup> More speech, rather than less, was the proper remedy in poisonous campaigns.<sup>179</sup> The majority concluded that the statute would chill the speech of "the faint of heart" and lacked a crucial limiting feature of the libel tort, the requirement that the statement be defamatory.<sup>180</sup> But more than these objections, the majority worried that the statute (a) could embroil courts in political conflicts disguised as legal contests over the truth of campaign statements, and (b) could be subject to manipulation by its implementing agency or by candidates seeking "to impugn the electoral process rather than promote truthfulness."<sup>181</sup> In effect, manipulative use of a truth-in-politics statute was more likely to poison public discourse than risks posed by non-defamatory falsehoods, even if intentional. Moreover, by keeping prosecutors out of the business of examining election statements for criminal behavior, and by not sparing voters the task of trying to distinguish true from false non-defamatory statements in a campaign, the *Vote No* majority relied, if less than persuasively, on citizens' commitment and capacity to monitor campaigns attentively.

The Dimova-Cookson "social process" model does not capture a case like *Vote No*. The dynamic of liberty-opportunity-arrival that describes the majority's "social

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<sup>173</sup> *Id.* at 694.

<sup>174</sup> *Id.* at 701 (Talmadge, J., concurring).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 708.

<sup>177</sup> *Id.* at 695 (majority opinion).

<sup>178</sup> *Id.* (omission in original) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

<sup>179</sup> *Id.* at 696.

<sup>180</sup> *Id.* at 696-97.

<sup>181</sup> *Id.* at 696, 698.

process" thinking in *Sullivan* cannot account for the concern that was common to justices on both sides in *Vote No*: the problem of the citizen who views the political system as closed, mendacious, or otherwise in violation of an original promise. The justices agonized over two sobering responses: the majority's — that over-criminalizing political speech distorts public debate, forcing the public into an arm's-length, skeptical, even cynical connection to politics; or the concurrence's — that citizens already share that grim perspective and that the statute simply responds in tailored fashion to a politics that has turned thinking citizens away.

### III. A SECONDARY PROCESS ACCOUNT: SPEECH AND MORAL AGENCY IN THE PERSON

*Vote No* intimates that a second "speech process" can underlie legal thought in contemporary speech cases. The primary account considered above — the "social process" account — envisions a dynamic of liberty in society at large and generates legal protections that, informed by considerations of trust, are designed to promote opportunities for moral agency. A secondary account looks at liberty on a smaller canvas — not society at large, but the individual interacting with and within society. Its focus is on individual, not social, process. Its fear is that the social process's considerations of trust have been insufficient to maintain the citizen's interest or loyalty. It concentrates less on creating opportunities for moral agency and more on promoting its actual exercise. If the social process account concerns facilitating the *arrival* of the citizen at a moment of moral opportunity, the individual process account looks toward a "later" stage in civic consciousness: the *return* of the citizen — from a kind of self-imposed exile from political participation due to a sense of futility or perceptions of injustice — to a moment of moral re-engagement.

The "individual process" model is secondary in the sense that it is a subset of the broader "social process" model. The latter model contemplates that persons who possess a range of negative liberty may undertake the moral agency of speech on public issues. The secondary process asks: How might this happen, if a first supply of social trust runs out? In these circumstances, what sort of journey is left for the citizen whose negative liberty is ensured by law but whose exercise of positive liberty is a matter of choice? We need to go beyond the broad strokes of the social process model and probe the speech process at the level of the individual and those immediately around her, the citizen not receptive to the moral agency of citizenship. How does she move toward moral agency, and what sort of transformative process, if any, awaits her in the speech process?

Rooted in political theory, Dimova-Cookson's model understandably lacks specificity about a psychological process of moving from alienation to involved citizenship through speech. A more likely source of insight would be works of the imagination — portraits by novelists or poets of alienation, who probe the promise and dangers of speech in an individual's stasis between alienation and citizenship. An

ancient story that grappled with this problem is Sophocles's play, *Philoctetes*.<sup>182</sup> The fact that it is told and retold today suggests a timeless relevance of its theme: the dilemma of the individual who has been abandoned by society's majorities, and whose bitterness completes his virtually absolute isolation.<sup>183</sup> It has been suggested that an attribute of modern political consciousness in American society is identification with outsider status — a sense of homelessness, isolation, and futility about participation in politics.<sup>184</sup> If alienation is pervasive, extending beyond minority groups to those who have majority status yet lack a strong sense of belonging in modern culture, then the tale of Philoctetes holds special interest. It may expand our understanding of the role of speech in becoming a participating citizen.

#### *A. Sophocles: Speech in Equilibrium With Other Goods*

Before the play begins, Philoctetes, high-born archer and part of the Greek forces bound for the war against Troy, suffers an unexpected injury: a serpent bites his foot as he enters a temple.<sup>185</sup> The wound, intensely painful, has an unbearable stench. The Greeks cannot tolerate the odor or the man's cries; he has become a

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<sup>182</sup> In an essay published in 1983, a noted classicist wrote, "*Philoctetes* has attracted more critical attention in the last fifteen years than any other play of Sophocles, more perhaps than any other Greek tragedy. This may be partly because its themes — alienation and communication, ends and means — are familiar and important to modern readers . . ." P.E. Easterling, *Philoctetes and Modern Criticism*, in OXFORD READINGS IN GREEK TRAGEDY 217, 217 (Erich Segal ed., 1983).

<sup>183</sup> In thinking about the meaning of citizenship from the perspective of the humanities, Julia R. Lupton identifies a "literature of citizenship," writings that "[in] their incisive, iconic, inaugural, or interventionist forms dramatize and reconstitute key myths and rhythms for literature and politics in the West." Julia Reinhard Lupton, *Rights, Commandments, and the Literature of Citizenship*, 66 MOD. LANG. Q. 21, 25 & n.3 (March 2005). She argues that "in the Western tradition, we would do better marking the origins of the literature of citizenship in tragedy than in epic, in Sophocles rather than in Homer." JULIA REINHARD LUPTON, *CITIZEN-SAINTS: SHAKESPEARE AND POLITICAL THEOLOGY* 207–08 (2005).

<sup>184</sup> BURT, *supra* note 55, at 68 (arguing that "the contemporary social experience of all Americans" has been a deep sense of "tenuous social bonding"). See also *id.* at 77 (maintaining that "American society today is characterized by a pervasive sense of homelessness"); cf. Morton J. Horowitz, Lecture, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 10 (1993) (arguing that the justices forming the majority in *Brown v. Board of Education*, 347 U.S. 483 (1954), "were, in different and complicated ways, themselves outsiders").

<sup>185</sup> For the sources of the Philoctetes story, see Meredith Clarke Hoppin, *What Happens in Philoctetes?*, in SOPHOCLES: MODERN CRITICAL VIEWS 137 (Harold Bloom ed., 1990). For a classic study of the Philoctetes story as used by Sophocles, other ancient Greek dramatists, and writers over the centuries, see EDMUND WILSON, *Philoctetes: The Wound and the Bow*, in THE WOUND AND THE BOW: SEVEN STUDIES IN LITERATURE 272 (1941) [hereinafter WILSON, *The Wound*].

monster.<sup>186</sup> Under the leadership of the supremely practical Odysseus, they make a fateful decision — to abandon their fellow warrior on Lemnos, a deserted island. Their one act of pity is to leave him a tool of survival: his bow, a mystical weapon given to him by Hercules in thanks for lighting Hercules's funeral pyre and releasing him from suffering of his own. As the play starts, ten years have passed since the Greeks abandoned Philoctetes. The war against Troy has raged on, and the Greeks have learned from a soothsayer that they cannot win the war without the participation of Philoctetes and Neoptolemus, the son of the now-dead champion, Achilles.

The Greeks dispatch Odysseus and Neoptolemus to the island; their mission is to bring Philoctetes back to the Greek forces and to sail for Troy and ultimate victory. The Greeks know that Philoctetes resents them for his miserable existence and will deny them any request. Odysseus devises a plan: Neoptolemus will present himself to Philoctetes and truthfully identify himself as Achilles's son, but he will contrive a story of his own supposed anger and resentment toward the Greeks. By this deception, he will gain the outcast's sympathy. With luck, Neoptolemus will find an opportunity to seize the bow; unarmed, Philoctetes will be powerless to resist rejoining the Greeks.

As the plan is set in motion, the play unfolds a compelling theme — the stark limitations of language as a means of restoring an alienated citizen's faith in the political order. The three principal characters constantly refer to "words" — true words, false words, promises of men, messages of gods — and each man has a highly problematic relation to language. Odysseus, invoking "Hermes, the lord of stratagem,"<sup>187</sup> scripts the deception of Philoctetes, justifying the plan by the sheer necessity of securing the warrior's aid in taking Troy after years of frustrated battle. For Odysseus, speech is first and last an instrument; it can and should be used, in his view, to achieve whatever the greater good commands. The object of speech is neither discernment nor revelation, but implementation: as long as leadership cites a plausible public objective, a calculated lie has legitimacy. In portraying Odysseus, Sophocles makes clear that the instrumentalist perspective is impoverished, but the play does not offer a clear alternative.<sup>188</sup> As an audience, we want Philoctetes to be healed and to return to society, and we soon enough see that traditional methods of persuasion will not come close to achieving those ends.

For Neoptolemus, in contrast, words control, and *man* is the instrument. The idealistic youth is mesmerized by words, mastered by their sound and fury, unable to turn speech to advantage in the creation of identity. At the outset, he balks at joining Odysseus's deception, but the leader's rhetoric gathers him in. Later, the

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<sup>186</sup> WILSON, *The Wound*, *supra* note 185, at 275.

<sup>187</sup> SOPHOCLES, PHILOCTETES, *supra* note 22, at 156.

<sup>188</sup> "For all of his ends-and-means morality, Odysseus is no mere caricature; his wisdom is worldly and unscrupulous, no doubt, but it represents a broader kind of second-rate wisdom than is to be summed in the mere politician." CEDRIC H. WHITMAN, *SOPHOCLES: A STUDY OF HEROIC HUMANISM* 180 (3d prtg. 1971).

Chorus's wrenching account of Philoctetes's history so affects the young man that he profoundly identifies with Philoctetes before they ever meet. At the same time, when Neoptolemus acts out the deception, his false words take charge, and he becomes the figure he represents. Language for him is a web of image and emotion, confounding judgment and splitting the self. It is not a vehicle for discovering truth about the world or one's capacity for independent mind.

For Philoctetes, speech has a third effect: it does not disperse him into many selves but locks him in a single, stubborn mindset. When he first appears in the play, he longs for communication, crying to his visitors:

O strangers!

Who may you be and from what country have you put into this  
land that is harborless and desolate? . . .

I would like to hear your speech. Do not shrink from me . . .  
nay, in pity for one so wretched and so lonely, for a sufferer so  
desolate and so friendless, speak to me . . . Oh, answer!<sup>189</sup>

However, his "frantic words"<sup>190</sup> limit any real ability to communicate. He can do little more than moan, thunder, build up extravagant hopes, lash out when they disintegrate, condemn, or forgive — all in a rush of bombast and self-pity.

These differences mean that the three main characters spend most of the play unable to meet through words. But the language problem that Sophocles creates is considerably more complex than a case of missed dialogue. When Neoptolemus carries out the ruse, telling the story of ill treatment by the Greeks, everything that he says is ostensibly false — yet because he has already clashed with Odysseus on whether such lies are necessary, many of Neoptolemus's false statements about estrangement from community ironically are *true*. Almost in a mirror image, when Philoctetes launches into his tale of victimhood, everything that he says of his experience at the hands of the Greeks is ostensibly true — yet because his bitterness has brought much of the misery on himself, many of his "true" statements attributing blame to others ironically are *false*. Thus, not only do the two men talk past each other, but each talks past himself. Language only seems to take each man more deeply into a hole of ignorance. These confusions signal that conditions among the Greeks have broken down on a fundamental level.<sup>191</sup>

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<sup>189</sup> SOPHOCLES, PHILOCTETES, *supra* note 22, at 158.

<sup>190</sup> *Id.* at 180.

<sup>191</sup> On Neoptolemus's intricate brew of truth and lies to deceive Philoctetes, see MARK RINGER, ELECTRA AND THE EMPTY URN: METATHEATER AND ROLE PLAYING IN SOPHOCLES 107–11 (1998). Sophocles's odd use of the Chorus reinforces the theme of social breakdown. In Greek tragic form, prolonged misrepresentation is not the Chorus's usual role. *Id.* at 111. In contrast, this play features a "complicit chorus," Diskin Clay, *Introduction* to SOPHOCLES, PHILOCTETES 3, 18 (Carl Phillips trans., 2003), readily joining in lies to entrap Philoctetes.

Language proves particularly futile in the plan to secure Philoctetes's return to the Greeks. These efforts are centered in Neoptolemus, who has two seemingly irreconcilable objectives: wise marshaling of forces to defeat the Trojans, and justice for his new friend. Throughout the play, he asks how wisdom of this kind and justice can be attained.<sup>192</sup> Seeking the first, he agrees to lie to Philoctetes; serving the second, he eventually tells Philoctetes the truth, still trying to win him back to the Greeks. Ultimately, although the young man grows in sympathy and judgment, he cannot synthesize his goals. All that he accomplishes through his verbal contacts, sensitive and winning though they are, is a decision to defy the Greeks — and his own destiny — by taking Philoctetes, unhealed and unlikely to be healed, back to his homeland.

However, Sophocles has a different ending in mind. As the two friends prepare to flee together, Sophocles supplies a stunning *coup de theatre*: the divinized Hercules, as *deus ex machina*, appears, reverses their decision, and sends them off to Troy. Standing on a high ledge, where the angle of vision is appropriately wide, Hercules commands them to "hearken[] to [his] words,"<sup>193</sup> surely an ironic order in a situation already snarled by speech and by speech-about-speech. But the god's words point the men beyond themselves to other goods, particularly the overarching purposes of the world they know, and he places the agonies of Philoctetes in a broader context of suffering and transcendence.<sup>194</sup> He assures fame and glory to both men and healing for Philoctetes, but he cautions them about the constant necessity of humility before existence.<sup>195</sup> He thus identifies moral agency not exclusively with the freedoms they have been exercising — the liberty of complaint, defamation, and self-scrutiny through speech — but with a mosaic of goods, including a recommitment to community ends, the act of returning to and undertaking repair of "a world of imperfect justice."<sup>196</sup> Given the sorry conditions of Greek life — where men discard other men as monsters, language leads not to clarity but darkness, and wisdom confounds justice — attending to fundamental social needs takes priority over settling scores, and priority even over the speech of dire protest. The god's commission to follow communal over individual need releases Philoctetes from physical and verbal captivity, perhaps enabling him to become what Benjamin Barber calls "that odd creature *Homo politicus* who inhabits both the ancient and modern worlds of democracy:

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<sup>192</sup> SOPHOCLES, PHILOCTETES, *supra* note 22, at 181–82 (exchange between Neoptolemus and Odysseus on wisdom versus justice).

<sup>193</sup> *Id.* at 186.

<sup>194</sup> Robert J. Rabel perceptively suggests that the god's success in persuading Philoctetes stems from the god's use of *mythos* in his argument. Robert J. Rabel, *Sophocles' Philoctetes and the Interpretation of Iliad 9*, 30 ARETHUSA 297, 302 (1997). "*Mythos*" is self-referential speech and "seems to be especially effective when the speaker is able to support a directive or request through an act of recollection, challenging his audience to the imitation and emulation of his own heroic achievements." *Id.*

<sup>195</sup> SOPHOCLES, PHILOCTETES, *supra* note 22, at 187.

<sup>196</sup> CHARLES SEGAL, SOPHOCLES' TRAGIC WORLD: DIVINITY, NATURE, SOCIETY 118 (1995).

dependent, yet under democracy self-determining; insufficient and ignorant, yet under democracy teachable; selfish, yet under democracy cooperative; stubborn and solipsistic, yet under democracy creative and capable of genuine self-transformation.”<sup>197</sup>

*Philoctetes* is about alienation’s failure to achieve reconciliation through language alone, and the role of other goods, when speech reaches a dead end, to secure that reconciliation. Other goods include repair of basic conditions upon which the flourishing of freedom depends. The challenging idea of *Philoctetes* is that speech exists in equilibrium with such other goods and that the alienated citizen’s return can stem from identification with a project of fundamental repair.

### *B. Heaney: Speech as Liberating the Listener*

For Sophocles, impasse gives way to the god’s example of readjusting one’s vision to the obligations of the social compact. In Irish poet Seamus Heaney’s 1990 version of the same play,<sup>198</sup> the focus shifts from god to friend, from Hercules to Neoptolemus. In fact, Hercules drops out of the play altogether; the Chorus speaks his lines,<sup>199</sup> confirming Heaney’s interest not so much in the priority of fundamental social needs over the uses of language, as in the priority of speech to determine those needs in the first place.

What attracted this lyric poet to *Philoctetes*? In an address accepting the Nobel Prize for Literature in 1995, Heaney invoked his coming of age in “a situation of ongoing political violence” in Northern Ireland.<sup>200</sup> Musing that perhaps “Tacitus was right . . . that peace is merely the desolation left behind after the decisive operations of merciless power,”<sup>201</sup> he recalled a world encompassing both “the atrocious nature of the IRA’s campaign of bombings and killings” and the “ruthlessness of the British Army on occasions like Bloody Sunday in Derry in 1972.”<sup>202</sup> As a youth in the mold of Neoptolemus, he possessed a “consciousness quickly realiz[ing] that it [was] the site of variously contending discourses,” and he could anticipate the “adult predicament” of “adjudicat[ing] among promptings variously ethical, aesthetical, moral, political, metrical, sceptical [sic], cultural, topical, typical, post-colonial and, taken all together, simply impossible.”<sup>203</sup>

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<sup>197</sup> BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 119 (1984).

<sup>198</sup> HEANEY, *supra* note 23.

<sup>199</sup> *Id.* at 1 (“By the end of the prologue, CHORUS LEADER has positioned herself where she will speak as HERCULES at the end of the play.”).

<sup>200</sup> Seamus Heaney, *Crediting Poetry*, Nobel Prize Acceptance Speech at the Swedish Academy Nobel (Dec. 7, 1995), <http://nobelprize.org/literature/laureates/1995/heaney-lecture.html> [hereinafter Heaney, Nobel Speech].

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

Heaney's address spoke of Northern Ireland in a way that showed what he must have seen in, and brought to, the story of Philoctetes. Of the two blood-soaked decades leading to cease-fires in the mid-1990s, he said:

The violence from below was then productive of nothing but a retaliatory violence from above, the dream of justice became subsumed into the callousness of reality, and people settled into a quarter century of life-waste and spirit-waste, of hardening attitudes and narrowing possibilities that were the natural result of political solidarity, traumatic suffering and sheer emotional self-protectiveness.<sup>204</sup>

Here we recognize both Ireland and Lemnos; as one scholar notes, *The Cure of Troy* uses the Sophoclean framework to ruminate on "Ireland and the Irish who have suffered."<sup>205</sup> In both the play and the Nobel speech, however, Heaney "[made] space . . . for the marvellous as well as for the murderous,"<sup>206</sup> expressing belief in the resilience of moral agency in the face of horrors within and without. And he related all of this to poetry's own contribution to humane values, even to the "creation and maintenance of a salubrious political space."<sup>207</sup>

It is unsurprising, then, that the central moment in *The Cure at Troy* comes not at the end, as in Sophocles, but in the center of the play, where Neoptolemus begins to abandon "the Odyssean narrative"<sup>208</sup> by unlocking the hidden truth. Entangled in the scheme by Odysseus, Neoptolemus at first proves exceptionally adept at trickery; Philoctetes believes everything he says. But then something odd happens. Odysseus sends a crew member to interrupt the conversation between Neoptolemus and Philoctetes; disguised as a merchant with supposed news of the Greek plans, the crew member is there to cement the men's false bond.<sup>209</sup> Neoptolemus plays along by forcing information out of the "merchant." But as he plays the frustrated information gatherer, Neoptolemus seems to experience real frustration at being kept in the dark; Odysseus has not told him in advance what the crew member will say, and thus Neoptolemus's irritation is not entirely a charade.<sup>210</sup> Once the merchant leaves,

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<sup>204</sup> *Id.*

<sup>205</sup> Marianne McDonald, *Seamus Heaney's Cure at Troy: Politics and Poetry*, 3 CLASSICS IRELAND 129 (1996).

<sup>206</sup> Heaney, Nobel Speech, *supra* note 200.

<sup>207</sup> *Id.*

<sup>208</sup> Hugh Denard, *Seamus Heaney, Colonialism, and The Cure: Sophoclean Re-visions*, 22 PAJ: J. PERFORMANCE & ART 1, 12 (2000).

<sup>209</sup> HEANEY, *supra* note 23, at 29–34 (scene in which MERCHANT discusses pending arrival of the Greeks to seize Philoctetes).

<sup>210</sup> Odysseus has simply said that he will send a disguised crew member "full of sailor-talk" to the scene of conversation between Neoptolemus and Philoctetes, and that Neoptolemus will be "fit to read between the lines/ For the message, whatever the message is." *Id.* at 11.

Neoptolemus appears exhausted, far less committed than before to the entire enterprise; he has had his own taste of thwarted communication and perhaps senses the blow to human connection when speech is manipulated.

Immediately after this, he has the chance to hold the sacred bow, which the archer had received from Hercules as a reward for “generosity.”<sup>211</sup> As the bow is “proffered, elevated and held significantly” between the two men,<sup>212</sup> it becomes a sign of human warmth, even an emblem of speech itself. After this ritual and after witnessing the archer’s attack of physical pain, Neoptolemus’s sympathy increases, and self-disgust affects his demeanor. Soon Philoctetes is forcing *him* to speak, and Neoptolemus can no longer hold back. He tells everything. Then he interprets and even advises. In fact, some scholars identify the heart of the play as the young man’s growth through speech — as he abandons one narrative and takes on his own — and the curative impact of his speech on Philoctetes. It appears that receipt of the young man’s words, honestly formed and generously shared, humanizes Philoctetes and restores him to society. On this view, the god’s speech at the end is superfluous; the alienated man’s heart has already changed.

Heaney thus focuses on the act and effects of untrammelled communication — or what the Chorus introducing his version of the play calls “poetry.”<sup>213</sup> In his Nobel speech and elsewhere, Heaney described poetry in ways that resonate with the play’s account of self-generated speech. Heaney discussed poetry’s energy, buoyancy, “fission and fusion,”<sup>214</sup> its capacity “to touch the base of our sympathetic nature while taking in at the same time the unsympathetic nature of the world to which that nature is constantly exposed,”<sup>215</sup> its power to “re-tun[e] the world itself . . . like the impatient thump which unexpectedly restores the picture to the television set,”<sup>216</sup> and its occasional feat of “open[ing] unexpected and unedited communications between our nature and the nature of the reality we inhabit,”<sup>217</sup> “intimating a possible order beyond itself.”<sup>218</sup> In the latter sense, unfettered speech enables the civic imagination not simply to remember tradition and established values but to envision new possibilities, the landscape of change.

Heaney, then, is less concerned with resurrecting the complex balance of fundamental values stressed by Sophocles in giving Hercules the last word, and more interested in capturing the sometimes unexpected benefits and energies of unimpeded communicative exchange. An essay by Edmund Wilson emphasized the paradoxical

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<sup>211</sup> *Id.* at 37 (Philoctetes explaining that his “generous behavior” prompted the god to give him the bow and implying that Neoptolemus’s own behavior has been similar).

<sup>212</sup> *Id.* (stage directions).

<sup>213</sup> *Id.* at 2.

<sup>214</sup> Heaney, Nobel Speech, *supra* note 200.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> SEAMUS HEANEY, *The Government of the Tongue*, in *THE GOVERNMENT OF THE TONGUE: SELECTED PROSE 1978–1987*, at 91, 93 (The Noonday Press 1990) (1988).

<sup>218</sup> *Id.* at 94.

fruits of Neoptolemus's particular odyssey in the play: "[I]n taking the risk to his cause which is involved in the recognition of his common humanity with the sick man, in refusing to break his word, [Neoptolemus] dissolves Philoctetes' stubbornness, and thus cures him and sets him free, and saves the campaign as well."<sup>219</sup>

*C. Scott: Speech as Instrument of Discovery*

A third telling of the Philoctetes story occurs in a four-novel sequence known as *The Raj Quartet* by British author Paul Scott.<sup>220</sup> These novels, set in India during World War II and dealing with the Nationalist movement for independence and its effects on an array of British residents and Indians caught up in momentous political change, have been called "among the greatest prose fictions of this and of the nineteenth century."<sup>221</sup> At the narrative's center is an Indian, raised as "Harry Coomer" in England and transplanted by events in the late 1930s to India, where he has no choice but to try to survive as "Hari Kumar," amidst a world that sees him as stranger and outcast. Late in the fourth novel of the sequence, after encountering the racist operations of the British Raj, including false arrests and imprisonments, Kumar begins to sign his writings for an Indian newspaper as "Philoctetes."<sup>222</sup> Scott thereby blends elements of Sophoclean tragedy with a vivid portrait of contemporary conflict, enduing his complex work with both specific historical insight and transcendent themes of human aspiration and the search for identity. If Sophocles emphasized the voice of the god, and Heaney stressed the voice of the friend, Scott's focus is the voice of the Philoctetes-figure himself, the rootless citizen who suffers profound disaffection but nonetheless seeks a way back to civic participation through speech — his own.

In Sophocles's and Heaney's versions, we see Philoctetes in the bitter tenth year of his abandonment on Lemnos, but Scott lays out a considerable pre-history of his Philoctetes, tracing the steps of his journey toward an equally harsh abandonment. Scott first embroiders the father-son story of Hercules and Philoctetes in recounting the poignant details of Duleep Kumar and his son Hari. Duleep, who leaves his home in India to study law in England, only to fail miserably, is hardly a conqueror, yet a herculean extravagance marks his dreams for Hari.<sup>223</sup> Duleep is determined to give the boy an English public school education and to transform him into a proper Englishman, complete with a westernized name ("Harry Coomer"). Once Harry possesses the

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<sup>219</sup> WILSON, *The Wound*, *supra* note 185, at 295.

<sup>220</sup> In order of publication, the four books are: *THE JEWEL IN THE CROWN* (Avon Books 1979) (1966) [hereinafter SCOTT, *THE JEWEL*]; *THE DAY OF THE SCORPION* (Avon Books 1979) (1968) [hereinafter SCOTT, *THE DAY*]; *THE TOWERS OF SILENCE* (Avon Books 1979) (1971) [hereinafter SCOTT, *THE TOWERS*]; *A DIVISION OF THE SPOILS* (Avon Books 1979) (1975) [hereinafter SCOTT, *A DIVISION*].

<sup>221</sup> Eva Brann, Critical Discussion, *Tapestry With Images: Paul Scott's Raj Novels*, 23 *PHIL. & LIT.* 181, 187 (1999).

<sup>222</sup> See SCOTT, *A DIVISION*, *supra* note 220, at 556–57.

<sup>223</sup> The father-son relationship is detailed in SCOTT, *THE JEWEL*, *supra* note 220. On the emotional extravagance of Hercules in legend and myth, see EDITH HAMILTON, *MYTHOLOGY* 224–43 (1942).

linguistic and cultural formation of the British ruling class, Duleep imagines, the youth will return to India as part of that class and assume a prominent position. Even more than this desire for his son's success, Duleep wishes to give him the wholeness of the English language itself. He muses to Harry:

English [unlike Hindi] is not spare. But it is beautiful. It cannot be called truthful because its subtleties are infinite. It is the language of a people who have probably earned their reputation for perfidy and hypocrisy because their language itself is so flexible, so often light-headed with statements which appear to mean one thing one year and quite a different thing the next. At least, this is so when it is written, and the English have usually confided their noblest aspirations and intentions to paper. Written, it looks like a way of gaining time and winning confidence.<sup>224</sup>

Duleep's plans for Harry proceed, but when finances fail, Duleep commits suicide; his only legacy to Harry is the "sacred bow" of fluent English. It proves a handicap. Harry's sole means of support are relatives in India, a place he has never known, a sprawling diversity of peoples then witnessing Gandhi's anti-British "Quit India" campaign and doing little to welcome a lost young man with dark skin, an English accent, and a fondness for swing music of the 1930s.

In his effort to adjust to surroundings he finds wholly foreign, Coomer becomes Kumar, working at a newspaper in a provincial city and encountering anti-British sentiments all around, including those of a local activist who says that even the fish-out-of-water Kumar might "learn to be a good Indian."<sup>225</sup> In letters to a cherished boyhood friend in England, Kumar ponders the concept of the "good Indian," using prose that strains to discern the relation, if any, of self to citizenship for one so utterly displaced. "I'm not sure I know what a good Indian *is*," he writes.<sup>226</sup>

Is he the fellow who joins the army (because it is a family tradition to join the army), or the fellow who is rich enough and ambitious enough to contribute money to Government War Funds, or is he the rebellious fellow . . . ? Or is the good Indian the Mahatma . . . who last month . . . praised the French for surrendering and wrote to the British cabinet asking them to . . . let the Axis powers walk into Britain. . . . [Or is he] the simple peasant who is only interested in ridding himself of the burden of the local money lender and becoming entitled to the whole of whatever it is he grows?<sup>227</sup>

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<sup>224</sup> SCOTT, *THE JEWEL*, *supra* note 220, at 206.

<sup>225</sup> *Id.* at 264.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 264–65.

Of British assurances that self-rule is just around the corner, Kumar notes that similar promises had been made for a hundred years but “were never fulfilled.”<sup>228</sup> Kumar, whose only interest as an English schoolboy was cricket, now finds a world in racial upheaval; he begins to think that “[w]hat [the British] dislike [about Indian demands for independence] is a black reflection of their own white radicalism which centuries ago led to the Magna Carta.”<sup>229</sup> Any hope for clarifying his situation, he realizes, can only come from putting words on a page, yet even that act of probing experience through speech brings limited results: “Working on this paper has forced me to look at the world and try to make sense out of it. But after I’ve looked at it I still ask myself where I stand in relation to it and that is what puzzles me to know.”<sup>230</sup>

Real trouble for Sophocles’s Philoctetes begins with a snake bite in a temple on the way to Troy; for Kumar, the moment comes when he and his English girlfriend — the observant, always questioning Daphne Manners — are assaulted by hooligans in a public garden at night. Daphne is raped. Merrick, an English police officer whose character blends the hardness, racism, and even the madness of the Raj, rearranges evidence in order to accuse Kumar falsely of the crime. A repellant version of pragmatic Odysseus, Merrick cannot accept the Englishness of a black man. He tortures and molests Kumar in detention. This is Kumar’s experience of Lemnos — abandonment, violation, injustice, despair. Beyond the prison where Hari struggles to stay sane, Daphne dies in childbirth.

Kumar’s story haunts the four novels. English characters discuss it, replay it, wonder what happened and why. Out of shame, some obtain his release and then puzzle over his apparent disappearance into the vastness of India. An Englishman who knew him in public school, trying to track him down a few years later, comes across the column signed “Philoctetes” in an Indian newspaper. It is an extraordinarily moving piece of writing, showing growth well beyond the prosaic musings of Kumar’s earlier ruminations on the good Indian. The column surely fulfills old Duleep’s sense of the English language’s subtlety, its facility for expressing “aspirations,” its tendency to stall for time. The column marks Kumar’s true birth as a writer — a birth that seemingly coincides with a Sophoclean truce with existence, an acceptance of engagement, despite everything, with India and its future.

For Scott, then, the individual discarded by social forces moves tentatively back to participation through self-discoveries of expression. Kumar’s newspaper piece ostensibly concerns the recent dedication of a college’s new wing: he describes the bareness of its still-unoccupied classrooms and labs, suggesting the smallness of its beginning and uncertainty of its future.<sup>231</sup> This is Kumar’s metaphor for India at independence: it too is empty and untested. Yet on another level, the writer surveys his own stance as both member and onlooker of a society that he did not choose.

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<sup>228</sup> *Id.* at 265.

<sup>229</sup> *Id.* at 266.

<sup>230</sup> *Id.* at 267.

<sup>231</sup> SCOTT, A DIVISION, *supra* note 220, at 556–57.

When he writes that as a reporter he had access to the new college wing because “[t]he carpenters and the workmen assumed I was a member of the college staff and such members of the staff as I encountered assumed I was connected with the builders,”<sup>232</sup> he refers to his impossible status as neither Anglo nor Indian but one mistaken for both. When he says he “faced dangers” in walking through the unfinished building, but visited classrooms “unmolested,” and left the building “subdued” by thought, the experience of detention and abuse are just beneath the surface of his prose.<sup>233</sup> But his art gives him oxygen; it allows him to order his knowledge of chaos, and like his counterparts in Sophocles and Heaney, he separates spirit from wound. Of the new school building, he notes its dependence “on what as yet unproven teachers and as yet unadmitted students must make of it and give to it before they can take anything lasting away from it.”<sup>234</sup> Civic responsibility, including the contribution of those, like him, with every right to turn their backs, will determine any success that India achieves. And then, in a final paragraph of surpassing beauty, he remembers “another place” — England and his youth — with its “seemingly long endless summers and the shade of different kinds of trees,” as well as the winter bareness of branches that should have taught him the illusion of all promises.<sup>235</sup> The wound remains, yet he must take part; his individuality, discovered in a form of writing about the self and its uneasy armistice with the political world, requires it. He retains the sacred bow of speech and bargains that it will suffice.

The Philoctetes stories suggest the outlines of a speech process within the zone of negative liberty that may occur in the modern context — considered here as the situation of citizens caught between alienation from politics perceived as closed or corrupt, on the one hand, and a readiness for engagement, based on a received tradition of participatory duty, on the other. Sophocles’s account teaches that when a breakdown in fundamental civic values is widely perceived, the alienated citizen may see her way back to civic participation if the law acts to reform or repair, even at the cost of some freedom. Heaney stresses the energies of untrammelled expression and its effect on the alienated mind’s resumption of interest and involvement in a system that claims to be self-governing. Scott focuses not on state-made repairs, or the vitality of expressive media external to the person, but on the speaker himself, for whom speech becomes a means of discerning one’s history in a way that opens up connection to political society. The citizen’s uncoerced movement in the direction of participation is an essential element of the broader societal dynamic envisioned by

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 557.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* Kumar’s use of the tree branch as an emblem of the spare consciousness that survives painful human experience revises a decidedly more consoling use of the tree image in John Stuart Mill’s *On Liberty*. MILL, *supra* note 60, at 60 (“Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.”).

Dimova-Cookson, the theory that an interaction of positive and negative liberties releases moral agency in civic affairs.

In Part IV below, the Article returns to its original question: what divides the justices in First Amendment cases? It considers the possibility that competing camps have differing interpretations of which means of restoring participation, and hence promoting self-governance, seems most workable and promising in a given context.

#### IV. FOUR CASES: WHAT DIVIDES THE JUSTICES?

*McIntyre v. Ohio Elections Commission*<sup>236</sup> exhibited a clash of understandings about how the law of the First Amendment should facilitate self-governance. A state law prohibited the distribution of anonymous political leaflets intended to influence voters.<sup>237</sup> Despite receiving cautions about the law, an Ohio woman handed out unsigned leaflets on an issue scheduled for referendum.<sup>238</sup> The state elections board charged Mrs. McIntyre with violating the law and fined her one hundred dollars.<sup>239</sup> The court of common pleas reversed, ruling that the statute was unconstitutional as applied, since Mrs. McIntyre had done nothing to mislead the public or otherwise behave surreptitiously.<sup>240</sup> The court of appeals reinstated the fine, however, and the state supreme court affirmed in a divided vote, finding the statute a “‘minor requirement’” designed to achieve legitimate goals: to help voters “‘evaluate [the] validity’” of campaign literature, and to help state officials “‘identify those who engage in fraud, libel or false advertising.’”<sup>241</sup> The state high court’s majority applied a test of reasonableness.<sup>242</sup> In contrast, the dissent called for a “more severe standard because of [the statute’s] significant effect ‘on the ability of individual citizens to freely express their views in writing on political issues.’”<sup>243</sup>

Judicial disagreement over the case continued in the United States Supreme Court, where a six-justice majority overruled the Ohio Supreme Court.<sup>244</sup> Four justices wrote: Justice Stevens for the majority; Justice Ginsburg, concurring in the decision; Justice Thomas, concurring in the judgment; and Justice Scalia, dissenting.<sup>245</sup> Justice Stevens’s opinion for the Court conformed to traditional analytic structure:

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<sup>236</sup> 514 U.S. 334 (1995).

<sup>237</sup> *Id.* at 338 n.3 (quoting OHIO REV. CODE ANN. § 3599.09(A) (1988)).

<sup>238</sup> *Id.* at 338.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 339.

<sup>241</sup> *Id.* at 339–40 (quoting *McIntyre v. Ohio Elections Comm’n*, 618 N.E.2d 152, 155–56 (Ohio 1993)).

<sup>242</sup> *Id.* at 340.

<sup>243</sup> *Id.* (quoting *McIntyre*, 618 N.E.2d at 156–57 (Wright, J., dissenting)).

<sup>244</sup> *Id.* at 335. Justice Thomas concurred in the judgment without joining the majority opinion. *Id.*

<sup>245</sup> *Id.*

first declaring that the leaflet was “the essence of First Amendment expression,”<sup>246</sup> then that the statute was a content-based regulation of pure political speech,<sup>247</sup> and third that “‘exacting scrutiny’”<sup>248</sup> was the standard of review necessary to ensure self-governance “[i]n a republic where the people are sovereign.”<sup>249</sup> Justice Stevens explicitly referenced *New York Times Co. v. Sullivan* and its affirmation of “our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”<sup>250</sup> Once the case had been organized and contextualized this way, the statute could not, and did not, survive.<sup>251</sup> However, only at the beginning and end of the opinion did Justice Stevens signal his value-based orientation to the case. At the outset he noted “a respected tradition of anonymity in the advocacy of political causes,”<sup>252</sup> and at the end, he took the point further, stating that the First Amendment protects anonymous speech in order “to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society.”<sup>253</sup> Recognizing the reality of alienation in the face of intolerance, Stevens again appeared to take the cue from *Sullivan*, this time its concern for the speaker’s dignity and the threat against it posed by vindictive social forces. But as discussed in Part I.A with respect to *Sullivan*, the dignity model of self-governance has only so much intellectual force in a speech case. To be sure, *Sullivan* implicated the compelling goal of equality, but its ultimate emphasis on autonomy stopped short of the process account’s concern for citizenship, in the sense of the individual’s finding a place in the larger political whole and participating in it actively. Dignity is prior to participation; it may not be adequate to fuel the democratic dynamic associated with citizenship. In nullifying the Ohio statute’s disclosure requirement, the Court in *McIntyre* privileged the speaker’s autonomy to say only as much as she chooses to say about an issue for election, but the Court took little note that anonymity could work against the goal of open deliberation among citizens.

If we evaluate Justice Stevens’s opinion from the perspective of a process model, we begin with the concept of “social process” derived from Dimova-Cookson’s work on liberty.<sup>254</sup> A social process reading of the Stevens opinion would note its extension of the handbill distributor’s negative liberty in order to create conditions for

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<sup>246</sup> *Id.* at 347.

<sup>247</sup> *Id.* at 345.

<sup>248</sup> *Id.* at 347.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 346 (quoting 376 U.S. 254, 270 (1964)).

<sup>251</sup> The state’s interest in providing relevant information to voters was deemed “plainly insufficient.” *Id.* at 349. The Court thought that other statutory provisions more directly addressed the state’s interest in preventing libel and fraud, *id.* at 349–51, and that the restriction covered too much speech unrelated to libel and fraud, *id.* at 351–53. The statute was a “blunderbuss approach” to a problem better treated otherwise. *Id.* at 357.

<sup>252</sup> *Id.* at 343.

<sup>253</sup> *Id.* at 357.

<sup>254</sup> See *supra* text accompanying notes 144–70.

uncoerced moral agency on the part of any who would receive the handbill, consider its content, and incorporate it into a decision on whether and how to take part in the referendum. But the social process account requires the desired causal effect of expanding negative liberty to be at least plausible, and here it is not. As noted in Part II, plausibility in the social process account is tied to trust, that lubricant of the speech process that gives it practical force. It is hard to see an opening for the trust necessary for moral action by recipients of electioneering speech when distributors of that speech can remain nameless. Mrs. McIntyre may well insist that a right to anonymity ensures her preparation and circulation of the handbill in the first place, thus adding to the store of political information generally. Nonetheless, it is doubtful that permitting speakers to avoid all named responsibility for the information they circulate can strengthen the moral agency of recipients to undertake responsibility for social conditions.

Thus, whether Stevens's opinion followed the substantive dignity model or the social process model, his opinion for the Court fell short of convincingly advancing self-governance. Justice Ginsburg, concurring, reached the same result,<sup>255</sup> but it appears that she employed the "individual process" model in Scott's self-discovery mode, emphasizing the citizen's own interest in locating a role in community life through unburdened speech.<sup>256</sup> Noting that "Margaret McIntyre's case . . . bears a marked resemblance to Margaret Gilleo's case and Mary Grace's,"<sup>257</sup> Justice Ginsburg relied on precedent respecting idiosyncratic participation, whether placing a political sign in the front yard or picketing on a public sidewalk. By recalling these speakers by name, Justice Ginsburg recognized the connection between civic speech and identity itself, between participation and personhood. But her concurring remarks were too brief to signal anything more definite about the content of this model.

Justice Scalia, dissenting, also appeared to follow an "individual process" model, although as a Sophoclean. His opinion invoked the effect of systemic reform, however modest, in aiding civic participation, in contrast to Justice Ginsburg's opinion, which sought to further participation by eliminating constraints on speech. Scalia would have upheld the Ohio statute on the basis of a presumption of constitutionality created by the states' "long, accepted usage" of disclosure statutes of this kind.<sup>258</sup> He also gave customary doctrinal reasons: the electoral context permits greater speech regulation than other contexts; the "right to anonymity" has no special place in American jurisprudence; and elected officials arguably have greater competence than courts to decide whether mandatory disclosure "is effective in protecting and enhancing democratic elections."<sup>259</sup>

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<sup>255</sup> *McIntyre*, 514 U.S. at 358 (Ginsburg, J., concurring).

<sup>256</sup> *See supra* Part III.C.

<sup>257</sup> *McIntyre*, 514 U.S. at 358 (Ginsburg, J., concurring) (citing *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *United States v. Grace*, 461 U.S. 171 (1983)).

<sup>258</sup> *Id.* at 375 (Scalia, J., dissenting).

<sup>259</sup> *Id.* at 378–81.

Justice Scalia stressed the governmental objective: “a civil and dignified level of campaign debate — which the State has no power to command, but ample power to encourage by such undemanding measures as a signature requirement.”<sup>260</sup> Here he touched on roots of citizen alienation, noting:

Observers of the past few national elections have expressed concern about the increase of character assassination — “mudslinging” is the colloquial term — engaged in by political candidates and their supporters to the detriment of the democratic process. . . . Imagine how much all of this would increase if it could be done anonymously. . . . Consider, moreover, . . . “dirty tricks.” . . . How much easier — and sanction free! — it would be to circulate anonymous material (for example, a *really* tasteless, though not actionably false, attack upon one’s own candidate) with the hope and expectation that it will be attributed to, and held against, the other side.<sup>261</sup>

It is this perception of “mudslinging” that arguably keeps citizens from both political dialogue and the voting booths, justifying their retreat into private concerns. The signing requirement responded to this problem, and Justice Scalia implicitly credited its role in curbing loss of faith in the system and consequent declines in participation.

In rejecting the applicability of precedent striking down “right of reply” statutes applicable to newspapers, Justice Scalia provided further evidence of an “individual process” approach to the case. He explained:

[I]t is not *usual* for a speaker to put forward the best arguments against himself, and it is a great imposition upon free speech to make him do so. Whereas it is quite usual — it is expected — for a speaker to *identify* himself, and requiring that is (at least where there are no special circumstances present) virtually no imposition at all.<sup>262</sup>

He concluded by decrying the notion that anonymity is “traditionally sacrosanct.”<sup>263</sup> For Scalia, “[i]t facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity.”<sup>264</sup> Concerned that the Court’s holding approved a practice that “will lead to a coarsening of the future,” Scalia voted to uphold the statute.<sup>265</sup>

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<sup>260</sup> *Id.* at 382.

<sup>261</sup> *Id.* at 382–83.

<sup>262</sup> *Id.* at 383.

<sup>263</sup> *Id.* at 385.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

The dissent, then, followed what we have called the Sophoclean “individual process” model. Just as Sophocles linked the alienated man’s return to civic life to the words of a bedrock authority (Hercules), Scalia linked a less coarsened politics — and the renewed participation of the individual exhausted with “mudslinging” — to the wisdom of another bedrock authority: the forty-nine states that had signing requirements.<sup>266</sup> On this view, the case involved a modest but not negligible response to a larger political problem, a partial solution sensibly related to improving the “quality” of electoral campaigns. Although Scalia did not write in broad terms indicative of the “social process” model suggested by Dimova-Cookson’s work, the dissent could comfortably fit into that schema as well. His approach accepted the positive liberty of a signing requirement on the theory that it promotes greater negative freedom, in the sense of less voter confusion caused by unaccountable information, less alienation from traditional forms of voter participation, and in the long run a greater liberty resulting from increased voter vigilance over who makes the laws and what the laws provide.

All in all, the dissent for these reasons was a remarkable meditation on speech and citizenship. It recognized that a signing requirement, while a restriction, was far from a significant diminishment of negative liberty, that the moral agency it promoted was salutary, and that the democratic contributions of a right to be anonymous were negligible at best — and more likely pernicious.

In sum, Justices Stevens, Ginsburg, and Scalia did not differ on the First Amendment value at stake in *McIntyre*. They agreed that it is the self-governance value. Their disagreement arose from dwelling on different aspects of self-governance. For Stevens, the Brennan-bestowed, dignity-driven, substantive value mattered most. For Ginsburg, the speaker-focused, “individual process” value was central. And Scalia gave prominence to the system-focused “individual process” value. Although these differences were important, the justices gave little sign of grasping their divisions.

Several years later, in *Bartnicki v. Vopper*, the Court addressed a lawsuit brought by union officials whose private cell-phone conversation about a contentious labor negotiation was intercepted and recorded by an unknown person.<sup>267</sup> The interceptor delivered a tape of the call to one of the union’s opponents, who delivered it to a talk-radio host, who broke no law in receiving it but had reason to know it had been illegally intercepted.<sup>268</sup> The radio station broadcast the taped conversation some months later.<sup>269</sup> The union officials sued the radio host, among others, under federal and state statutory provisions aimed at protecting the privacy of electronic communications.<sup>270</sup> The question before the Supreme Court was whether the First

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<sup>266</sup> *Id.* at 381–82.

<sup>267</sup> 532 U.S. 514 (2001).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 519–20.

Amendment prohibited imposing civil damages for airing the illegally intercepted telephone conversation.<sup>271</sup> The case was complicated by the fact that the conversation included angry remarks about the plaintiffs' opponents in the labor dispute, including statements about doing violence to them.<sup>272</sup>

The Court held 6–3 that the statutes as applied to the radio host violated the First Amendment because the phone conversation consisted of “truthful information of public concern.”<sup>273</sup> Justice Stevens again wrote for the Court, although a concurrence by Justice Breyer (joined by Justice O'Connor) emphasized the narrowness of the holding.<sup>274</sup> Chief Justice Rehnquist dissented, joined by Justices Scalia and Thomas.

Justice Stevens's majority opinion followed the pattern of his opinion in *McIntyre*.<sup>275</sup> He invoked a First Amendment framework and perfunctorily applied it. On difficult elements — for example, whether the information involved a public issue, and whether it was lawfully obtained by the broadcaster — the analysis was highly technical and even counter-intuitive. He then considered whether imposition of damages for the broadcast was a narrowly tailored means of serving a compelling state interest, and he concluded that it was not.<sup>276</sup> As in *McIntyre*, his analysis in *Bartnicki* ultimately gave way to comments on value, and he cited *Sullivan*<sup>277</sup> to support a privilege for public speech, regardless of its dubious gathering by “a stranger.”<sup>278</sup> However, Justice Stevens made little effort to relate this disposition to *Sullivan*'s equality-based dignity rationale, and it would be difficult to do so in a context of an intercepted phone conversation leading to a stark invasion of privacy. Despite its

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<sup>271</sup> *Id.* at 524–25.

<sup>272</sup> *Id.* at 518–19.

<sup>273</sup> *Id.* at 534.

<sup>274</sup> *Id.* at 535–36 (Breyer, J., concurring) (stating agreement with the Court's “narrow holding limited to the special circumstances present here: (1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized involved a matter of unusual public concern, namely, a threat of potential physical harm to others”). The concurrence prompted Professor Smolla's observation that “Justice Stevens's opinion is more aptly described as a four-justice plurality decision, a decision that is quite sharply and dramatically constrained by the limiting language in the Breyer and O'Connor concurrence.” Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1114 (2002).

<sup>275</sup> *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

<sup>276</sup> The state interests in imposing damages on the broadcaster — “removing an incentive for parties to intercept private conversations, and . . . minimizing the harm to persons whose conversations have been illegally intercepted” — were not adequate under the First Amendment. *Bartnicki*, 532 U.S. at 529. The first end could justify imposing penalties on the interceptor, but not the broadcaster who neither intercepted the conversation nor violated a law in receiving the tape. *Id.* at 529–30. The second end, in the Court's view, was stronger yet ultimately insufficient in this case because the information involved a matter of public concern. *Id.* at 533–34.

<sup>277</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>278</sup> *Bartnicki*, 532 U.S. at 534–35.

invocation of *Sullivan*, casting the *Bartnicki* majority opinion in terms of a substantive self-governance analysis did not, and will not, work.

Justice Stevens's invocation of *Sullivan* could suggest a "social process" account in the sense derived from Dimova-Cookson. On this analysis, the Court would protect the negative liberty of the radio host to air the telephone conversation, on the theory that a broadcast that is not intentionally false enhances the marketplace of ideas and contributes to the exercise of moral agency (positive liberty) by recipients. Here, unlike the scenario in *McIntyre*, the element of trust is not lacking; the information, however intrusively obtained, is presumably accurate and, in that sense, trustworthy. However, on the "individual process" level, it is difficult to see how the freedom to broadcast an illegally intercepted private phone call, even if its content involves a public matter, can awaken moral agency in an alienated or apathetic citizen. Strong distaste for the method of information gathering and a deep skepticism about taking literally the contents of a private telephone call of this kind, would likely undermine any chance of increasing participation.

The Chief Justice and Justices Scalia and Thomas, on the other hand, did appear to see the case in "individual process" terms — not in the Sophoclean, system-repairing mode associated earlier with Justice Scalia's dissent in *McIntyre*,<sup>279</sup> but in Scott's self-discovery mode: removing constraints on speakers to the extent possible in order to permit them to negotiate individual connections to society through speech. How did the dissent do this in upholding sanctions against the radio host's speech? The dissent followed Scott by focusing not on the talk show's broadcast but on the private conversation that triggered the dispute in the first place. Besides strongly opposing the majority's doctrinal analysis, the Chief Justice castigated the majority's willingness to chill private speech, the telephone communication between two citizens.<sup>280</sup> The dissent cited approvingly a 1967 presidential report that stated:

In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.<sup>281</sup>

Here the dissent recognized a connection between the citizen's privacy and her civic participation; unburdened conversation in the private realm directly related to the individual's capacity to bring well-conceived, constructive input to the public marketplace and thus to find a place in public dialogue.

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<sup>279</sup> See *supra* text accompanying notes 258–66.

<sup>280</sup> *Bartnicki*, 532 U.S. at 553–54 (Rehnquist, C.J., dissenting).

<sup>281</sup> *Id.* at 543 (citation omitted).

As in *McIntyre*, then, the justices in *Bartnicki* agreed on the over-arching value, self-governance, but divided in terms of emphasis. The majority opted either for a weak substantive-value approach or for the “social process” approach, and the dissent conceptualized the case in terms of “individual process.” This split suggests that the left-of-center justices were more concerned with increased participation considered in terms of broad social effects (*McIntyre*, *Bartnicki*), while the right-of-center justices regarded First Amendment disputes in terms of responding to systemic breakdown (*McIntyre*) or protecting individual creative development (*Bartnicki*).

In *Republican Party of Minnesota v. White*,<sup>282</sup> the judicial roles changed. Justice Scalia wrote for the majority, opting for the “individual process” account, focusing on the flow of information as Justice Stevens did in the two prior cases. For his part, Justice Stevens took the Sophoclean position that Justice Scalia shouldered in *McIntyre*, perceiving (albeit with precious little evidence) a broken system and a sensibly restrictive solution. Justice Ginsburg fleshed out this approach.

*White* involved a judicial election in Minnesota and the state’s code of judicial conduct.<sup>283</sup> The code’s Announce Clause provided that “a ‘candidate for a judicial office, including an incumbent judge,’ shall not ‘announce his or her views on disputed legal or political issues.’”<sup>284</sup> Steep sanctions applied: a violating incumbent judge faced a spectrum of penalties, “including removal, censure, civil penalties, and suspension without pay.”<sup>285</sup> A lawyer who ran for judicial office and violated the clause could be disbarred, suspended, or put on probation.<sup>286</sup> After a judicial candidate sought and failed to receive clear advice from a state enforcement board as to the scope of the clause, the candidate sued the board in federal district court, seeking a declaratory order that the clause violated the First Amendment.<sup>287</sup> Both the trial court and the United States Court of Appeals for the Eighth Circuit upheld the clause’s constitutionality.<sup>288</sup>

The Supreme Court reversed, holding that the Announce Clause violated the First Amendment.<sup>289</sup> First, although courts had interpreted the clause narrowly in order to rid it of constitutional problems, Justice Scalia had trouble taking seriously the altered law and was unconvinced that the saving interpretations significantly reduced its reach.<sup>290</sup> Even as narrowed, the clause

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<sup>282</sup> 536 U.S. 765 (2002).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000)).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *White*, 536 U.S. 765.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 772–73.

prohibit[ed] a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions — and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.<sup>291</sup>

Justice Scalia noted as well that the state board had “printed a list of preapproved questions which judicial candidates [were] allowed to answer.”<sup>292</sup> This rendition of the facts strongly signaled the Justice’s sense that an Orwellian speech code, enforced by a board with power to disbar, governed Minnesota’s judicial elections.

Applying strict scrutiny, Justice Scalia found fatal problems with both the adequacy of the state interests and the narrowness of the Announce Clause as a means of achieving them.<sup>293</sup> His additional, perhaps greater, concern was that the state had “set[] our First Amendment jurisprudence on its head” by abridging the right of candidates “to speak out on disputed issues . . . to voters during an election.”<sup>294</sup> Even if many observers deemed merit selection of judges preferable to popular election, Minnesota had maintained “the principle of elections in place while preventing candidates from discussing what the elections are about.”<sup>295</sup> The state simply could not “tap the energy and the legitimizing power of the democratic process” without according free speech to “participants in that process.”<sup>296</sup>

This opinion was surely consistent with a “social process” reading derived from Dimova-Cookson. By increasing the negative liberty of judicial candidates to address issues of their choice, the Court facilitated an increased flow of highly relevant information to voters, assisting voters in the exercise of moral agency, if they chose to exercise it.<sup>297</sup> The trustworthiness of the judicial information could not be in doubt, since it came from the candidates’ own mouths. Whether it is desirable to

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<sup>291</sup> *Id.* at 773.

<sup>292</sup> *Id.* at 774.

<sup>293</sup> The state interests were “preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary.” *Id.* at 775. The state linked the first interest to due process and the second to public confidence in the judiciary. *Id.* Justice Scalia found that the Announce Clause, which “does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*,” was not narrowly tailored to serve either of the state interests. *Id.* at 776–77. To the extent that the state interests involved guaranteeing litigants “an equal chance to persuade the court on the legal points in their case,” Justice Scalia found the interests not even compelling. *Id.* at 777. He doubted that a state interest was to preserve open-mindedness because on that score the Announce Clause was patently underinclusive. *Id.* at 780.

<sup>294</sup> *Id.* at 781–82.

<sup>295</sup> *Id.* at 788.

<sup>296</sup> *Id.*

<sup>297</sup> Cf. Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 196 (2004) (noting that “restrictions [on speech of judicial candidates] may make it more difficult to get the public interested in judicial campaigns”).

have judicial elections in the first place is a separate question. But elections in our tradition cannot easily go hand-in-hand with speech supervised for candidates by government rules.

In invoking “the energy and the legitimizing power of the democratic process,”<sup>298</sup> the Court followed an “individual process” model as well: the Heaney model of communication as bond-among-citizens. Permitting expressive freedom of judicial candidates not only informs the individual voter but, like much issue-related information, provides a currency for argument among citizens on where society is going. The conversational bond can, on this view, spark a disaffected citizen to reconsider engagement. Justice Kennedy’s concurrence in *White* supplemented this essential theme with the idea that permitting candidates to speak freely can prompt citizens to respond with speech of their own, particularly speech aimed at reaching “voters who are uninterested or uninformed or blinded by partisanship.”<sup>299</sup> Accepting that a state “cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech,”<sup>300</sup> yet recognizing that “judicial campaigns in age of frenetic fund-raising and mass media” can heighten alienation and “disrespect for the legal system,”<sup>301</sup> Kennedy would rely on “democracy and free speech” to be “their own correctives.”<sup>302</sup> Kennedy’s view came close to Heaney’s faith in creative solutions arising from the always risky “fission and fusion” of people talking.

Four justices signed two separate dissents declaring that the Court had “exaggerate[d] the reach of the Announce Clause,” “ignore[d] the significance of that provision to the [state’s] integrated system of judicial campaign regulation,”<sup>303</sup> and undervalued the differences between judicial and political campaigns.<sup>304</sup> Responding to Justice Kennedy’s point that speech of press, academy, groups, and citizens was the proper check on inappropriate speech by judicial candidates, Justice Stevens grudgingly stated, “If the solution to harmful speech must be more speech, so be it.”<sup>305</sup> But he insisted that the majority had mistakenly ignored the difference between types of elections.<sup>306</sup> Justice Ginsburg stressed the state’s compelling interest in “preserving the public’s confidence in the integrity and impartiality of its judiciary,”<sup>307</sup> an interest that made it permissible for the state, in her view, to “install[] an election process geared to the judicial office.”<sup>308</sup> Both dissents therefore followed the Sophoclean “individual process” model, willingly subordinating a limited amount

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<sup>298</sup> *White*, 536 U.S. at 788.

<sup>299</sup> *Id.* at 795 (Kennedy, J., concurring).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 794.

<sup>302</sup> *Id.* at 795.

<sup>303</sup> *Id.* at 812 (Ginsburg, J., dissenting).

<sup>304</sup> *Id.* at 797–98 (Stevens, J., dissenting); *id.* at 803–04 (Ginsburg, J., dissenting).

<sup>305</sup> *Id.* at 797 (Stevens, J., dissenting).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 817 (Ginsburg, J., dissenting).

<sup>308</sup> *Id.* at 805.

of speech to systemic repair as a means of bolstering civic faith and participation. However, neither dissent could document the existence or effects of a real threat needing repair — or one that plausibly related to candidates' speech.

*White* leaves the impression that one "individual process" approach that was not followed — the self-discovery model associated above with Scott's Indian Philoctetes — may well have been the most appropriate. As Justice Scalia indicated, the judicial candidate navigating the Announce Clause as written and as interpreted had a hard time knowing what to say to voters in an election.<sup>309</sup> The candidate's statements would either be nonsensical or terribly convoluted. Perhaps the unseen value in this case is the candidate's interest in self-discovery as a public citizen during a judicial election campaign — an interest in finding the proper judicial stance between detachment and engagement. Justice Kennedy came close to this model when he cited Benjamin Cardozo's self-examining book about judging, *The Nature of the Judicial Process*,<sup>310</sup> and then remarked about what elected judges discover living with the law: "Many [elected judges], despite the difficulties imposed by the election system, have discovered in the law the enlightenment, instruction, and inspiration that make them independent-minded and faithful jurists of real integrity."<sup>311</sup> If part of this discovery takes place as a candidate, then Scott's self-discovery model, protecting speech to the fullest extent possible, arguably comes into play.

The fourth case that spurred this Article is *McConnell v. Federal Election Commission*,<sup>312</sup> which reviewed Congress's mammoth new campaign finance law. The Court fragmented again, but the *White* majority lost Justice O'Connor. On many of the provisions at issue, the Court voted 5–4 to uphold the legislation. A key issue in the case was the constitutionality of statutory restrictions on non-candidate-paid political advertisements that are disseminated by broadcast, cable, or satellite, run "in close proximity to a federal election," and "clearly identify a federal candidate

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<sup>309</sup> See *id.* at 769 (majority opinion).

<sup>310</sup> *Id.* at 794 (Kennedy, J., concurring) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921)).

<sup>311</sup> *Id.* at 796.

<sup>312</sup> 540 U.S. 93 (2003). The Court described a Senate Committee's six-volume report summarizing the results of an extensive investigation into the campaign practices in the 1996 federal elections. The report gave particular attention to the effect of soft money on the American political system, including elected officials' practice of granting special access in return for political contributions. . . . One Senator stated that "the hearings provided overwhelming evidence that the twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble."

*Id.* at 129–30. The lower court opinion in *McConnell* contains a history of the legislation, noting that "[t]he overhaul of our Nation's existing campaign finance laws — culminating with the enactment of [the Bipartisan Campaign Reform Act of 2002] — would consume the attention of three separate Congresses and require navigation through atypical parliamentary procedures." *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 202 (D.D.C. 2003) (footnote omitted).

and are targeted to that candidate's electorate."<sup>313</sup> Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibits unions and corporations from using their general treasury funds to finance such advertisements, defined as "electioneering communication[s]."<sup>314</sup> Congress passed the measure to address a problem that had intensified beginning in the 1996 presidential campaign:<sup>315</sup> that pre-existing law did not cover non-candidate broadcast advertisements unless the ads contained so-called "magic words" signaling that the ads constituted "express advocacy" of a candidate.<sup>316</sup> With the pre-existing law's blessing, unions and corporations had developed the practice of foregoing the "magic words," thus escaping the letter of the law, and airing unregulated "issue advertisements" that had identical or greater impact.<sup>317</sup> Many in Congress, declaring that issue ads were the equivalent of "poison politics"<sup>318</sup> and that the government's interest in "'limit[ing] the actuality and appearance of corruption'"<sup>319</sup> had been validated in a line of Supreme Court cases, decided to do something about them. Title II of BCRA made it a felony for unions and corporations to finance the ads within sixty days of a federal election or within thirty days of a primary.<sup>320</sup>

A special three-judge district court held that the ban on funding the ads from general treasury funds was constitutional.<sup>321</sup> A dissenting judge, quoting the well-known *Sullivan* phrase, would have struck down the ban on the ground that the First Amendment "delegates to the populace at large the responsibility of conducting an 'uninhibited, robust, and wide-open' debate about government affairs and political candidates."<sup>322</sup>

The Supreme Court upheld Title II as well. The Court's opinion, authored by Justices O'Connor and Stevens, took a decidedly Sophoclean approach under the "individual process" model, relying on a record that they determined amply warranted subordinating speech to larger systemic reform. The Court recalled the still persuasive rationales for earlier reform legislation: that substantial financial support for candidates in effect purchases "'access,'" and "'that the feeling that big contributors gain special treatment produces a reaction that the average American has no

<sup>313</sup> *McConnell*, 251 F. Supp. 2d at 592 (opinion of Kollar-Kotelly, J.).

<sup>314</sup> 2 U.S.C.A. § 434(f)(3)(A)(i) (Supp. 2005). See *McConnell*, 540 U.S. at 189–90. BCRA permits funding of such ads through "separate segregated fund[s]," 2 U.S.C.A. § 441b(b)(2)(C), which are subject to the limitations contained in the Federal Election Campaign Act, e.g., 2 U.S.C.A. § 441a(1)(C).

<sup>315</sup> *McConnell*, 540 U.S. at 131 (noting increase in funds spent on issue ads in 1996).

<sup>316</sup> *McConnell*, 251 F. Supp. 2d at 792 (opinion of Leon, J.). See *McConnell*, 540 U.S. at 126 (noting that under the strict reading of the Court in *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976), "a bright statutory line separat[ed] 'express advocacy' from 'issue advocacy'").

<sup>317</sup> *McConnell*, 540 U.S. at 126–27.

<sup>318</sup> *Id.* at 260 (Scalia, J., dissenting) (quoting Sen. Wellstone).

<sup>319</sup> *Id.* at 120 (majority opinion) (citation omitted).

<sup>320</sup> *Id.* at 204. See also *id.* at 323 (Kennedy, J., dissenting) (referencing "severe criminal penalties for broadcasting advocacy messages that 'refe[r] to a clearly identified candidate'").

<sup>321</sup> *McConnell*, 251 F. Supp. 2d at 185 (summarizing holdings).

<sup>322</sup> *Id.* at 360 (Henderson, J., dissenting) (citing *Buckley*, 424 U.S. at 14 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

significant role in the political process.”<sup>323</sup> For the *McConnell* majority, Congress legitimately kept these goals in mind in BCRA, seeking “to confine the ill effects of aggregated wealth on our political system.”<sup>324</sup> The Court found interests of the “highest importance”: “[p]reserving the integrity of the electoral process, preventing corruption, and “sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government.”<sup>325</sup> From this perspective, self-governance is possible only when citizens perceive the efficacy of participation. If government is essentially closed to all but the financially well-off, citizens give up.<sup>326</sup>

The dissenting justices had no disagreement that self-governance was at stake, but they saw self-governance as imperiled, not promoted, by the statute. For the dissenters, Heaney’s “individual process” model, emphasizing the free flow of information to citizens seeking to inform themselves and jointly deliberate, counseled invalidation of the Act. Justice Scalia, stating that “[t]his is a sad day for freedom of speech,” assailed the majority’s decision for “cut[ting] to the heart of what the First Amendment is meant to protect: the right to criticize the government.”<sup>327</sup> Scalia’s position was that disclosure requirements were the constitutional means of addressing the fact of “amassed wealth” in the political system.<sup>328</sup> With respect to electioneering communications, disclosure requirements would “tell the people where the speech is coming from,” thus comporting with the “premise of the First Amendment” that “people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. . . . Given the premises of democracy, there is no such thing as *too much* speech.”<sup>329</sup> Noting that supporters of the limitations on advertisements openly objected to the ads’ contents, he deplored the legislative effort to prohibit criticism of government.<sup>330</sup>

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<sup>323</sup> *McConnell*, 540 U.S. at 119 n.5 (recapping appellate decision in *Buckley v. Valeo*, 519 F.2d 821, 838 (D.C. Cir. 1975) (en banc), which cited statements of U.S. Senator Charles Mathias). See also *id.* at 150–54 (discussing legislative concern about access peddling as legitimate rationale for BCRA, and concluding that “[i]t was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption.”). Justice Kennedy questioned the interest in curbing access as a legitimate justification under the Court’s precedent. *Id.* at 294–95 (Kennedy, J., dissenting).

<sup>324</sup> *Id.* at 224 (majority opinion).

<sup>325</sup> *Id.* at 206 n.88 (alterations in original) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (citations and footnotes omitted)).

<sup>326</sup> For an interesting account of the “credulity” of the majority in taking “an unrealistically rosy view of how campaign finance has worked and therefore how BCRA will work,” see Roy A. Schotland, *Act I: BCRA Wins in Congress. Act II: BCRA Wins Big at the Court. Act III: BCRA Loses to Reality*, 3 ELECTION L.J. 335, 336 (2004). For the observation that Justice O’Connor, “perceived as the deciding vote in the case,” was “the one Justice with practical experience as a politician,” and that “the extensive record of unsavory fundraising practices reflected a believable reality to her,” see Ellen L. Weintraub, *Perspectives on Corruption*, 3 ELECTION L.J. 355, 356 (2004).

<sup>327</sup> *McConnell*, 540 U.S. at 248 (Scalia, J., dissenting).

<sup>328</sup> *Id.* at 258.

<sup>329</sup> *Id.* at 258–59.

<sup>330</sup> *Id.* at 260. “The first instinct of power is the retention of power, and, under a Consti-

Justice Kennedy also sharply disagreed with the majority, particularly with the sufficiency of the government rationale for Title II, that electioneering communications purchased by unions and corporations with general treasury funds would “‘endea[r] those entities to elected officials in a way that could be perceived by the public as corrupting.’”<sup>331</sup> For Kennedy, the rationale had “no limiting principle” and would justify “outlaw[ing] even pure issue ads, because they, too, could endear their sponsors to candidates who adopt the favored positions.”<sup>332</sup> Kennedy urged the Court to resist “ced[ing] authority to the Legislature to do with the First Amendment as it pleases.”<sup>333</sup>

These are strong words and should be taken seriously. But *McConnell* resists confident assessment that either side was clearly right on First Amendment law or value. The symbolism of BCRA was immense: Americans followed its proponents, especially Senator McCain, on the evening news for years as he and others pushed the legislation through Congress. Its eventual passage assumed the cultural image of a victory for good government and improved civic participation. In the wake of *McConnell*, Senator McCain put it simply — BCRA’s goal was

to restore the American people’s faith that their government belongs to them, and not only to those who can afford enormous payments to parties and candidates. That faith, badly damaged these past years, is the indispensable element of a working democracy.

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tution that requires periodic elections, that is best achieved by the suppression of election-time speech.” *Id.* at 263. Justice Scalia’s dissent parallels academic commentary arguing that “a legislatively enacted regulation on campaign spending and speaking would likely represent the outcome of self-interested political dealing and would result in a deliberate sovereign incursion on the formal political freedom of those whose speaking and spending it limited.” Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1765 (1999). Professor BeVier has also argued that the survival of BCRA’s restrictions on electioneering communications in *McConnell* contradicts *Sullivan*’s protection of speech critical of government officials. She writes:

In its willingness carefully to evaluate the likely effects on the quantity of speech of the legal rule it was evaluating, in its understanding that quantity and openness of debate required freedom and that freedom requires tolerance of false statements, and in its recognition of how important it is to representative democracy that citizens be free to criticize their government, [*Sullivan*] embodies a different First Amendment from that embodied in *McConnell*.

Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley’s First Amendment*, 3 ELECTION L.J. 127, 144 (2004). Justice Scalia’s dissent, in exploring the meaning of the legislation through the prism of political power, is reminiscent of his earlier dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), where he argued strenuously that the independent counsel provisions of the Ethics in Government Act were unconstitutional violations of the separation of powers. *Id.* at 697–734 (Scalia, J., dissenting).

<sup>331</sup> *McConnell*, 540 U.S. at 329 (Kennedy, J., dissenting) (quoting the government’s position as recapped by one of the judges on the lower court panel, *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 176, 622–23 (D.D.C. 2003) (opinion of Kollar-Kotelly, J.) (alteration in original)).

<sup>332</sup> *McConnell*, 540 U.S. at 329 (Kennedy, J., dissenting).

<sup>333</sup> *Id.* at 330.

Without it, citizens' incentive to participate in the civic life of their own nation will shrink to the vanishing point.<sup>334</sup>

Richard L. Hasen persuasively writes that *McConnell* contains unmistakable "signs of the Court's acceptance of the participatory self-government rationale"<sup>335</sup> developed by Justice Breyer.<sup>336</sup>

The majority opinions in the lower court and Supreme Court, however, are not rigorous First Amendment opinions in the sense that *Sullivan*, or even *McIntyre*, *Bartnicki*, or *White* applied searching scrutiny to government rules arguably violating the First Amendment.<sup>337</sup> Perhaps First Amendment cases should not be the sole precedents to emphasize in evaluating *McConnell*. Another interpretation would consider *McConnell* as the First Amendment analogue of *Morrison v. Olson*,<sup>338</sup> which in 1988 took a strikingly functionalist approach to separation of powers doctrine in upholding 8–1 the independent counsel provisions of the Ethics in Government Act.<sup>339</sup> As in *Morrison*, the justices in the *McConnell* majority were willing to defer in large measure to Congress's judgment on how to regulate potential corruption in politics. Perhaps both cases constitute a new kind of political question analysis.

Both involved statutes addressing what many Americans considered to be complex, well-documented problems directly related — indeed, central — to the integrity of the political system. And in both, the systemic problems were, oddly enough, products of constitutional "freedoms" taken to logical extremes. In *Morrison*, the problem was the absence of any real check — whether in the form of judicial review or expedient legislative recourse — on the president's power to spare his high-level appointees from investigation or prosecution for possible criminal misconduct. The absence of a structural check was a function of branch independence under the separation of powers doctrine. Congress sought to address the problem by creating the office of independent counsel, endowed with prosecutorial power yet removed from direct presidential control. The problem, then, arose from the separation of powers, yet the legal framework for testing the reform legislation was the

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<sup>334</sup> John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 115 (2004).

<sup>335</sup> Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 59 (2004).

<sup>336</sup> Justice Breyer has noted that this rationale aims "to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation." Breyer, *supra* note 135, at 253.

<sup>337</sup> For example, Professor Hasen has explained that what was missing from *McConnell* was careful balancing of competing constitutional interests, and serious policing for incumbent legislators' self-interest. Hasen, *supra* note 335, at 60. Professor Issacharoff has noted that *McConnell* features "the almost complete absence of such conventional First Amendment concerns" as "the need for the regulation and tightness of fit between state objectives and means taken." Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, 3 ELECTION L.J. 259, 261 (2004).

<sup>338</sup> 487 U.S. 654 (1988).

<sup>339</sup> *Id.*

separation of powers doctrine itself. Applying a functionalist framework,<sup>340</sup> the Court examined the legislation for signs of balanced relations between the independent counsel and all three branches, and finding a balance, upheld the statute.<sup>341</sup> While many Americans later rued, perhaps rightly, the legislation's wisdom, the Court's analytic approach in *Morrison* was not terribly surprising. If the logic of the separation of powers contributed to a serious problem going to the heart of the system's integrity, the Court's unwillingness to apply the same logic strictly in evaluating the reform made sense: better to defer to the political branches as long as the statute included a process of internal checks on its operations.

*McConnell* resembles *Morrison* in important respects. *McConnell*'s systemic problem — an increase in popular distrust of government, heightened by popular revulsion against elections due to the perceived role of corporate money and its use for candidate advertisements — arose in part from constitutional protections of speech and press. Congress enacted BCRA in response. If the logic of the First Amendment helped create a serious civic problem, deferring to the political branches may have been more democratic than strictly applying the logic that created the problem in the first place, particularly given the statute's authorization of corporate and union use of segregated funds for electioneering communications.<sup>342</sup>

But *McConnell* seems more than the product of a new theory of deference. It is also the outcome of practical surmise about a subtle question: how do citizens think? The case's opinions are replete with speculation about perceptions of corruption and endearments. The justices were pressed to give realistic consideration to how the living, breathing citizen regards politics and influence, the professed linkages between money and policy. The question presented in this Article — how the disenchanting citizen is won back to civic life — appeared to be central. The *McConnell* majority may have rushed to the judgments that citizens see corruption almost everywhere in the system, and that they link even televised advertisements to unseemly access. On the other hand, the dissenters may have been too dismissive of the risks posed to participation by the status quo. In the end, the symbolism of reform prevailed; Hercules appeared on the high ledge, signaled the priority of reform, and a decision was made. The only difference is that the justices in *McConnell* had none of Hercules's power to command Philoctetes back to the army and on to Troy. The *McConnell* Court could only uphold BCRA and hope that disengaged citizens would respond to the symbolism on their own. By the time of the election of 2004, however, many voters were back anyway. Even as money found new routes of entry into the

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<sup>340</sup> *Id.* at 691 (formulating the question under the separation of powers doctrine as whether the statute's restriction on presidential power to remove the independent counsel "unduly trammels on executive authority").

<sup>341</sup> *Id.* at 692 (holding that, despite restrictions on the removal power, "the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act").

<sup>342</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 204–07 (2003).

system, war and fear — and the media's unique power to package it all — brought many back to the voting booths, if not to energetic dialogue. But for how long?

### CONCLUSION

1. A process account of the First Amendment looks at the workings of speech in both the society as a whole and in the psychology of the questioning, often dissatisfied citizen. The account has multiple strands and does not point to a single answer in every case. This Article has attempted to explore and bring into the open some of the complexities of this account, so that legal disagreements over self-governance can begin to find a clearer, workable vocabulary.

2. In the cases studied, the justices had to appreciate that they lacked such a vocabulary and hence a firm grasp of the workings of American democracy at the start of the twenty-first century. In *McIntyre*, they were unnerved by a citizen who wished to make a statement but refused to stand up and be publicly identified with it. In *Bartnicki*, they were unsettled not by what a speaker wished to omit from his public speech, but what he wished to *put in*: someone else's private phone conversation. In *White*, they puzzled over a system of popular judicial elections that included a code of unmentionables to be followed, under threat of disbarment, by all candidates for the bench. And in *McConnell*, they considered a massive law that sought to advance democracy by cutting back on a range of speech. Where was the First Amendment, where was citizenship, and where were the words for either?

The justices fell back on values, those underlying dictates that recall why the First Amendment exists. Chief among them was self-governance. A shape-shifter, the self-governance value has elements of substance and process, but both are poorly defined and infrequently considered. What divided the justices were multiple, contentious understandings of self-governance. Most of the justices saw the contours of a social process account — the liberty/language dynamic, in which positive and negative liberties interact. But they divided in deploying different aspects of the “individual process” account.

3. Although much of the self-governance value can be explained, it remains a partial mystery because at its heart is the citizen, Philoctetes, wary of politics, uncertain of his next move. He may make himself visible when society points to needs more pressing than his own (Sophocles); he may step forward from the sidelines when a friend unshackles discussion and releases the “fission and fusion” of a communal bond (Heaney); or he may find a stance by his own searching use of language — to push off from the past and construct verbal bridges between public and private concerns (Scott). If he is Kumar, we think of him as homeless but situated, expecting change if not quite believing in it, searching for the good Indian yet writing in English. Scott's final novel revisits many of the characters of the earlier books but never mentions Kumar.<sup>343</sup> We imagine that, as part of his truce, Kumar has disappeared into India, part of a process where self-governance takes the next step, from speech to the speech that is action.

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<sup>343</sup> PAUL SCOTT, *STAYING ON* (1977).