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Against Political Speech

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AGAINST POLITICAL SPEECH

John M. Kang*

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INTRODUCTION

The Supreme Court has dedicated itself to the proposition that political speech, more than any other category of speech, is deserving of the highest protection.¹ A succession of cases amply supports this proposition. In *Virginia v. Black*, the Court announced that “lawful political speech [is] at the core of what the First Amendment is designed to protect.”² The Court similarly declared in *Monitor Patriot Co. v. Roy* that the First Amendment “has its fullest and most urgent application” to political speech.³ In *McIntyre v. Ohio Elections Commission*, the Court held that “handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression” and

* Professor of Law, University of New Mexico. I am grateful to Maryam Ahranjani and Josh Kastenbergh for generously reviewing the manuscript. I owe particular thanks to Cliff Villa for extensive comments, and to my assistant, Michael Woods, for his several contributions. I am grateful for the institutional support of the Professor Pamela Burgy Minzner Award for Faculty Excellence & Professionalism.

¹ For specific instances of how the Court has granted the highest protection to political speech, see *infra* Part I.

² *Virginia v. Black*, 538 U.S. 343, 365 (2003).

³ *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

that “[n]o form of speech is entitled to greater constitutional protection.”⁴ So too the Court stressed in *Buckley v. Valeo* that “[t]he First Amendment affords the broadest protection to . . . political expression.”⁵ The Court in *Texas v. Johnson* emphasized that the speaker who had burned the American flag as a form of expressive protest “was not . . . prosecuted for the expression of just any idea.”⁶ Rather, Johnson was, in the Court’s words, “prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.”⁷ In *Landmark Communications, Inc. v. Virginia*, the Court stated that political speech “lies near the core of the First Amendment.”⁸ These affirming words in *Landmark Communications* were recited by the Supreme Court in other cases, a testament to the Court’s steadfast protection of political speech as a uniquely deserving category.⁹ In *Mills v. Alabama*, the Court reiterated its support for the priority of political speech: “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”¹⁰ The *Mills* Court added, “This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”¹¹ As such examples illustrate, political speech enjoys a coveted place in the Supreme Court’s jurisprudence.

⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995).

⁵ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

⁶ *Texas v. Johnson*, 491 U.S. 397, 411 (1989); see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting) (“Political speech is the primary object of First Amendment protection.”). The Court stated in *Federal Election Commission v. National Conservative Political Action Committee*, “There can be no doubt that the expenditures at issue in this case produce speech at the core of the First Amendment.” 470 U.S. 480, 493 (1985).

⁷ *Johnson*, 491 U.S. at 411.

⁸ *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978).

⁹ See, e.g., *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979); *Butterworth v. Smith*, 494 U.S. 624, 631 (1990). The Court is not alone in its suggestion that political speech merits the highest protection. Prominent scholars have made similar claims. Laurence Tribe thus argues that “political advocacy” is “the very kind of speech that the First Amendment is meant to protect most vigorously.” Laurence H. Tribe, *Dividing Citizens United: The Case v. the Controversy*, 30 CONST. COMMENT. 463, 467 (2015). Cass Sunstein stresses that “political speech belongs in the top tier . . .” CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 132 (1993). Floyd Abrams writes that “political speech . . . is at the core of the First Amendment . . .” Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77 (2010), <http://yalelawjournal.org/forum/citizens-united-and-its-critics> [<https://perma.cc/GDG3-LH5B>]. Sunstein and Tribe are left-leaning scholars, but their arguments in favor of the priority of political speech has found supporters on the right as well. Robert Bork, for example, has argued that *only* political speech should be protected. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27–28 (1971).

¹⁰ See *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Other Supreme Court cases have repeated this language from *Mills*. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 196 (1992); *Landmark Commc’ns, Inc.*, 435 U.S. at 838.

¹¹ *Mills*, 384 U.S. at 218–19.

What is less clear is whether political speech deserves its privileged status. Undeniably, political speech has helped to advance civil rights and civic enlightenment, but political speech has also been used to justify, among other evils, the enslavement of blacks¹² and the perpetuation of racial segregation.¹³ That these abhorrent practices have been formally eradicated is only a partial victory for political speech given how long they had persisted. If political speech does bend to the arc of justice, it seems to do so at a disheartening pace. One reason why is because the so-called marketplace of ideas, while containing political speech that is in the service of justice, also eagerly feeds a voracious public appetite for political speech that seeks to further oppression.

These days, another problem presented by political speech is its unprecedented propensity to spread misinformation.¹⁴ It is a truism that false political speech has existed as long as politics has existed, but the internet has afforded political misinformation extraordinary influence.¹⁵ Even a casual search of Facebook or Twitter or Google will reveal an endless catalogue of political misinformation. Among the more well-known examples include the following claims: that the COVID pandemic was manufactured in a lab in China,¹⁶ that Democratic Party leaders along with Hollywood celebrities are part of a cabal of cannibal

¹² See generally PAUL FINKELMAN, *DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH* (2003) (summarizing arguments for slavery by some of America's most prominent leaders). See also *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406–08 (1856) (denying the right of black slaves to claim citizenship under the Constitution).

¹³ See, e.g., NICHOLAS GUYATT, *BIND US APART: HOW ENLIGHTENED AMERICANS INVENTED RACIAL SEGREGATION* 2–5 (2016) (discussing political arguments for racial segregation); see also *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (arguing that the Constitution does not forbid racial segregation), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The Supreme Court has never formally overruled *Korematsu v. United States*, 323 U.S. 214, 215–18 (1944), the case that justified the racial segregation of Americans of Japanese ancestry.

¹⁴ See Tim Wu, *Is the First Amendment Obsolete?*, in *THE PERILOUS PUBLIC SQUARE: STRUCTURAL THREATS TO FREE EXPRESSION TODAY* 15, 15–16, 20–21, 25 (David E. Pozen ed., 2020).

¹⁵ See Louis W. Tompros et al., *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvarez, Social Media-Obsessed World*, 31 HARV. J.L. & TECH. 65, 75–80 (2017); see also WORLD ECON. F., *GLOBAL RISKS 2013*, at 23, 25 (8th ed. 2013), <http://reports.weforum.org/global-risks-2013/risk-case-1/digital-wildfires-in-a-hyper-connected-world/> [<https://perma.cc/XM73-EKLL>] (discussing how misinformation spreads rapidly on social media and can cause panic); Peter Dizikes, *Study: On Twitter, False News Travels Faster Than True Stories*, MIT NEWS (Mar. 8, 2018), <https://news.mit.edu/2018/study-twitter-false-news-travels-faster-true-stories-0308> [<https://perma.cc/2B7G-FX9V>].

¹⁶ Aaron Blake, *How Misinformation, Filtered Through Fox and Conservative Media, Quickly Became Trump Administration Policy*, WASH. POST (May 11, 2020), <https://www.washingtonpost.com/politics/2020/05/11/how-misinformation-filtered-through-fox-news-conservative-media-became-trump-administration-policy/> [<https://perma.cc/H42K-K67J>]; Melissa Healy, *Was the Coronavirus Made in a Wuhan Lab? Here's What the Genetic Evidence Shows*, L.A. TIMES (May 9, 2020, 6:00 AM), <https://www.latimes.com/science/story/2020-05-09/was-the-coronavirus-made-in-a-wuhan-lab-heres-what-the-genetic-evidence-shows> [<https://perma.cc/4DTW-39HE>].

pedophiles,¹⁷ and, most alarmingly, that the presidential election was “rigged,” a patently baseless charge that nonetheless managed to spur a mob of people to storm the Capitol Building during the certification of the presidential ballots on January 6, 2021.¹⁸ However pernicious, such speech, by virtue of being political, would be afforded the highest protection by the Supreme Court.

Against this backdrop, scientific speech—speech that is not political, in other words—has paradoxically assumed a terrible urgency for America’s viability, including its political viability. Scientists have warned that global warming poses a daunting threat to the Earth’s inhabitants.¹⁹ More immediately, scientists have strenuously publicized the danger presented by COVID-19.²⁰ Neither of these examples constitute political speech in a conventional sense, and therefore would not likely be accorded the highest protection by the Supreme Court.²¹ On the other hand, the highest protection would surely have been extended to President Trump’s insistence that global warming is a hoax and that public officials who accept the validity of global warming are either lying to the public or absurdly ignorant.²² While proffered by someone who has been unable

¹⁷ Moira Donegan, *QAnon Conspiracists Believe in a Vast Pedophile Ring: The Truth Is Sadder*, *GUARDIAN* (Sept. 20, 2020, 6:40 AM), <https://www.theguardian.com/commentisfree/2020/sep/20/qanon-conspiracy-child-abuse-truth-trump> [<https://perma.cc/3CD2-V7SV>]; Alex Henderson, *Half of Trump Supporters Believe Baseless QAnon Pedophilia Claim About Democrats: Poll*, *SALON* (Oct. 20, 2020, 7:10 PM), https://www.salon.com/2020/10/20/half-of-trump-supporters-believe-baseless-qanon-pedophilia-claim-about-democrats-poll_partner/ [<https://perma.cc/Y5L6-CAYA>].

¹⁸ See Greg Miller et al., *A Mob Insurrection Stoked by False Claims of Election Fraud and Promises of Violent Restoration*, *WASH. POST* (Jan. 9, 2021), <https://www.washingtonpost.com/national-security/trump-capitol-mob-attack-origins/> [<https://perma.cc/B7G5-VGES>]; Mike Baker et al., *Mob Attack, Incited by Trump, Delays Election Certification*, *N.Y. TIMES* (July 25, 2021), <https://www.nytimes.com/live/2021/01/06/us/electoral-vote> [<https://perma.cc/ZK3S-PH28>].

¹⁹ See Damian Carrington, *Climate Crisis: 11,000 Scientists Warn of “Untold Suffering,”* *GUARDIAN* (Nov. 5, 2019, 10:00 AM), <https://www.theguardian.com/environment/2019/nov/05/climate-crisis-11000-scientists-warn-of-untold-suffering> [<https://perma.cc/8F73-XV5B>]; William J Ripple et al., *World Scientists’ Warning of a Climate Emergency*, 70 *BIOSCIENCE* 8, 8–11 (2020).

²⁰ See Carl Zimmer, *U.S. Is Blind to Contagious New Virus Variant, Scientists Warn*, *N.Y. TIMES* (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/health/coronavirus-variant-tracking.html> [<https://perma.cc/4N3V-49GW>]; *Covid-19: Lockdown Needs to Be Stricter, Scientists Warn*, *BBC NEWS* (Jan. 9, 2021), <https://www.bbc.com/news/uk-55602828> [<https://perma.cc/3NR7-GY2K>].

²¹ For discussion of how the Court conceives of political speech vis-à-vis other categories of speech, see *infra* Part II.

²² President Trump tweeted: “Well, it happened again. Amy Klobuchar announced that she is running for President, talking proudly of fighting global warming while standing in a virtual blizzard of snow, ice and freezing temperatures. Bad timing. By the end of her speech she looked like a Snowman(woman)!” Tim Marcin, *Amy Klobuchar Mocks Donald Trump Climate Change Tweet: “I’m Sorry If It Still Snows in the World,”* *NEWSWEEK* (Feb. 11, 2019, 12:53 PM), <https://www.newsweek.com/amy-klobuchar-mocks-donald-trump-climate-change-tweet-still-snows-world-132676> [<https://perma.cc/U3Y9-7HRB>]. President Trump also tweeted: “Be careful and try staying in your house. Large parts of the Country are suffering

to demonstrate even a rudimentary understanding of science,²³ these claims concerning science would constitute political speech—and hence would deserve the highest protection—because they reference public officials and because they are expressed by the President. The same heightened protection for political speech would also have applied to President Trump’s unfounded assurance to the public that COVID-19 is not a grave threat.²⁴ Americans thus find themselves in a disorienting world where factually based scientific speech, more than at any other time in recent memory, has to compete forcefully with untruthful political speech in the marketplace of ideas.

Prompted in part by a reflection of these disquieting circumstances, this Article will argue that the Supreme Court’s heightened protection for political speech is unjustified. The Article is organized as follows. Part I will summarize how the Supreme Court has privileged political speech. It then will identify two arguments that have been enlisted by the Court and scholars to support the contention that political speech deserves the highest protection. The Article will refer to these two arguments as the argument from originalism and the argument from self-government.²⁵ According to the argument from originalism, the Founding Fathers of the Republic intended for the First Amendment to grant political

from tremendous amounts of snow and near record setting cold. Amazing how big this system is. Wouldn’t be bad to have a little of that good old fashioned Global Warming right now!” *Climate Science Misrepresented by President Trump*, COLUM. CLIMATE SCH. SABIN CTR. FOR CLIMATE CHANGE L., <https://climate.law.columbia.edu/content/climate-science-misrepresented-president-trump-2> [<https://perma.cc/E33A-TD4V>].

²³ President Trump proffered, the reader will read, that disinfectants and sunlight, if injected inside a person’s skin, could serve as remedies for COVID. Reality Check Team, *Coronavirus: Trump’s Disinfectant and Sunlight Claims Fact-Checked*, BBC NEWS (Apr. 24, 2020), <https://www.bbc.com/news/world-us-canada-52399464> [<https://perma.cc/4J8S-GU8L>].

²⁴ See Maggie Haberman, *Trump Admits Downplaying the Virus Knowing It Was “Deadly Stuff,”* N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2020/09/09/us/politics/woodward-trump-book-virus.html> [<https://perma.cc/2G8X-J2K8>] (“President Trump acknowledged to the journalist Bob Woodward that he knowingly played down the coronavirus earlier this year even though he was aware it was life-threatening and vastly more serious than the seasonal flu.”); Emily Bazelon, *The First Amendment in the Age of Disinformation*, N.Y. TIMES MAG. (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/magazine/free-speech.html> [<https://perma.cc/V8ZF-ZSS8>] (“Seven months into the pandemic in America, with Trump leading the way, coronavirus skeptics continue to mock masks and incorrectly equate the virus with the flu.”).

html [<https://perma.cc/V8ZF-ZSS8>] (“Seven months into the pandemic in America, with Trump leading the way, coronavirus skeptics continue to mock masks and incorrectly equate the virus with the flu.”).

²⁵ A sustained discussion of originalism is beyond the scope of this Article, but there are some sources that the reader may wish to consult as an initial matter. See generally Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory* (Apr. 28, 2011) (unpublished manuscript), <http://ssrn.com/abstract=1825543> [<https://perma.cc/R3WH-5MKA>]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). See also KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* xi (1999); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 3–10 (2009).

speech the highest protection.²⁶ Part I will show that there is a dearth of historical evidence to support the argument from originalism. If anything, as Part I will suggest, the historical evidence could be read for the proposition that many, and perhaps most, in the Founding Generation warily regarded political speech—if voiced by powerful and subversive constituencies—as potentially detrimental to the survival of the republic, and therefore, as deserving less than consummate protection.

Other scholars and jurists have pursued a different tact, the argument from self-government, to brace their claim that political speech warrants the highest protection.²⁷ The argument from self-government starts from the premise that in a constitutional democracy, the people themselves are the ultimate source of political authority.²⁸ In order to make the best political decisions, the argument goes, the people must have available for deliberation a rich array of political speech.²⁹ Yet, instead of bolstering their claim that political speech should be granted special protection, the argument from self-government, as Part I will demonstrate, can lead to the ironic conclusion that political speech should be punished. Part I will also address an additional problem with the argument from self-government. So enamored is the argument from self-government with the category of political speech that the former is willing to provide nearly unfettered entrance to the latter into the marketplace of ideas. Owing to this virtually indiscriminate access, political misinformation has flooded the marketplace of ideas, a problem that has grown to seemingly insurmountable proportions in the age of the internet. By privileging political speech in this undiscerning manner, the argument from self-government has tended to undermine its own purpose: to help people to make well-informed decisions about their government.

Even if scholars and the Supreme Court were able to defend their position that political speech deserves the highest protection, Part II will argue that the effort to afford special protection to political speech is nevertheless unfeasible. For “political” speech is much too difficult to define. To illustrate this point, Part II will show how the category of “political” speech can easily bleed into what the Court styles as obscenity, literary speech, scientific speech, and commercial speech. Part II will further argue that the very notion of “political” speech is inherently contestable because speech that is “nonpolitical” can deeply inform our ideas about what is “political.” That is, Part II will argue at length that no one realistically forms “political” ideas by studying other “political” ideas alone. However, by having moored itself to the mission of protecting “political” speech,

²⁶ See discussion *infra* Section I.A.

²⁷ For classic discussions of the right of self-government, see ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* ix–x (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263. For more contemporary articulations, see also SUNSTEIN, *supra* note 9, at 132; CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 2–4 (1993).

²⁸ See *infra* Section I.B.

²⁹ See *infra* Section I.B.

the Court has diminished the political discourse that it has formally pledged to enrich.

Part III will raise a different objection to the Court's elevation of political speech. The heightened protection that the Court has granted to political speech frequently comes at the cost of two essential goods that society values: civility and dignity. Part III will argue that the Court has failed to justify why political speech should take precedence over these countervalues. As Part III will elaborate at length, civility is more than polite manners. It is the social adhesive that holds a community together and is understood as a set of rules for how members of that community should treat each other. Civility furnishes the moral substance to scaffold the claims for dignity by the community's members.³⁰ Part III will show, however, that the Supreme Court in some of its most monumental cases—cases that serve as cornerstones for the precedent that political speech is deserving of the highest protection—did not even acknowledge the existence of civility or dignity. Instead, the Court blissfully empowered political speech to liberate itself from the moral obligations imposed by civility. As a consequence, political speech was empowered to excoriate, demean, and verbally assault others, including those who have done nothing to deserve such abuse.

I. INADEQUATE JUSTIFICATIONS FOR WHY POLITICAL SPEECH DESERVES HEIGHTENED PROTECTION

There are different examples of how the Supreme Court has granted political speech special protection. One example is how the Court has treated political speech in comparison to commercial speech.³¹ The Court has defined commercial speech, variously, as speech that “does no more than propose a commercial transaction”³² and “expression related solely to the economic interests of the speaker and its audience.”³³ While the references to “no more” and “solely to” can appear to be attempts to limit the meaning of commercial speech, the definition of commercial speech wrought by the Court is actually quite capacious. Consider how commercial speech encompasses the countless everyday offers to buy or sell something,³⁴ as well as speech pertaining to the thing that is being bought or sold.³⁵ Given the ubiquity and importance of commercial transactions in our

³⁰ See *infra* Part III.

³¹ See *infra* Section I.B.

³² *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001).

³³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

³⁴ See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (treating as commercial speech advertisements for the price of alcohol); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 791–92 (1985) (Brennan, J., dissenting) (“In every case in which we have permitted more extensive state regulation on the basis of a commercial speech rationale the speech being regulated was pure advertising—an offer to buy or sell goods and services or encouraging such buying and selling.”).

³⁵ See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 63 (1983) (treating as commercial speech unsolicited pamphlets that provide information about the desirability and availability of prophylactics in general or in seller's products).

lives, one might assume that commercial speech has always been protected by the Court. In fact, the Court did not protect commercial speech until 1976.³⁶ Even then, the Court refused to bestow unqualified protection. The Court decided to protect commercial speech only as long as the speech was not misleading and did not propose an illegal activity.³⁷ By contrast, the Court protects political speech even if it advocates illegality, including unlawful violence, or is grossly misleading.³⁸ Indeed, it is the Court's position that political speech should be protected almost regardless of the consequences.³⁹ Notably, the Court has not conditioned its protection for political speech on the basis of the speech's perceived value.⁴⁰

In his now celebrated dissent from 1925 in *Gitlow v. New York*, Justice Holmes anticipated how the present Court would protect political speech even if doing so would result in catastrophe.⁴¹ With majestic indifference for the harmful results that political speech may wrought, Justice Holmes remarked, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."⁴² Justice Holmes's support for political speech—irrespective of worth—found expression in the clear and present danger doctrine fashioned by the Court in 1969.⁴³ According to the doctrine, political speech could lose protection only if it advocated "imminent lawless action and [was] likely to incite or produce such action."⁴⁴ By contrast, commercial speech that merely *proposed* an unlawful transaction was denied protection regardless of whether the speech proposed imminent unlawfulness or was likely to succeed.⁴⁵

³⁶ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

³⁷ See *Cent. Hudson*, 447 U.S. at 563–64 (denying constitutional protection for commercial speech that misleads or proposes an unlawful activity).

³⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that political speech will not be protected if it advocates imminent unlawful conduct and is likely to produce such action); see also *United States v. Alvarez*, 567 U.S. 709, 727–28 (2012) (holding that political speech that is entirely false will be protected).

³⁹ Consider, for example, that political speech is protected even if it advocates violence or is misleading. See *Brandenburg*, 395 U.S. at 447 (holding that political speech is protected unless it poses a clear and present danger); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that political speech is exempted from the regular rules of defamation).

⁴⁰ Political speech will be denied constitutional protection only if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447.

⁴¹ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.")

⁴² *Id.*

⁴³ *Brandenburg*, 395 U.S. at 452.

⁴⁴ *Id.* at 447 (emphasis added).

⁴⁵ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64 (1980).

Another way in which the Supreme Court has protected political speech has been by exempting political speech from categories of unprotected speech. Obscenity is one such unprotected category. The Court denies constitutional protection for speech that is obscene, but if the speech contains “serious” political value, the Court will spare the otherwise obscene speech from the category of obscenity.⁴⁶ The Court will do something similar for the tort of defamation. Defamation is a tort that requires the plaintiff to show that a factually inaccurate statement about the plaintiff was said by the speaker to a third party and that the false statement injured plaintiff’s reputation.⁴⁷ In order for the plaintiff to recover damages for defamation, the plaintiff must show that the speaker made the defamatory statement in a manner that was negligent with regard to whether the statement was factually true.⁴⁸ The standard of proof for defamation is generally preponderance of the evidence.⁴⁹ However, the Court has placed additional burdens on the plaintiff if she seeks to recover for a defamatory statement that contains political content.⁵⁰

If the defamatory statement concerns a public official who was acting within her official capacity, the Court requires the plaintiff to prove that the speaker made the false statement with “actual malice.”⁵¹ Under the actual malice test, the plaintiff faces the formidable task of having to show that the speaker made the false statement in a reckless manner or knew that the statement was false.⁵² Further, the actual malice test requires the plaintiff to satisfy the much higher standard for clear and convincing evidence, rather than the lower threshold for preponderance of the evidence.⁵³ Through this arrangement, the Court has sought to protect political speech by largely removing it from the unprotected category of defamation.⁵⁴ Such exemption has also been carved out in the tort of intentional infliction of emotional distress. Generally, speech that is deemed an intentional infliction of emotional distress is unprotected, and the plaintiff may recover damages for such distress. The Court, however, has held that no recovery will be possible if the speaker’s statement, no matter how hurtful, related to a public official or public figure and was of public concern.⁵⁵ As these comparisons to nonpolitical speech illustrate, the Court has provided political speech with special protection.

⁴⁶ See *Miller v. California*, 413 U.S. 15, 23–24 (1973); see also *infra* Part III.

⁴⁷ RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

⁴⁸ *Id.*

⁴⁹ *Id.* § 580B reporter’s note.

⁵⁰ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334–35 (1974).

⁵¹ See *id.*

⁵² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

⁵³ *Gertz*, 418 U.S. at 342.

⁵⁴ The Court has extended the actual malice test to public figures, those, in other words, who are not government officials. See generally *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988).

⁵⁵ See *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 13–14 (1990) (reviewing the history of the Court expanding defamation protections for matters of public concern).

Lamentably, it is also the case that the Supreme Court, along with scholars, has failed to assemble a serviceable justification for privileging political speech.

A. The Argument from Originalism

One means that judges and scholars have fashioned to underwrite the priority of political speech is the argument from originalism. The argument from originalism maintains that political speech is entitled to the highest protection because the framers of the Constitution or the Founding Fathers wished it so.⁵⁶ In *Nixon v. Shrink Missouri Government PAC*, Justice Thomas proclaimed in his dissent, “I begin with a proposition that ought to be unassailable: Political speech is the primary object of First Amendment protection.”⁵⁷ For support, Justice Thomas invoked the authority of the Founding Fathers.⁵⁸ “The Founders,” he contended, “sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information.”⁵⁹ Justice Thomas added that “free exchange should receive the most protection when it matters the most—during campaigns for elective office.”⁶⁰ As evidence, Justice Thomas cited James Madison’s “Report on the Resolutions” from 1800.⁶¹

The “Report” figured as a critical source of legal authority for Justice Thomas, but it was up to someone else, a major legal scholar, to integrate Madison into a more developed jurisprudential theory. That scholar was Cass Sunstein. Sunstein is a professor at Harvard Law School, and, in terms of scholarly reputation, he is perhaps the most prominent law professor in America today. According to Sunstein, “The view [adopted by the Supreme Court] that political speech belongs in the top tier receives firm support from history.”⁶² “By this,” explained Sunstein, “I refer first to the founding generation’s own theory of free expression.”⁶³ The term “founding generation” implied the voices of many people, but Sunstein meant only one person: James Madison.⁶⁴ In fact, Sunstein referred to his own conception of speech as “Madisonian.”⁶⁵ Sunstein’s choice to select Madison as the focal point is understandable on some level because

⁵⁶ See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting).

⁵⁷ *Id.*

⁵⁸ *Id.* at 411.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* Justice Thomas cites the publication date as 1799, but it is actually 1800. See JAMES MADISON, REPORT ON THE ALIEN AND SEDITION ACTS (1800), reprinted in MADISON: WRITINGS 608, 662 (Jack N. Rakove ed., 1999).

⁶² SUNSTEIN, *supra* note 9, at 132.

⁶³ *Id.*

⁶⁴ See *id.*

⁶⁵ *Id.* at 122.

Madison made unusually prominent contributions to the Constitution, so much so that he is now known as the “father of the Constitution.”⁶⁶

Sunstein’s effort to enlist Madison is not without problems, however. For Madison simply did not offer much direct commentary about whether political speech deserved the highest protection. Sunstein relied heavily on Madison’s “Report on the Alien and Sedition Acts.”⁶⁷ This was the same document, albeit under a different title, invoked by Justice Thomas in *Nixon*.⁶⁸ Before anything is said about Madison’s “Report,” an explanation about its historical context is in order. At the center of this historical context was the French Revolution.⁶⁹ As Professor Geoffrey Stone remarked, “No single foreign event affected the United States more profoundly in the 1790s than the French Revolution and its social, political, and diplomatic repercussions.”⁷⁰ At first, Americans lauded the French Revolution’s ideals of “*liberté, fraternité, égalité*,” but “[o]ver the next several years . . . France exploded with religious conflict, civil war, and economic chaos.”⁷¹ Specifically, “[w]ith the executions in 1793 of Louis XVI and Marie Antoinette, France spiraled into the ‘Reign of Terror.’”⁷² Instead of paving the way for the rights of the individual, the new French republic “sought to suppress dissent, de-Christianize the nation, and impose a rigid system of economic egalitarianism.”⁷³ Moreover, France was not satisfied with overturning its own regime. Under Napoleon’s command, France in 1797 had taken control of modern-day Belgium, the Rhineland, and the Italian peninsula.⁷⁴ France was now the dominant military power in Europe, and Napoleon set his ravenous sights on Britain.⁷⁵

Little imagination was required for Americans to believe that they were next. Vexed with fear, President John Adams asked Congress to set up a provisional army and to increase the size of the navy to protect against potential French invasion.⁷⁶ The apprehension felt by the Americans became exacerbated when the French navy captured American seamen and, between 1796 and 1797, seized 316 ships flying American colors.⁷⁷ Americans feared that some speakers in the United States would publicly support Napoleon or French political ideals in a manner that would erode confidence in the fledgling government of the United

⁶⁶ See J. William Davis, Book Review, 29 TEX. L. REV. 273, 275 (1950) (reviewing IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800 (1950)).

⁶⁷ SUNSTEIN, *supra* note 9, at xvii.

⁶⁸ *Id.*; see also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting).

⁶⁹ GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 21 (2004).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 22.

⁷⁷ *Id.* at 21.

States.⁷⁸ There was also the fear in America that newly arrived immigrants from France would subversively denounce the federal government of the United States in public as part of a campaign to destabilize it.⁷⁹

It was in this fraught setting that the Sedition Act of 1798, the subject of Madison's "Report," was passed.⁸⁰ The Act read as follows:

That if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States . . . or to excite against them . . . the hatred of the good people of the United States, . . . then such person . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.⁸¹

To modern eyes, the Act may appear unjust. But sedition laws are hardly new in the Anglo-American tradition. They have existed in England since 1275, and their terms were more oppressive than the American variant.⁸² Unlike their English counterpart, the American Sedition Act required the government to show that the speaker acted with malicious intent, and the Act permitted truth as a defense.⁸³ The American Sedition Act, however, was not met with uniform approval. It was passed in the Congress by a 44 to 41 vote along party lines.⁸⁴ President Adams's Federalist Party, with its devotion to a strong central government, supported the Act, while James Madison's Republican Party, with its dedication to states' rights, opposed it.⁸⁵

Unwilling to accept defeat, Madison composed his grievances against the Sedition Act. These grievances were collected in the "Report," the document that Professor Sunstein enlisted for his thesis that the framers sought to protect political speech above all others.⁸⁶ Unfortunately for Sunstein, Madison's "Report" was not mainly a disquisition about free speech, but a pointed attack on the Sedition Act, and, much more broadly, what Madison saw as overreaching by the federal government.⁸⁷ The "Report" is a relatively long document, but Sunstein only quoted short excerpts of it. The dearth of quoted material was not owing to lackadaisical research; there simply was not much in the "Report" that related directly to free speech. Moreover, neither part that Sunstein excerpted necessarily stood for his proposition that political speech deserved the highest protection.

⁷⁸ *Id.* at 26–29.

⁷⁹ *Id.* at 30–31.

⁸⁰ *Id.* at 43; An Act for the Punishment of Certain Crimes Against the United States (Sedition Act of 1798), ch. 74, 1 Stat. 596 (1798).

⁸¹ Sedition Act of 1798 § 2.

⁸² STONE, *supra* note 69, at 42.

⁸³ *Id.* at 44.

⁸⁴ *Id.* at 43.

⁸⁵ *See id.* at 25–29, 43.

⁸⁶ *See generally* SUNSTEIN, *supra* note 9.

⁸⁷ MADISON, *supra* note 61, at 611.

Here is the first excerpt from Madison’s “Report” that Sunstein provided: “[T]he right of electing the members of the Government constitutes . . . the essence of a free and responsible government,” and “[t]he value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for the public trust.”⁸⁸

Because knowledge of political candidates was central for “free and responsible government,” Sunstein drew the conclusion that political speech deserved more constitutional protection than other speech.⁸⁹ But Sunstein inferred too much. Madison’s statements merely amounted to a truism about the nature of political elections, not a larger philosophical commentary about the value of political speech. To be sure, part of what Sunstein asserted was right: Yes, free elections were in theory essential to responsible government, and, yes, too, the people should probably have the right to discuss the merits and demerits of the candidates so as to make sensible decisions about whom to vote for. Be that as it may, even if the entirety of Madison’s proposition were taken as true, it does not follow from anything Madison has said that political speech deserves more protection than commercial speech, religious speech, artistic speech, social speech, or any other form of speech.

Sunstein excerpted another part from Madison’s “Report”:

Indeed, the power represented by a Sedition Act ought, “more than any other, to produce universal alarm; because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.”⁹⁰

Removed from its historical context, this passage appeared to support Sunstein’s position that political speech deserved the highest protection. Placed in historical context, however, the meaning of Madison’s words is more constraining. For it must be remembered that Madison was writing the passage not to expound upon the abstract virtues of political speech. He was writing the passage to respond to a law that punished people for criticizing the federal government. Therefore, Madison’s defense of speech incidentally harped on the right to engage in political speech. To put the point differently, if, say, the Sedition Act forbade speech that was commercial or religious, Madison may very well have argued against the Act on the grounds that it forbade commercial speech or religious speech, rather than political speech.

From a broader perspective, it might not even be accurate to say that Madison’s “Report” was mainly about speech, political or otherwise. If Madison were truly concerned about the right of political speech, one must wonder why he never spoke out against the common law offense of seditious libel that was then extant in every state—including his own Virginia—which resembled the Federal

⁸⁸ SUNSTEIN, *supra* note 9, at xvii.

⁸⁹ *Id.*

⁹⁰ *Id.*

Sedition Act and was usually more repressive.⁹¹ Why did Madison reserve his criticism for the Sedition Act? The answer was implied in his “Report.” There, Madison argued that the paramount problem with the Sedition Act was not necessarily its repression of speech, but its encroachment on the rights of states. To better appreciate this aspect of the “Report,” it is first necessary to clarify that the “Report” was Madison’s attempt to justify an earlier document that he authored for the Virginia Assembly: the “Virginia Resolutions Against the Alien and Sedition Acts.”⁹² The “Resolutions” were written in 1798, and the “Report” was circulated in 1800.⁹³

If one delves into the substance of Madison’s “Report,” one finds little mention of the right of speech. One finds in its stead a sustained attempt to shore up the rights of the states against what Madison feared was federal encroachment. In the “Resolutions,” Madison wrote that the Virginia Assembly “views the powers of the federal government[] as resulting from the compact to which the states are parties.”⁹⁴ Not only does this statement complicate Sunstein’s effort to cast Madison as a champion of free speech, but the statement also complicates the received picture of Madison as a champion of constitutional democracy. Madison seemed to suggest in the “Resolutions” that the federal government was not created by the people in whose name the Constitution was formally written, but by the *states*.⁹⁵ Later in the “Resolutions,” Madison affirmed that all of the powers belonging to the federal government were “granted by the said compact” of the states.⁹⁶ Because he characterized the Constitution as a compact among the states—rather than an agreement by the people *per se*—Madison was able to assert that the states were the supreme sovereign, and therefore were not bound by the decisions of the people acting as a national collective in Congress. Madison argued that the “states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.”⁹⁷ Lest there be any confusion, Madison stressed in the “Report” that

⁹¹ The historian Forrest McDonald usefully observed that by permitting truth as a defense and requiring proof of malicious intent, the terms of the Sedition Act of 1798 “were more lenient than those of the common-law offense of seditious libel that prevailed in every state.” FORREST McDONALD, *STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876*, at 41 (2000). The objection raised by the Republicans in Congress “was not that it limited freedom of the press but that it made seditious libel a federal offense.” *Id.* Professor McDonald added, “Jefferson’s and Madison’s responses to these acts, embodied in the Virginia and Kentucky Resolutions, brought the issue of states’ rights back to center stage.” *Id.*

⁹² JAMES MADISON, *VIRGINIA RESOLUTIONS AGAINST THE ALIEN AND SEDITION ACTS (1798)*, reprinted in *MADISON: WRITINGS*, *supra* note 61, at 589, 589.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See U.S. CONST. pmbl.

⁹⁶ MADISON, *supra* note 92, at 589.

⁹⁷ *Id.* The Supreme Court begged to differ with Madison. In *M’Culloch v. Maryland*, Chief Justice Marshall for the Court argued that, according to the Constitution, the people—not the states—were the highest sovereign. See 17 U.S. (4 Wheat.) 316, 403–04 (1819).

“[t]he [C]onstitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity.”⁹⁸

Consonant language could be found in another part of Madison’s “Report”: “The states then being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated”⁹⁹

Here was an early pronouncement made shortly after the birth of the republic, a pronouncement that unsettlingly anticipated the right of nullification and secession that would be invoked by Southern states as a preface to the Civil War.¹⁰⁰ Madison summed up in the “Report” that “as parties to [the constitutional compact], [the states] must themselves decide in the last resort, such questions as may be of sufficient magnitude to require their interposition.”¹⁰¹ As Madison’s emphasis on states’ rights suggested, the Father of the Constitution penned his “Report” and “Resolutions” to shore up the rights of the states and—contrary to the respective interpretations by Professor Sunstein and Justice Thomas—much less so for the purpose of underwriting the argument that political speech deserved the highest protection.

Given his adamant defense of the right of a state to disobey federal laws that the state judged to be unconstitutional, it was no wonder that Madison provoked widespread rebuke from the very generation that Sunstein believes Madison spoke for.¹⁰² One must remember the Sedition Act, whatever its faults, was passed in Congress by a majority.¹⁰³ Those who voted for the Act publicly defended that it was necessary to prevent the weak republic from disintegrating in the face of French military invasion.¹⁰⁴

But whether the Sedition Act was meritorious is beside the point. What matters is that it was a product of the founding generation. Recall Sunstein’s claim that “[t]he view [adopted by the Supreme Court] that political speech belongs in the top tier receives firm support from history.”¹⁰⁵ Sunstein explained, “By this, I refer first to the founding generation’s own theory of free expression.”¹⁰⁶ Recall too that by “founding generation” Sunstein referred essentially to Madison alone. Madison’s criticism of the Sedition Act was the lone article of evidence that Sunstein had tendered. However, much of the “founding generation,” far from

⁹⁸ MADISON, *supra* note 61, at 611.

⁹⁹ *Id.*

¹⁰⁰ See generally WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836*, at 291 (1965).

¹⁰¹ MADISON, *supra* note 61, at 611.

¹⁰² See STONE, *supra* note 69, at 45. (Consider that nearly every other state’s legislature condemned Madison’s “Resolution.”)

¹⁰³ *Id.* at 43 (explaining that the Act was passed 44 for and 41 against).

¹⁰⁴ *Id.* at 27.

¹⁰⁵ SUNSTEIN, *supra* note 9, at 132.

¹⁰⁶ *Id.*

rallying around Madison's arguments, censured them. So intolerable was Madison's "Resolutions" that nearly every state other than Virginia passed its own resolutions in 1799 condemning Madison's "Resolutions" as illegal, dangerous, or both.¹⁰⁷ Condemnations of Madison's "Resolutions" were expressed by

¹⁰⁷ STONE, *supra* note 69, at 45.

Delaware,¹⁰⁸ Rhode Island,¹⁰⁹ Massachusetts,¹¹⁰ Connecticut,¹¹¹ New York,¹¹² New Hampshire,¹¹³ Vermont,¹¹⁴ Maryland,¹¹⁵ and Pennsylvania.¹¹⁶ New Jersey

¹⁰⁸ Delaware's general assembly offered the following words in 1799:

Resolved, By the Senate and House of Representatives of the state of Delaware, . . . that they consider the resolutions from the state of Virginia as a very unjustifiable interference with the general government and constituted authorities of the United States, and of dangerous tendency, and therefore not fit subject for the further consideration of the General Assembly.

Answers of the Several State Legislatures: State of Delaware, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 532, 532 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter THE DEBATES].

¹⁰⁹ Rhode Island harped on the fact that the U.S. Supreme Court had never declared unconstitutional the Sedition Act. Therefore, Rhode Island construed Virginia's Resolution, declaring the act unconstitutional, to be an attempt to usurp the powers of the Supreme Court and thus a violation of the principle of the separation of powers.

1. *Resolved*, That, in the opinion of this legislature, the second section of third article of the Constitution of the United States, in these words, to wit,—“The judicial power shall extend to all cases arising under the laws of the United States,”—vests in the federal courts, exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States.

Answers of the Several State Legislatures: State of Rhode Island, in THE DEBATES, *supra* note 108, at 533, 533. Rhode Island then addressed the Virginia Resolution:

2. *Resolved*, That for any state legislature to assume that authority would be—

- 1st. Blending together legislative and judicial powers;
- 2d. Hazarding an interruption of the peace of the states by civil discord, in case of a diversity of opinions among the state legislatures; each state having, in that case, no resort for vindicating its own opinion, but to the strength of its own arm; —
- 3d. Submitting most important questions of law, to less competent tribunals; and,
- 4th. An infraction of the Constitution of the United States, expressed in plain terms.

Id.

¹¹⁰ The Massachusetts general assembly wrote the longest rebuke of the Virginia Resolution. Madison had claimed that the Constitution was created by the states and that, therefore, the states could interpret the meaning of the Constitution and, where appropriate, nullify federal laws. Massachusetts, however, argued that the Constitution was created by the people:

[T]he people, in that solemn compact which is declared to be the supreme law of the land, have not constituted the state legislatures the judges of the acts or measures of the federal government, but have confided to them the power of proposing such amendments of the Constitution as shall appear to them necessary to the interests, or conformable to the wishes, of the people whom they represent.

Answers of the Several State Legislatures: Commonwealth of Massachusetts, in THE DEBATES, *supra* note 108, at 533, 534. Massachusetts called out Virginia by name:

[S]hould the respectable state of Virginia persist in the assumption of the right to declare the acts of the national government unconstitutional, and should she oppose successfully her force and will to those of the nation, the Constitution would be reduced to a mere cipher, to the form and pageantry of authority, without the energy of power

Id.

¹¹¹ Connecticut's general assembly also condemned Madison's Resolution:

That this Assembly views with deep regret, and explicitly disavows, the principles contained in the aforesaid resolutions, and particularly the opposition to the “Alien and Sedition Acts”—acts which the Constitution authorized, which the exigency of the country rendered necessary; which the constituted authorities have enacted, and which merit the entire approbation of this Assembly. They therefore, decidedly refuse to concur with the legislature of Virginia in promoting any of the objects attempted in the aforesaid resolutions.

Answers of the Several State Legislatures: State of Connecticut, in THE DEBATES, *supra* note 108, at 538.

¹¹² New York's senate also opposed Madison's Resolution. New York's senate affirmed the importance of a strong national government:

[T]he people of the United States have established for themselves a free and independent national government . . . it is essential to the existence of every government, that it have authority to defend and preserve its constitutional powers inviolate, inasmuch as every infringement thereof tends to its subversion.

Answers of the Several State Legislatures: State of New York, in *Senate*, in THE DEBATES, *supra* note 108, at 537, 537. Having set this backdrop, the New York senate took aim at Virginia and Kentucky:

And whereas the Senate, not perceiving that the rights of the particular states have been violated, nor any unconstitutional powers assumed by the general government, cannot forbear to express the anxiety and regret with which they observe the inflammatory and pernicious sentiments and doctrines which are contained in the resolutions of the legislatures of Virginia and Kentucky . . .

Id. at 537–38. Madison was not the only Founding Father who discussed the First Amendment. Massachusetts, in its critique of Madison's Resolution, tried to clarify why Madison's interpretation of the right of speech was flawed.

¹¹³ New Hampshire's house of representatives wrote the following in response:

Resolved, That the Legislature of New Hampshire unequivocally express a firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this state, against every aggression, either foreign or domestic, and that they will support the government of the United States in all measures warranted by the former . . . That if the Legislature of New Hampshire, for mere speculative purposes, were to express an opinion on the acts of the general government, commonly called "the Alien and Sedition Bills," that opinion would unreservedly be, that those acts are constitutional, and, in the present critical situation of our country, highly expedient.

Answers of the Several State Legislatures: State of New Hampshire, in *the House of Representatives*, in THE DEBATES, *supra* note 108, at 538, 539.

¹¹⁴ Vermont's house of representatives passed the following resolution:

Resolved, That the General Assembly of the state of Vermont do highly disapprove of the resolutions of the General Assembly of Virginia, as being unconstitutional in their nature, and dangerous in their tendency. It belongs not to state legislatures to decide on the constitutionality of laws made by the general government; this power being exclusively vested in the judiciary courts of the Union. That his excellency, the governor, be requested to transmit a copy of this resolution to the executive of Virginia, to be communicated to the General Assembly of that state: And that the same be sent to the governor and council for their concurrence.

Answers of the Several State Legislatures: State of Vermont, in *the House of Representatives*, in THE DEBATES, *supra* note 108, at 539, 539.

¹¹⁵ Maryland's House of Delegates declared:

Resolved, That the general assembly of Maryland highly disapprove of the sentiments and opinions contained in the resolutions of the legislature of Virginia, inasmuch as they contain the unwarrantable doctrine of the competency of a state government, by a legislative act, to declare an act of the federal government unconstitutional and void, and as they contain a request for our co-operation with them in obtaining a repeal of laws, which, at this crisis, we believe are wise and politic.

Frank M. Anderson, *Contemporary Opinion of the Virginia and Kentucky Resolutions* (pt. 2), 5 AM. HIST. REV. 225, 248 (1900) (quoting *Report of the Votes and Proceedings of the House of Delegates of the State of Maryland at November Session, 1798*).

¹¹⁶ The Pennsylvania House of Representatives adopted this resolution:

Resolved, That as it is the opinion of this House that the principles contained in the resolutions of the Legislature of Virginia, relative to certain measures of the general government, are calculated

did not pass a formal resolution but its legislature in 1799 spoke out against Madison's "Resolution."¹¹⁷ There were *ten* states, then, out of thirteen, that expressed disapproval for Madison's resolution.¹¹⁸ To be sure, a substantial number of Americans supported Madison's "Resolutions." That they did scarcely mitigates the irony in Professor Sunstein having attributed to Madison the voice of the "founding generation" when, in reality, Madison's was, by a formal measure, the minority view at the time it was publicly expressed.

B. *The Argument from Self-Government*

Looking to the views of the Founding Fathers has not been the only means that scholars have pursued in bracing the claim that political speech deserves the highest protection. Scholars have also turned to the political theory of self-government.¹¹⁹ The scholar who is associated most directly with the political theory of self-government is Alexander Meiklejohn. Meiklejohn was president of Amherst College from 1913 to 1923 and a prominent public intellectual in his day.¹²⁰ In Meiklejohn's view, "[t]he First Amendment does not protect a 'freedom to speak.'¹²¹ Instead, "[i]t protects the freedom of those activities of thought and communication by which we 'govern.'¹²² By inserting the word *govern*, Meiklejohn implied that the main task of the First Amendment was to protect political speech. His words were published in an article from 1961, but by 1948 Meiklejohn had developed the political theory animating them.¹²³ The culmination of his arguments was his landmark book, *Free Speech and Its Relation to Self-Government*.¹²⁴ There, he developed the thesis that Americans had created a constitutional democracy where all political authority accrued from the people.¹²⁵ Under such a system, "[t]here is only one group—the self-governing people" and, accordingly, "[r]ulers and ruled are the same individuals."¹²⁶ In sum, for

to excite unwarrantable discontents, and to destroy the very existence of our government, they ought to be, and are hereby, rejected.

Id. (quoting 4 H.R. JOURNAL 289 (Pa. 1799)).

¹¹⁷ The New Jersey Resolution, unlike the resolutions by the other states, was not formally delivered to Congress, and therefore, a record of it does not exist. See Frank M. Anderson, *Contemporary Opinion of the Virginia and Kentucky Resolutions* (pt. 1), 5 AM. HIST. REV. 45, 52 (1899).

¹¹⁸ See *supra* notes 108–17 and accompanying text.

¹¹⁹ Sunstein's reading of Madison, while in part originalist, is also an effort to develop what Sunstein sees as the merits of Madison's theory of self-government. See SUNSTEIN, *supra* note 9, at xvi.

¹²⁰ Bidly Martin, President, Amherst Coll., 2017 Convocation Address (Sept. 24, 2017), <https://www.amherst.edu/amherst-story/today/amherst-videos/convocation-2017> [<https://perma.cc/FN69-58DW>].

¹²¹ Meiklejohn, *supra* note 27, at 255.

¹²² *Id.*

¹²³ *Id.* at 246 n.4.

¹²⁴ See generally MEIKLEJOHN, *supra* note 27.

¹²⁵ *Id.* at 6.

¹²⁶ *Id.*

Meiklejohn, “[w]e, the People, are our own masters, our own subjects.”¹²⁷ Therefore, he argued that the people must be permitted to discuss political matters with each other.¹²⁸ It was Meiklejohn’s hope that with the benefit of such discussion, the people would make meaningful political choices as self-governing beings.¹²⁹

Meiklejohn’s arguments resonated with those of Justice Brennan in one of the most important cases in the history of the First Amendment: *New York Times v. Sullivan*.¹³⁰ Decided in 1964, the case involved an advertisement that was published by the *Times*.¹³¹ The Court noted, however, that the substance of the “advertisement” could more properly be characterized as political speech.¹³² A group of civil rights activists who supported Martin Luther King, Jr. asserted in the advertisement that the local police in Montgomery, Alabama, had harassed, abused, and unlawfully detained King and the activists.¹³³ L. B. Sullivan was Montgomery’s commissioner and he was responsible for the police.¹³⁴ Therefore, while Sullivan was not named, the reader of the advertisement could reasonably infer that Sullivan had ordered the police to attack King and his supporters. In fact, Sullivan argued at trial that the advertisement left no doubt that the activists were pointing to him as the culpable party.¹³⁵ Sullivan accordingly sued the *Times* for libel.¹³⁶ The jury awarded him \$500,000, an incredible sum back in 1964, and the Alabama Supreme Court affirmed.¹³⁷

To Sullivan’s dismay, the Supreme Court in *New York Times* introduced a radical legal concept called the actual malice test that would usher unprecedented protection for political speech, including speech that was otherwise defamatory.¹³⁸ Under the traditional law of defamation, a plaintiff had to show that a statement purporting to be fact was published to a third party and that the false statement was made at least negligently and had damaged the plaintiff’s reputation.¹³⁹ No category of speech—including political speech—was excepted from the traditional law of defamation. In *New York Times*, however, the Court invented the actual malice test for the purpose of exempting political speech from the tort of defamation.¹⁴⁰ Writing for the Court, Justice Brennan introduced the

¹²⁷ *Id.*

¹²⁸ *Id.* at 22–27.

¹²⁹ *Id.*

¹³⁰ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹³¹ *Id.* at 256.

¹³² *Id.* at 266.

¹³³ *Id.* at 257–58.

¹³⁴ *Id.* at 256 (“[Sullivan] testified that he was ‘Commissioner of Public Affairs and the duties are supervision of the Police Department’”).

¹³⁵ Brief for Respondent at 25, *N.Y. Times*, 376 U.S. 254 (No. 39) 1963 WL 105892.

¹³⁶ *N.Y. Times*, 376 U.S. at 256.

¹³⁷ *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 28, 52 (Ala. 1962).

¹³⁸ See Randall P. Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 539–40 (1988) (discussing the effects of the actual malice test on common law libel).

¹³⁹ RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

¹⁴⁰ *N.Y. Times*, 376 U.S. at 267–68.

actual malice test as an additional element that a plaintiff had to prove if he were a *public official* and the statement that was said about him concerned his *official* conduct.¹⁴¹ The actual malice test thus applied to a certain variety of political speech because it did not apply to defamatory statements about a *private* person acting in her *private* capacity. Under the actual malice test, the plaintiff had to prove that the defamatory statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”¹⁴² The *New York Times* Court thus endeavored to provide special protection for political speech that was nevertheless defamatory.

Justice Brennan for the *New York Times* Court argued that there was precedent for the actual malice test. He pointed to a 1908 Kansas case, *Coleman v. MacLennan*, in which the state attorney general, who was running for reelection, sued a newspaper for publishing libel in an article that discussed the candidate’s official conduct.¹⁴³ Justice Brennan approvingly quoted the jury instructions by the trial judge in *Coleman*, who had instructed the jury as follows:

[W]here an article is published . . . for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, . . . in such a case the burden is on the plaintiff to show actual malice in the publication of the article.¹⁴⁴

The Kansas Supreme Court affirmed the trial court’s ruling, and Justice Brennan quoted from the former as well: “[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.”¹⁴⁵ By focusing on the importance of public deliberation of political affairs, these words reverberated Meiklejohn’s argument from self-government.

While the Kansas Supreme Court’s ruling did not, strictly speaking, serve as formal precedent for the U.S. Supreme Court, the ruling did provide a guidepost for what was possible. The Supreme Court in *New York Times* followed that guidepost and extended protection for political speech that was otherwise defamatory and hence unprotected.¹⁴⁶ At the same time, Justice Brennan emphasized that there also existed independent reasons rooted in the logic of self-government for why the actual malice test was justified.¹⁴⁷ He explained that the actual malice test formulated in *New York Times* was underwritten by “[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment [and] has long been settled by our decisions.”¹⁴⁸ The reference to “public questions” implied that Justice Brennan had in mind topics addressed by

¹⁴¹ *Id.* at 279–80.

¹⁴² *Id.*

¹⁴³ *Id.* at 280 (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)).

¹⁴⁴ *Id.* at 280–81 (quoting *Coleman*, 98 P. at 281–82).

¹⁴⁵ *Id.* at 281.

¹⁴⁶ *Id.* at 282–83.

¹⁴⁷ *Id.* at 282.

¹⁴⁸ *Id.* at 269.

political speech. Support for this inference was supplied by a statement that Justice Brennan quoted in *New York Times* from his own majority opinion in *Roth v. United States*: “The constitutional safeguard, we have said, ‘was fashioned to assure unfettered interchange of ideas for the bringing about of *political* and social changes desired by the people.’”¹⁴⁹ In the next sentence, Justice Brennan quoted from *Stromberg v. California*: “The maintenance of the opportunity for free *political* discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”¹⁵⁰ Like Professor Meiklejohn, Justice Brennan seemed to adopt the view that political speech should be afforded the highest protection because it was necessary for a people who are self-governing to exercise their rights to change their laws and their government.

1. *The Logical Problem*

The argument advanced by Meiklejohn and Justice Brennan for the priority of political speech is hobbled by a subversive paradox. Meiklejohn and Justice Brennan were eager to grant the highest protection to political speech based on the principle that the people should be permitted to exercise their rights in a constitutional democracy to create, alter, or abolish laws.¹⁵¹ According to this view, political speech is valuable because it helps people to form ideas and opinions about what kinds of laws to pass. Therefore, for Meiklejohn and Justice Brennan, laws that abridge political speech are presumptively unconstitutional.

This position adopted by Meiklejohn and Justice Brennan exists, however, in corrosive tension with the logic that they believe underwrites said position. To understand why, it is vital to recognize that the argument from self-government proposed by Meiklejohn and Justice Brennan is not in essence an argument for political speech; at its heart, theirs is not an argument about speech at all. Their arguments instead should properly be understood as arguments for the right of the people to *participate* in self-government. Under the formulation by Meiklejohn and Justice Brennan, the heightened protection enjoyed by political speech is simply derivative of this larger theory of democracy. Meiklejohn and Justice Brennan claimed that the purpose of protecting political speech was to empower the people to make their own political decisions as self-governing beings.¹⁵² But the dedication to self-government, rather than shielding political speech with the highest protection, could also restrict it.

Suppose “the people”—the democratic collective whom Meiklejohn and Justice Brennan insisted are the highest sovereign—were exposed to a rich diversity of ideas and opinions concerning a given issue, exactly the sort of

¹⁴⁹ *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

¹⁵⁰ *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

¹⁵¹ See discussion *supra* Section I.B.

¹⁵² See discussion *supra* Section I.B.

diversity of political speech idealized by Meiklejohn and Justice Brennan. Suppose further that the people weighed the competing arguments provided by this diversity, and, after much reflection, decided to urge their elected representatives to pass a law that abridged political speech, which the people feared was dangerous to stable government. Acting on the wishes of the people, the representatives, let us stipulate, enacted such a law. The argument from self-government advanced by Meiklejohn and Justice Brennan would require that both men presumptively accept the decision of the people regardless of how either of them feels about the moral substance of the decision. To do otherwise would be to court a logical contradiction. As Meiklejohn himself admitted, “No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American.”¹⁵³

Seen from this perspective, the 1798 Sedition Act, the law condemned by James Madison as a threat to self-government, was not necessarily a transgression from the principle of self-government extolled by Meiklejohn and Justice Brennan. The Act was arguably an instantiation of it. For in enacting the Sedition Act, federal officials, working on behalf of their constituents, had engaged in and been exposed to political speech. The officials had deliberated the speech and then, for good or ill, decided that statements that were critical of the federal government should be prohibited, at least for the time being, for the sake of national security.¹⁵⁴ Considered in this light, the Sedition Act, even as it stifled political speech, was itself the product of political speech. In short, the Sedition Act was a collective assertion by a people who subscribed to the argument from self-government. The same thing may be said of the resolutions passed by ten of the thirteen states that were extant in 1799. Passionately supportive of the Sedition Act, these resolutions were the expressions of a people who, after having deliberated competing opinions, had decided that speech critical of the national government should not be suffered at an exceptionally precarious time for the United States. As the example of the Sedition Act of 1798 suggested, the protection for political speech could, ironically, cause people to voice and to deliberate political opinions that, in turn, could cause the same people to pass laws that severely restrict political speech. Rather than enabling greater freedom for political speech, as Justice Brennan and Meiklejohn seem to hope, the justification from self-government can bring together circumstances that can result in the constriction of political speech.

Something similar may be said of the decision by the jury, the trial court, and the Alabama Supreme Court in *New York Times v. Sullivan*. For a plausible argument may be made that these decisions are the products of deliberation by the people of Alabama. The jury heard the arguments—the political speech, in other words—delivered in court by the *Times* and by Sullivan. The jury deliberated the competing arguments. Afterwards, the jury awarded Sullivan \$500,000

¹⁵³ MEIKLEJOHN, *supra* note 27, at 26.

¹⁵⁴ For further discussion of the Sedition Act, see *supra* Section I.A.

based on his claim that he had been libeled by the *Times*.¹⁵⁵ As described, the jury behaved as the quintessential democratic body; it weighed the merits of competing political speech for purposes of adjudication.¹⁵⁶ The trial judge heard the jury's verdict, a form of political speech in its own right. The trial judge then deliberated whether he should permit the verdict to stand, which he eventually did.¹⁵⁷ The Alabama Supreme Court subsequently reviewed the arguments by Sullivan and the *Times* and made the decision to let the verdict stand.¹⁵⁸ The Alabama Supreme Court, like the jury who made the initial decision, had weighed the myriad instances of political speech presented in the case—including the arguments by plaintiff, the arguments by defendant, and the *Times*'s advertisement itself—and then had rendered its decision to uphold the jury's verdict. All three deliberative bodies (the jury, the trial court, and the Alabama Supreme Court) therefore did exactly what they were expected to do in terms of the argument from self-government advanced by Justice Brennan in *New York Times*.

Justice Brennan, however, introduced the actual malice test for the purpose of overturning the decisions by each of these deliberative bodies even though each of them, in theory, had performed in accord with the principle of self-government touted by Justice Brennan himself. He had formulated the actual malice test in order to enhance opportunities for the people alluded to in the Constitution's Preamble to make their own political decisions, but the upshot of the actual malice test was to empower *judges* at the expense of the people. This ironic consequence manifested itself in the following manner: The Court held in *New York Times* that if the plaintiff were required to prove that the speaker acted with actual malice, the plaintiff had to satisfy the evidential standard of clear and convincing proof.¹⁵⁹ The *New York Times* Court permitted the jury to make the initial decision regarding whether the plaintiff met this standard of proof. However, the *New York Times* Court also held that the judge could review the jury's decision.¹⁶⁰ Under the holding in *New York Times*, the judge thus enjoyed the right to overturn the jury's verdict.¹⁶¹ But the Court in *New York Times* never explained how

¹⁵⁵ *N.Y. Times*, 376 U.S. at 256.

¹⁵⁶ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 264 (Harvey C. Mansfield & Debra Winthrop eds. & trans., Univ. of Chi. Press, 2002) (1835). Consider, too, the Court's words in *Glasser v. United States*:

Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

315 U.S. 60, 85 (1942) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

¹⁵⁷ *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 51 (Ala. 1962) ("All in all we do not feel justified in mitigating the damages awarded by the jury, and approved by the trial judge below, by its judgment on the motion for a new trial . . .").

¹⁵⁸ *Id.* at 51–52.

¹⁵⁹ *N.Y. Times*, 376 U.S. at 285–86.

¹⁶⁰ *Id.* at 285.

¹⁶¹ *Id.* at 284–85.

the judge should make this determination, opting only to say that actual malice should be proved with “convincing clarity.”¹⁶² This ambiguity has provided the judge a degree of control over the jury’s decision about whether plaintiff has proven actual malice. By bestowing the trial judge the power to overturn the jury’s determination that plaintiff had met the standard of clear and convincing evidence, the Court in *New York Times* strayed from the traditional rule that jury determinations were not to be set aside unless they were clearly erroneous.¹⁶³

On a related note, Justice Brennan for the Court in *New York Times* made in his instant case what was a potentially factual determination about the actual malice test that was best left to the jury. The jury in *New York Times* made the inference that while the *Times* did not refer to Sullivan by name, a reasonable person could infer as much.¹⁶⁴ Justice Brennan for the Court, however, overturned the jury’s conclusion and argued that the political advertisement in the *Times* referred only to the local government in Montgomery.¹⁶⁵ To do otherwise, he warned, would amount to permitting seditious libel.¹⁶⁶ “The present proposition,” Justice Brennan insisted, “would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.”¹⁶⁷ In a case that has been celebrated as a colossal victory for the right of self-government, Justice Brennan’s opinion in *New York Times* contained structural features that could have the effect of thwarting the will of the people, the very thing that the argument from self-government was trying to facilitate.

Thus far, this Article has addressed the issue of whether political speech deserves the highest protection. This Article has suggested that efforts to justify such a lofty position for political speech have proved unsatisfactory. Even if one were to accept the premise that political speech did deserve heightened protection, there is another issue that must be addressed: What counts as “political” speech? The Supreme Court has operated from the assumption that “political” speech is a distinct category. The next Part challenges that assumption as untenable in practice.

II. DEFINING “POLITICAL” SPEECH IS TOO DIFFICULT

Even if we accepted the proposition that political speech deserved the highest protection, there is a basic problem concerning how one should define “political” speech. As Professor Sunstein himself confesses, “the distinction

¹⁶² *Id.* at 285–86.

¹⁶³ David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 495 (1991).

¹⁶⁴ *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 43–44 (Ala. 1962) (“The court had previously made it crystal clear that the jury were to determine to their reasonable satisfaction from the evidence that the words were spoken of and concerning the plaintiff.”).

¹⁶⁵ *N.Y. Times*, 376 U.S. at 291–292.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 292.

between the political and the nonpolitical may be extremely difficult to draw.¹⁶⁸ The Supreme Court has tacitly acknowledged this difficulty. Notwithstanding its repeated insistence that “[p]olitical speech . . . is ‘at the core of what the First Amendment is designed to protect,’”¹⁶⁹ the Court has never clarified what exactly it means by “political speech.”

A. *Obscenity, Literary Speech, and Scientific Speech*

In 1973, the Supreme Court in *Miller v. California* decided that obscenity should not receive any First Amendment protection.¹⁷⁰ Writing for the Court, Chief Justice Burger explained that expression was obscene if it appealed “to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, *political*, or scientific value.”¹⁷¹ Chief Justice Burger’s definition of obscenity did not exempt political speech alone. Speech that contained serious literary, artistic, or scientific content was also exempted from obscenity. However, when one examines Chief Justice Burger’s rationale for exempting these nonpolitical categories from obscenity, one discovers that he had little to say about them. Instead, he harped on the importance of political speech, as if literary, artistic, and scientific speech could be exempted from obscenity only to the extent that they bore similarities to political speech. Responding to the dissenting opinion, which accused his majority opinion of “repression,” Chief Justice Burger explained: “[I]n our view, to equate the free and robust exchange of ideas and *political* debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.”¹⁷²

In the aforementioned remark, Chief Justice Burger evinced a preoccupation with the task of distinguishing political speech from obscenity, a task that would seem to hinge on the existence of objective criteria. Yet the method that he selected to distinguish political speech from obscenity was in part based on a normative assumption. One could go so far as to say that his attempt at clarification amounted to a celebration of political speech and a rebuke of obscenity. According to Chief Justice Burger, the First Amendment was not designed to remain neutral about speech.¹⁷³ It was meant to promote “political debate,” not to titillate as obscenity was wont to do.¹⁷⁴ For Chief Justice Burger, the First Amendment was created to serve “high purposes,” not to aid the “commercial exploitation of

¹⁶⁸ SUNSTEIN, *supra* note 9, at 148.

¹⁶⁹ *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion)).

¹⁷⁰ *Miller v. California*, 413 U.S. 15, 36–37 (1973).

¹⁷¹ *Id.* at 24 (emphasis added).

¹⁷² *Id.* at 34 (emphasis added).

¹⁷³ *Id.* at 34–35.

¹⁷⁴ *Id.* at 34.

obscene material.”¹⁷⁵ Indeed, he insisted that the First Amendment was intertwined with the overtly political cause of “the historic struggle for freedom,” a cause that was presumptively incongruous with the lewd and embarrassing aims of obscenity.¹⁷⁶

The Chief Justice, however, did insert one potentially instructive distinction between political speech and obscenity. He implied that obscenity was not political speech because obscenity could not contribute to “the free and robust exchange of ideas” and obscenity could not contribute to “political debate.”¹⁷⁷ This purported distinction is not useful, however. Despite the arguments of Chief Justice Burger, the distinction between political speech and obscenity was less turbid than turbid. For speech that is “obscene” could also contribute to the “interchange of ideas” and even “bring about political and social changes.”¹⁷⁸ The *Miller* Court defined as “obscene” speech that was “patently offensive” and “prurient,” as these terms were interpreted by the local standards of a jury.¹⁷⁹ But speech that is patently offensive and prurient can have a powerful effect on shaping one’s political worldview.

Consider the following hypothetical. Joseph is a forty-year-old single resident of Albuquerque who works at the copy center at the University of New Mexico. He has never given any sustained thought to the topic of polygamy. However, out of curiosity, Joseph googled and retrieved an “obscene” video on the internet that portrayed sexual intercourse in a manner that glorified polygamy. There was no mention in the obscene video of laws, government, public policy, politicians, or anything else resembling politics in a conventional sense. Nevertheless, the video could be seen as brimming with political meaning. For polygamy is a crime,¹⁸⁰ and the video represented the crime in a way that the erotic pleasures associated with it could be deeply attractive to some viewers. From a certain angle, the obscene video amounted to the same “free and robust exchange of ideas” that Chief Justice Burger attributed to political speech.

Suppose that Joseph watched this obscene video several times. He gradually arrived at the conclusion that the sexual rewards of polygamy outweighed whatever social taboos it harbored. Joseph then began to post on social media and other online venues that he believed laws against polygamy were paternalistic and misguided. Some readers, let us suppose, spiritedly criticized his position. Joseph deliberated the content of their criticisms and, after some weeks, developed more considered arguments. He insisted, for example, that his arguments for polygamy were meant to apply only to consenting adults and never to minors,

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 34–35.

¹⁷⁹ *Id.* at 24–25, 30.

¹⁸⁰ Avigail Eisenberg, *How Should Public Institutions Assess Religious Identity?*, in *POLYGAMY’S RIGHTS AND WRONGS: PERSPECTIVES ON HARM, FAMILY, AND LAW* 46, 46 (Gillian Calder & Lori G. Beaman eds., 2014).

and that any spouse in the polygamous marriage retained the right of divorce. Joseph also published online a relatively sophisticated argument that polygamy was a victimless “crime” and therefore should be permitted. Notice what Joseph was doing. After watching content that the Court would deem obscene, he now participated in the very thing that made political speech so worthy of protection for Chief Justice Burger in *Miller*: the “interchange of ideas for the bringing about of political and social changes desired by the people.”¹⁸¹ Material that was formally obscene has caused Joseph to reimagine what his world could look like in political terms. Allegedly obscene material came to deeply ingrain his political ideas.

The same scenario can play out under different circumstances. Consider the case of Ashley, a married thirty-five-year-old woman who works at her family’s flower shop in Bowling Green, Kentucky. She has never thought seriously about issues related to feminism. Out of curiosity, she searched for pornography on the internet. There, Ashley stumbled upon the same obscene video seen by Joseph. Ashley was appalled by what seemed to her a celebratory depiction of unfiltered misogyny. Rather than interpreting the video as an endorsement for adult autonomy, as Joseph had done, Ashley saw it as an attempt by men to portray women as objects of sexual exploitation. Whatever ostensive autonomy the men enjoyed in the video was at the expense of the women who were exploited, Ashley concluded. In particular, she became disgusted, not in the aesthetic sense because the content was “obscene,” but in the moral sense because the video appeared to her to represent the worldview that one man was entitled to unapologetically exploit a group of young women who have been brainwashed to fawn over him sexually.

After watching the video, Ashley became livid. Her anger grew when she saw how often this video had been streamed and, presumably, enjoyed by men. Her rage galvanized Ashley to become politicized for the first time in her life. Ashley attended conferences organized by the Gender and Women’s Studies Program at nearby Western Kentucky University, and at the public library, she checked out books by feminist scholars. Eventually, Ashley joined a group in Bowling Green that aspired to strengthen punishment for sexual assaults against women. While Ashley’s preferred form of political action differed from Joseph’s, their respective outcomes demonstrate that the distinction between “obscenity” and “political” speech is extremely porous. Under the Supreme Court’s formulation, the content, if obscene, would be deemed as lacking “serious” political value. Yet the hypotheticals involving Joseph and Ashley suggest that it was the “obscene” video that powerfully inspired their respective political beliefs and spurred them to participate in political discourse with others.

As such, perhaps it is more accurate to propose that the distinction between “political” speech and “obscenity” is not only porous, but mutually constitutive. Political speech cannot exist in a vacuum. People do not learn about “politics”

¹⁸¹ Roth v. United States, 354 U.S. 476, 484 (1957).

(however it is defined) from reading and talking about “politics” alone. Chief Justice Burger in *Miller* tries to ennoble political speech as consistent with “high purposes in the struggle for freedom” while disparaging obscenity by associating it with “commercial exploitation.”¹⁸² But as suggested by the hypotheticals involving Joseph and Ashley, it was obscenity that stimulated how each person thought about politics. Political speech cannot become “free and robust,” as Chief Justice Burger in *Miller* wished for it, unless people are permitted wide discretion to peruse a host of different categories of speech, including speech that is unprotected.¹⁸³ It is certainly possible that neither Joseph nor Ashley would have formed their political opinions about gender but for having seen the obscene video.

There appears, indeed, to be a backward logic to the Court’s definition of political speech in relation to other categories of speech. In *Miller*, the Court held that material that was otherwise patently offensive and prurient was exempted from obscenity if the speech contained serious “literary,” “artistic,” “scientific,” and “political” value.¹⁸⁴ Yet the insistence that these sundry categories differ from political speech is problematic. As shown in the examples of Joseph and Ashley, “obscene” speech could be in theory reasonably interpreted as “political” speech, and, to the extent there are differences between the two, the former could crucially inform the latter. The same could be said for the other categories of speech in relation to political speech. Literary speech, for example—speech found in novels, short stories, poems, and memoirs—could form the basis of a person’s political ideas.

Leo Tolstoy’s short story *The Death of Ivan Ilyich* can be enlisted as an example for how a literary work can also function as political speech.¹⁸⁵ *Ivan Ilyich* is a fictionalized account of a successful Russian attorney in the late nineteenth century who, after a life of striving and ambition, learns, as he is dying over the course of several months, how spiritually and morally pointless his life has been.¹⁸⁶ It is only when he is very near death that he experiences the rapture of something akin to religious epiphany.¹⁸⁷ Tolstoy’s story, like any excellent work of fiction, can serve as a commentary about more than one thing, and it is not necessary for the reader to interpret *Ivan Ilyich* as a story with a political theme. The story can be read as such too, however. Ivan ultimately obtained a job as a magistrate on the Court of Justice, nineteenth-century Russia’s version of the U.S. Supreme Court.¹⁸⁸ In lieu of pondering issues of justice and the moral consequences of his decisions, Ivan “completely exclud[ed] his personal opinion of

¹⁸² *Miller*, 413 U.S. at 34.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ LEO TOLSTOY, *THE DEATH OF IVAN ILYICH* (Aylmer Maude & Louise Maude trans., Seven Treasures Publ’ns, 2009) (1886).

¹⁸⁶ *See generally id.*

¹⁸⁷ *Id.* at 58.

¹⁸⁸ *Id.* at 14.

the matter, while above all observing every prescribed formality.”¹⁸⁹ Ivan, like all of the magistrates and lawyers in his upper-class circle, lived a morally shallow life, and his main obsession was the augmentation of his social status.¹⁹⁰ They never dwelt on whether they should be mindful of their ethical obligations to the vulnerable, over whom they had godlike powers, or how their professional lives were devoid of philosophic purpose.¹⁹¹ Therefore, Tolstoy’s short story could be read as a political commentary that calls attention to the need to reform the legal profession. At the least, Tolstoy’s story could inspire reflection by the reader about various political topics including whether laws should be passed to compel attorneys to provide pro bono assistance to indigents, and whether lawyers should be required to attend educational forums to address how they can use their legal training to benefit society as a whole.

The category of “scientific” speech could also bleed into the category of “political” speech. One noteworthy example is how speech rooted in empirical evidence was employed in 1975 by the American Psychological Association (APA) to refute the assumption that homosexuality is a manifestation of mental illness.¹⁹² The conclusions made by the APA, while empirically based, can be seen as having significant political substance. For the logical upshot of the APA’s speech is that gay persons should not be treated as second-class citizens marked by stigma.¹⁹³ While it is impossible to measure with certainty the degree to which the APA’s clinical pronouncements directly affected political discourse, it is worth reflecting on the difference in tone adopted by Supreme Court Justices over time. In *Bowers v. Hardwick*, the Court upheld in 1986 a Georgia law that

¹⁸⁹ *Id.* at 15.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 14, 23.

¹⁹² Consider the amici curiae brief in *Bowers v. Hardwick* filed by the American Psychological Association and American Public Health Association. Brief of Amici Curiae Am. Psych. Ass’n and Am. Pub. Health Ass’n in Support of Respondents at 8–9, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1986 WL 720445 [hereinafter Amicus Brief]. There, the two associations wrote:

The vast majority of mental health professionals no longer consider homosexuality to be a disorder. In 1973, the American Psychiatric Association removed homosexuality from its list of mental disorders, declaring that “homosexuality *per se* implies no impairment in judgment, stability, reliability or general social or vocational capabilities,” and concluded that “[i]n the reasoned judgment of most American psychiatrists today, homosexuality *per se* does not constitute any form of mental disease.

Id.

¹⁹³ The American Psychological Association made this view explicit in 1975 at its annual meeting:

The American Psychological deplors all public and private discrimination in such areas as employment [and] housing . . . against those who engage in or who have engaged in homosexual activities and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon these individuals greater than that imposed on any other persons.

John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCH. 620, 633 (1975).

forbade “sodomy.”¹⁹⁴ Michael Hardwick, a gay man, had been charged with violating the law, although the prosecutor declined to bring charges.¹⁹⁵ Writing for the Court, Justice White argued that there was no “fundamental right to homosexuals to engage in acts of consensual sodomy.”¹⁹⁶ Chief Justice Burger, concurring, delivered a severe moral condemnation of what he dubbed “[h]omosexual sodomy.”¹⁹⁷ He announced that homosexual sodomy was, according to the British jurist William Blackstone, “the infamous *crime against nature*” as an offense of “‘deeper malignity’ than rape, a heinous act ‘the very mention of which is a disgrace to human nature,’ and ‘a crime not fit to be named.’”¹⁹⁸ To accept that the right to participate in homosexual sodomy is fundamental, Chief Justice Burger warned, “would be to cast aside millennia of moral teaching.”¹⁹⁹

Such language was antithetical, if not hostile, to the APA’s conclusion that homosexuality was not a disease or a mental disorder. The APA’s conclusions were expounded in the amicus brief that the APA had filed in *Bowers*.²⁰⁰ Against the explicitly moral rhetoric of Chief Justice Burger, the APA urged the Court to “consider scientific, demographic, and clinical information concerning the intimate conduct made criminal by the statute.”²⁰¹ The APA added, “Despite some people’s moral or theological objections to oral or anal sex, this conduct is extremely common among married and unmarried heterosexuals and homosexuals.”²⁰² Not only was the prohibited conduct pervasive, the APA reassured that the conduct was psychologically healthy:

Clinical research also indicates that the freedom to engage in such conduct is important to the psychological health of individuals and of their most intimate and profound relationships. Like the decision whether to use contraceptives, the decision with whom and whether one will engage in these types of nonprocreative sexual conduct is among “the most private and sensitive” of decisions, concerning “the most intimate of human activities and relationships.”²⁰³

In conclusion, the APA posited in its brief that “[b]ecause neither homosexuality nor the prohibited sexual conduct is pathological in and of itself, preventing the development of homosexuality and deterring the prohibited conduct cannot be defended as mental health goals, even if the statute had such effects (which

¹⁹⁴ *Bowers*, 478 U.S. at 196; GA. CODE ANN. § 16-6-2(a)–(b) (1984) (“A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . . A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . .”).

¹⁹⁵ *Bowers*, 478 U.S. at 188.

¹⁹⁶ *Id.* at 192.

¹⁹⁷ *Id.* at 196 (Burger, J., concurring).

¹⁹⁸ *Id.* at 197 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215).

¹⁹⁹ *Id.*

²⁰⁰ Amicus Brief, *supra* note 192.

²⁰¹ *Id.* at 2.

²⁰² *Id.*

²⁰³ *Id.* (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977)).

it does not).²⁰⁴ According to the APA, then, homosexuality was not a psychological aberration that required medical treatment.

Reflect on what the APA was doing in relation to Chief Justice Burger's assertions in *Bowers*. The Chief Justice had framed the issue as one that was far removed from science. For him, the issue in *Bowers* was squarely rooted in morality. "Homosexual sodomy" was for him "the infamous crime against nature" and contrary to a "millennia of moral teaching."²⁰⁵ The APA brief, on the other hand, recast the issue as a *scientific* one about mental health. As a formal matter, the brief did not have a political agenda. The brief merely sought to illuminate scientific knowledge that had been procured by experts through the process of investigation and analysis. But the "scientific" speech by the APA could be read, in its fashion, as a form of political speech as well. By presenting itself as a better source of epistemic authority than the traditional moralism of Blackstone invoked by Chief Justice Burger, the APA, in effect, had rendered a political opinion about what constitutes the best evidential basis for the Court's decision.

Bowers, decided in 1986, would be overturned by *Lawrence v. Texas* in 2003.²⁰⁶ In *Lawrence*, the Court struck down a Texas law that forbade two persons of the same gender from engaging in "deviate sexual intercourse."²⁰⁷ Like it did in *Bowers*, the APA filed an amicus brief.²⁰⁸ The amicus brief read, "Decades of research and clinical experience have led all mainstream mental health organizations in this country to the conclusion that homosexuality is a normal form of human sexuality."²⁰⁹ "Research has also found no inherent association," the APA reiterated, "between homosexuality and psychopathology."²¹⁰ The APA directly addressed the claims by Texas: "Because Texas does not attempt to punish consensual, private sexual conduct between adults of different sexes, [Texas's law] must rest on the perception that intimate sexual activity warrants suppression when, but only when, it occurs between persons of the same sex."²¹¹ However, the APA cautioned that "[s]cientific research and the experience of the mental health professions do not support that position."²¹² "To the contrary," continued the APA, "the sexual orientation known as homosexuality . . . is a

²⁰⁴ *Id.* at 3.

²⁰⁵ *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, J., concurring).

²⁰⁶ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁰⁷ TEX. PENAL CODE ANN. § 21.06(a) (2003), *invalidated by Lawrence*, 539 U.S. 558 ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."); *id.* § 21.01(1) ("Deviate sexual intercourse [is] any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object.").

²⁰⁸ Brief for Amici Curiae Am. Psych. Ass'n et al. in Support of Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152338.

²⁰⁹ *Id.* at 1.

²¹⁰ *Id.* at 2.

²¹¹ *Id.* at 4.

²¹² *Id.*

normal variant of human sexual expression.”²¹³ Further, the APA added, “[s]exual orientation is . . . integrally linked to the close bonds that human beings form with others to meet their personal needs for love, attachment, and intimacy.”²¹⁴ “These bonds,” the APA explained, “also encompass nonsexual physical affection between partners, shared goals and values, mutual support, and ongoing commitment.”²¹⁵

The APA offered its statements as scientific conclusions, not as political speech in a conventional sense. But their substance reverberated with Justice Kennedy’s plurality opinion in *Lawrence*. Justice Kennedy in *Lawrence*, like the APA in its amicus brief, affirmed that homosexuality was not a disorder or a disease.²¹⁶ He thus announced, “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”²¹⁷ Suggestively, these words seem to echo those in the APA’s amicus brief that homosexual intimacy is a normal, healthy part of a mutually affectionate relationship. While conclusive evidence is unavailable, the similarity between the words of Justice Kennedy and the APA imply that “scientific” speech can animate the substance of “political” speech.

The APA’s statement about homosexuality as neither a disease nor a disorder was issued in 1973, but today, there also exist prominent examples of scientific speech that can also arguably qualify as political speech or contribute meaningfully to the ideas that inform the same. During the worldwide pandemic that has ravaged the world at the time of this writing, scientific reports have come to assume the character of political speech. An outwardly scientific question about where COVID-19 originated—in a wet market in Wuhan (as President Trump claimed²¹⁸) or by American soldiers visiting China (as President Xi claimed²¹⁹)—is a decidedly political issue. Other aspects of COVID-19 have become a matter of politics, and hence discussions about them can be seen as examples of political speech. The case of Dr. Anthony Fauci is illustrative. He is the Director of the National Institute of Allergy and Infectious Diseases (NAID). Having served in both Republican and Democratic administrations, he “oversees

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 5.

²¹⁶ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

²¹⁷ *Id.* Even if the APA’s speech were “purely” clinical in substance, the speech could very well have prompted deliberation about explicitly political issues such as the constitutionality of gay marriage and whether the ban against gays in the military was justified.

²¹⁸ Mamvi Singh et al., *Trump Claims to Have Evidence Coronavirus Started in Chinese Lab but Offers No Details*, *GUARDIAN* (Apr. 30, 2020, 11:51 PM), <https://www.theguardian.com/us-news/2020/apr/30/donald-trump-coronavirus-chinese-lab-claim> [<https://perma.cc/3BCW-VG33>].

²¹⁹ Gabriel Crossley, *China Government Spokesman Says U.S. Military May Have Brought Virus to China*, *REUTERS* (Mar. 12, 2020, 2:25 AM), <https://www.reuters.com/article/us-health-coronavirus-china-usa/china-government-spokesman-says-u-s-military-may-have-brought-virus-to-china-idUSKBN20Z196> [<https://perma.cc/83ZN-U6VS>].

an extensive research portfolio of basic and applied research to prevent, diagnose, and treat established infectious diseases.”²²⁰ On July 17, 2020, the *New York Times* described Fauci as follows: “‘You can trust respected medical authorities,’ Dr. Fauci said this week in a virtual forum at Georgetown University, almost plaintively at times. ‘I believe I’m one of them, so I think you can trust me.’”²²¹

According to the *Times*, Fauci “checked all the right boxes of a particular kind of Washington icon who could ‘transcend politics.’”²²² The *Times* excerpted a testimonial:

“I have known Tony a long time, and I’ve never heard him identify himself as a Democrat or Republican,” said Dr. Margaret A. Hamburg, a former director of the Food and Drug Administration and a onetime assistant to Dr. Fauci. “He has always taken great pride in that he has continued to run a lab and see patients.”²²³

In this nonpartisan role, Fauci has made recommendations about best practices for health in light of the available scientific evidence.²²⁴ He testified before Congress on May 12, 2020, that states must be cautious about opening restaurants, bars, and the like too quickly.²²⁵ Fauci was adamant that opening schools was dangerous: “I think we better be careful, if we are not cavalier, in thinking that children are completely immune to the deleterious effects.”²²⁶

President Trump dismissed Fauci’s warnings,²²⁷ and thereby illustrated how outwardly scientific speech could be seen as possessing the properties of political speech. The President responded, “I was surprised by his answer.”²²⁸ Fauci, President Trump mocked, “wants to play all sides of the equation.”²²⁹ The President thus insinuated that the doctor was interested in protecting his own reputation, not in providing scientific advice.²³⁰ The President then bragged that the economy next year would be “phenomenal.”²³¹ With this latter comment, President Trump implied that Fauci’s conclusion about science was both scientifically

²²⁰ Anthony S. Fauci, M.D., *NIAID Director*, NAT’L INST. OF ALLERGY AND INFECTIOUS DISEASES, <https://www.niaid.nih.gov/about/director> [https://perma.cc/5ZHP-G92L].

²²¹ Mark Leibovich, *Treacherous Times for Dr. Fauci in the Sacred Cow Business*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2020/07/17/us/fauci-trump.html> [https://perma.cc/YV2L-48F2].

²²² *Id.*

²²³ *Id.*

²²⁴ Sheryl Gay Stolberg, *At Senate Hearing, Government Experts Paint Bleak Picture of the Pandemic*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/us/politics/coronavirus-dr-fauci-robert-redfield.html> [https://perma.cc/55YA-M5V7].

²²⁵ *Id.*

²²⁶ Katie Rogers, *Trump Pointedly Criticizes Fauci for His Testimony to Congress*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/05/13/us/politics/fauci-trump-coronavirus.html> [https://perma.cc/B6XS-YN73].

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

inaccurate and posed a threat to the economy. As the *Times* put it, “Dr. Fauci has increasingly become a target of critics who see him as undermining the president’s efforts to open up the country and restore the economy and as exaggerating the effects of the pandemic.”²³² While lacking Fauci’s scientific training, the President, a former reality-TV actor, spun the scientific data to benefit his bid for reelection. In his characteristically ungrammatical style, the President asserted: “[While COVID-19 could hurt those with preexisting ailments] with the young children, I mean, and students, it is really just take a look at the statistics, it is pretty amazing.”²³³ Just as President Trump had accused Fauci of using speech about science for political ends, here was the President seemingly doing the same thing. In *Miller v. California*, the Supreme Court had maintained that there existed boundaries between “scientific” speech and “political” speech, but the President’s statements, as well as Fauci’s, suggest that these boundaries are tenuous, and indeed, that “scientific” speech and “political” speech can work to define each other’s meaning.

This mutually constitutive quality also attends the relationship between commercial speech and political speech, a proposition to which the Article will turn next.

B. Commercial Speech

The Supreme Court did not even afford First Amendment protection for commercial speech until 1976.²³⁴ Even after the Court decided to protect it, commercial speech was denied protection if it proposed an illegal transaction or was misleading.²³⁵ By contrast, the Court has protected political speech even if it proposed an illegal transaction or was misleading, as long as the speech did not amount to a clear and present danger.²³⁶ Such unequal treatment suggests that there are fundamental differences between the two categories of speech. Upon closer review, however, the purported differences seem questionable.

This argument can be unpacked by starting with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.²³⁷ In *Virginia Pharmacy*, the Supreme Court held for the first time that commercial speech deserved First Amendment protection.²³⁸ Virginia’s State Board of Pharmacy passed a law stating that a pharmacist was guilty of “unprofessional conduct” if he “publishes, advertises or promotes . . . any amount . . . for any drugs which may be

²³² *Id.*

²³³ *Id.*

²³⁴ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (“In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way.”).

²³⁵ *Id.* at 770–71.

²³⁶ *See Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

²³⁷ *Va. State Bd. of Pharmacy*, 425 U.S. 748.

²³⁸ *Id.* at 762.

dispensed only by prescription.”²³⁹ The State Board argued that such a law was necessary to preserve the integrity of the pharmacy profession.²⁴⁰ But an unwelcome effect of the law was to suppress information about the differences in drug prices, which, the Court noted, could be as high as 650% in Virginia, depending on the pharmacy.²⁴¹ The Court struck down Virginia’s law as a violation of the First Amendment.²⁴² To do so, the Court had to break with precedent and declare that commercial speech deserved protection.

The justification employed by the Court stressed that commercial speech was valuable, but in doing so, the Court unwittingly blurred the line between commercial speech and political speech. Writing for the Court, Justice Blackmun argued that commercial speech, like political speech, could relate to matters of public interest.²⁴³ “As to the particular consumer’s interest in the free flow of commercial information,” Justice Blackmun announced, “that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”²⁴⁴ This was true, according to Justice Blackmun, because “[t]hose whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged.”²⁴⁵ He explained at length:

A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.²⁴⁶

Hence, Justice Blackmun emphasized that advertisement regarding drug prices could be crucial for consumers.

There was in his remarks the implication that commercial speech could, in its way, be construed as political speech as well. How this could be so can be illustrated with a hypothetical. Agnes is an eighty-year-old resident of Alabama. She suffers from a chronic medical problem that requires expensive prescription drugs. Without the medicine, her life would be imperiled. Based on online advertisements posted by a pharmacy in Virginia, Agnes learns that she can purchase the same drug at a much lower price if she buys it in Virginia than from any vendor in Alabama. For Agnes, then, the advertisement from Virginia can be interpreted as a form of political speech. This is because the advertisement could be read as an unintended commentary about the failure of Alabama’s

²³⁹ *Id.* at 749–50 (quoting VA. CODE ANN. § 54–524.35 (1974)).

²⁴⁰ *Id.* at 768 (“Price advertising, it is said, will reduce the pharmacist’s status to that of a mere retailer.”).

²⁴¹ *Id.* at 754.

²⁴² *Id.* at 770.

²⁴³ *Id.* at 764 (“Even an individual advertisement, though entirely ‘commercial,’ may be of general public interest.”).

²⁴⁴ *Id.* at 763.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 763–64.

government to regulate prices in a manner that is fair to its residents. The advertisement for less expensive drugs in Virginia can serve as a powerful indictment—probably far more effective than a standard political editorial—for how Alabama’s politicians have not protected its residents from price gouging. Worth emphasizing in this regard is Justice Blackmun’s statement that information relating to drug prices “hits the hardest” those who are “the poor, the sick, and particularly the aged.”²⁴⁷ From the perspectives of such people, advertisement about something as vital as drug prices can also function as tacit editorials about the denial of social justice, the insidiousness of lobbying efforts by rich drug companies, and the potential for corruption by elected officials. Indeed, it seems to border on the absurd that the highest constitutional protection should be extended unblinkingly to a dreadfully written editorial that denounces skyrocketing prices for prescription drugs, but that the same protection should be offered only begrudgingly to “commercial” speech whose lucid details and cogent arguments prove vital to the elderly cash-strapped consumer. In *Virginia Pharmacy*, Justice Blackmun seemed to be alluding to this lamentable irony when he wrote the following sentence: “As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”²⁴⁸

To be sure, Justice Blackmun conceded in *Virginia Pharmacy* that “not all commercial messages contain the same or even a very great public interest element.”²⁴⁹ Nonetheless, he immediately qualified, “[t]here are few to which such an element . . . could not be added.”²⁵⁰ With this latter remark, Justice Blackmun nearly obliterated his own demarcation between commercial speech and political speech. His subsequent statements in *Virginia Pharmacy* further erased the line between the two. Justice Blackmun observed that “[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.”²⁵¹ He continued:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a *matter of public interest* that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.²⁵²

What is being suggested by Justice Blackmun in the passage has profound consequences for blurring the distinction between commercial speech and political speech. According to Justice Blackmun, trying to ensure that consumers make good decisions about how they spend their money—about how they

²⁴⁷ *Id.* at 763.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 764.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 765.

²⁵² *Id.* (emphasis added).

determine the “allocation of our resources”—is “a matter of public interest.”²⁵³ Justice Blackmun thereby implied that speech that proposed a commercial transaction could also be thought of in terms of “public interest,” and hence also in terms of politics.

There are other Supreme Court cases besides *Virginia Pharmacy* that contain examples of “commercial” speech that can also be construed as “political” speech. A relevant illustration is *Bigelow v. Virginia*,²⁵⁴ a case that Justice Blackmun had cited in *Virginia Pharmacy*.²⁵⁵ *Bigelow* paved the way for *Virginia Pharmacy*. The *Bigelow* Court did, in effect, protect commercial speech, but unlike its successor *Virginia Pharmacy*, *Bigelow* sought to protect what was arguably commercial speech by characterizing it as something that was better understood as political speech. In *Bigelow*, a newspaper in Virginia had published an advertisement for an abortion clinic in New York City.²⁵⁶ *Bigelow* was the publisher of the newspaper and was charged with violating a Virginia law that prohibited advertisements that “encourage[d] or prompt[ed] the procuring of abortion.”²⁵⁷ As he would do one year later for the Court in *Virginia Pharmacy*, Justice Blackmun authored the Court’s opinion in *Bigelow*. He first asserted that “[t]he fact that the particular advertisement in appellant’s newspaper had commercial aspects or reflected the advertiser’s commercial interests did not negate all First Amendment guarantees.”²⁵⁸ Justice Blackmun elaborated:

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.²⁵⁹

In the passage, Justice Blackmun characterized the commercial speech regarding abortion services as possessing copious political meaning. He added that the advertisement in *Bigelow* contained substantial political meaning because, only two years before the Court had decided *Bigelow*, the Court had decided in *Roe v. Wade* that a woman was entitled to a fundamental right of abortion.²⁶⁰

The advertisement at issue in *Bigelow* related to abortion at a time when abortion was not widely available in the United States. The advertisement in *Bigelow* alerted readers that abortion clinics were readily available in New York City and thus offered an alternative to the sexually restrictive norms of Virginia. Outside Virginia, women enjoyed greater access in 1975 to exercise their newly

²⁵³ *Id.*

²⁵⁴ *Bigelow v. Virginia*, 421 U.S. 809 (1975).

²⁵⁵ *Va. State Bd. of Pharmacy*, 425 U.S. at 749 n.1.

²⁵⁶ *Bigelow*, 421 U.S. at 812.

²⁵⁷ *Id.* at 812–13 (citing VA. CODE ANN. § 18.1–63 (1960)).

²⁵⁸ *Id.* at 818.

²⁵⁹ *Id.* at 822.

²⁶⁰ *Id.* at 815. Partly on the basis of *Roe*, the Court vacated *Bigelow*’s judgement of conviction and remanded the case. *Id.*

won right of abortion.²⁶¹ The advertisement for abortion at issue in *Bigelow* appeared in the *Virginia Weekly*, a newspaper whose main audience consisted of the students at the University of Virginia.²⁶² The advertisement could thus be interpreted as a political statement intended to educate the students in the then provincial locale of Charlottesville about how, in cosmopolitan centers like New York City in 1975, a woman was welcome to exercise her fundamental right of abortion. Presented in this light, the advertisement relating to abortion could also be seen as a species of political speech.

Perhaps realizing the difficulty of defining “commercial” speech in relation to other categories like political speech, the Supreme Court has taken affirmative steps to define it.²⁶³ The Court’s most sustained attempt to define commercial speech appears in *Bolger v. Youngs Drug Products Corp.* in 1983.²⁶⁴ There, the Court stated that commercial speech was characterized by a combination of three factors. One, the speech “conceded to be advertisements.”²⁶⁵ Two, the speech referred to “a specific product.”²⁶⁶ Three, the speech had “an economic motivation.”²⁶⁷ The problem with this three-part definition is that it does not recognize how “commercial” speech that contained all three properties could nonetheless be construed also as political.

Consider the facts of *Bolger*. At issue in *Bolger* was a law that forbade unsolicited advertisements for contraceptives.²⁶⁸ The *Bolger* Court decided that the speech at hand amounted to commercial speech.²⁶⁹ Yet the speech could just as easily have been characterized as political. The unsolicited advertisement in *Bolger* consisted of two documents.²⁷⁰ One was titled “Condoms and Human Sexuality.”²⁷¹ The document was, according to the Court, “a 12-page pamphlet describing the use, manufacture, desirability, and availability of condoms, and providing detailed descriptions of various Trojan-brand condoms manufactured by Youngs.”²⁷² The pamphlet thus contained information relating to a particular product that Youngs sought to sell. But there was political content too. The pamphlet was conveying information about how to exercise the fundamental right of reproductive freedom and the moral acceptability of doing so. The pamphlet thus touched on something that could be seen as a political issue. That the federal

²⁶¹ See *id.* at 822.

²⁶² *Id.* at 811.

²⁶³ Unfortunately, the Court’s attempts have faltered in the eyes of some scholars. As Robert Post remarked, “The boundaries of the category [of commercial speech] are . . . quite blurred.” Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000).

²⁶⁴ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

²⁶⁵ *Id.* at 66.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 67.

²⁶⁸ *Id.* at 63.

²⁶⁹ *Id.* at 68.

²⁷⁰ *Id.* at 62 n.4.

²⁷¹ *Id.*

²⁷² *Id.*

government tried to suppress such information rendered the commercial speech all the more political in content. For the seemingly nonpolitical discussion of “Condoms and Human Sexuality” now took on a more political cast by being seen as the expression of a defiant desire to subvert the government’s notions about sexual propriety and reproductive freedom.

The second pamphlet in *Bolger* could also be read as a form of political speech. Titled “Plain Talk about Venereal Disease,” the “eight-page pamphlet discuss[ed] at length the problem of venereal disease and the use and advantages of condoms in aiding the prevention of venereal disease.”²⁷³ In this second document, “[t]he only identification of Youngs or its products is at the bottom of the last page of the pamphlet, which states that the pamphlet has been contributed as a public service by Youngs, the distributor of Trojan-brand prophylactics.”²⁷⁴ Even more than the first pamphlet, the second pamphlet explicitly dealt with a public health problem (venereal disease) and how individuals could protect themselves from it by using condoms. Implicit in this message was the implication—an expression of political speech—that the government could not solve the problem on its own.

It is not an exaggeration to suggest that even garden-variety examples of commercial speech that appear to be devoid of political content can reasonably be construed as containing such content. Consider *44 Liquormart v. Rhode Island*.²⁷⁵ In that Supreme Court case from 1996, Rhode Island forbade advertisements that included the price of any alcoholic beverage sold in the state.²⁷⁶ Rhode Island claimed that it was trying to promote temperance, health, and, by indirectly discouraging drunk driving, safety.²⁷⁷ Writing for the Court, Justice Stevens concluded that promoting such ends was a substantial government interest, but he struck down the law as a violation of the First Amendment because its means did not directly advance its stated goal and were more extensive than necessary.²⁷⁸ To justify the Court’s decision, Justice Stevens first reaffirmed the Court’s precedent in *Virginia Pharmacy* that commercial speech was protected.²⁷⁹ He then concluded that the advertisement at issue in *44 Liquormart* was commercial speech.²⁸⁰

The contents in the advertisement could also be viewed as political speech, however. Rhode Island claimed that its advertisement ban was meant to promote temperance, health, and safety.²⁸¹ The advertisement for vodka and rum in *44*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

²⁷⁶ *Id.* at 489–90 (citing R.I. GEN. LAWS § 3-8-8.1 (1987)).

²⁷⁷ *See id.* at 492.

²⁷⁸ *Id.* at 484.

²⁷⁹ *Id.* at 495–96.

²⁸⁰ *See id.* at 503–05.

²⁸¹ In its Brief, Rhode Island cited experts who argued that a reduction in alcohol advertisement “foster[ed] health and safety benefits.” Brief for Respondents at 28, *44 Liquormart*, 517

Liquormart could be read as mocking the very notion of temperance, health, and safety. After all, the advertisement “include[d] the word ‘WOW’ in large letters next to pictures of vodka and rum bottles.”²⁸² Instead of paying lip service to the civic virtues of temperance and the like, the advertisement celebrates, without any remorse, the pleasures of imbibing hard liquor. In doing so, the advertisement could be interpreted as a form of political speech. The point of the advertisement was not to counsel temperance, health, and safety, as the politicians of Rhode Island would wish, but to delight the consumer with a “WOW” opportunity to drink abundant quantities of hard liquor at cheap prices—consequences be damned. The advertisement served as a kind of political opinion that thumbed its nose at the solemn aspirations of the Rhode Island legislature to encourage widespread temperance and its associated benefits in health and safety.

As the foregoing discussion has suggested, the Supreme Court’s purported distinctions between political speech and nonpolitical speech seem porous. The subsequent section takes a different approach. It argues that even if the distinctions are tenable, political speech should not be granted special protection because such protection has been used by speakers to assault civility and dignity as well as to diminish opportunities for obtaining political truth.

III. HOW PRIVILEGING POLITICAL SPEECH UNDERMINES CIVILITY, DIGNITY, AND TRUTH

Another problem with the Court’s embrace of political speech as worthy of the highest protection is that the Court has not convincingly explained why privileging political speech outweighs the harms that such privileging causes. While the harm can come in various guises, the principal harms caused by political speech are against civility, the dignity that civility makes possible, and, perhaps unexpectedly, political truth.

A. *Threat to Civility and Dignity*

To examine how political speech undermines dignity and civility, let us begin with *New York Times v. Sullivan*, the Supreme Court case that set the precedent for extending extraordinary protection for political speech that was nonetheless defamatory.²⁸³ According to the common law of torts, a statement that is defamatory is generally unprotected.²⁸⁴ There is a good reason why. A defamatory statement is one that makes a false representation of fact and, by doing so,

U.S. 484 (No. 94–1140), 1995 WL 500727 (quoting GEORGE A. HACKER & LAURA ANN STUART, *DOUBLE DIP: THE SIMULTANEOUS DECLINE OF ALCOHOL ADVERTISEMENT AND ALCOHOL PROBLEMS IN THE UNITED STATES* (1995)).

²⁸² *44 Liquormart*, 517 U.S. at 492.

²⁸³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–73 (1964).

²⁸⁴ *Id.* at 273.

hurts a person's reputation.²⁸⁵ In *New York Times*, however, the Supreme Court established an exception for political statements.²⁸⁶ *New York Times* has been lauded for enhancing opportunities for people, as a self-governing body, to discover political truth. What the *New York Times* Court failed to do, however, was to explain why the Court's purported search for truth outweighed the need to protect the norms of civility and the right to individual dignity.

This Article has already examined in Part I the *New York Times* Court's emphasis on the search for truth within the context of self-government. The Article will presently address the competing value of civility that was rendered severely vulnerable by the Court's introduction of the actual malice test. Despite its conventional affiliation with politeness, civility is more than good manners.²⁸⁷ Civility is indispensable as the social glue that holds a community together by preempting conflict.²⁸⁸ For "[c]ivility . . . is the sum of the many sacrifices we are called to make for the sake of living together."²⁸⁹ Civility, so conceived, is the means by which we obtain societal peace.²⁹⁰ Note here the etymological intimations of civility's function as a social adhesive; we find derivations of the word "civility" in "civilization" and "civil" society.²⁹¹ The creation and recognition of rules of civility also serve as a means for a community to define its moral identity as a collection of beings to whom a duty of respectful behavior is owed. Offensive speech like defamation is therefore not only a violation of a person's right to civility, but also a violation of the community's right to expect civility from its members.

Of course, the harm produced by offensive speech is usually felt more painfully by the individual victim than by the community. This particular harm against the individual differs from the harm that offensive speech inflicts on the community because the individual, unlike the community, suffers the harm to her dignity.²⁹² For an individual derives her sense of self-worth—her dignity—

²⁸⁵ See RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).

²⁸⁶ See discussion *supra* Section I.B.

²⁸⁷ Writing in seventeenth-century England, the philosopher Thomas Hobbes reflected that absent civility "the life of man [is] poor, nasty, brutish, and short." THOMAS HOBBS, *LEVIATHAN* 76 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651). See also John M. Kang, *The Uses of Insincerity: Thomas Hobbes's Theory of Law and Society*, 15 L. & LITERATURE 371, 378–81 (2003) (arguing that civility is the basis for civil society) [hereinafter Kang, *Insincerity*]; John M. Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POL'Y 261, 293–97 (2009) (making an analogous argument) [hereinafter Kang, *Manliness*].

²⁸⁸ Kang, *Manliness*, *supra* note 287, at 293–94; Kang, *Insincerity*, *supra* note 284, at 378–81.

²⁸⁹ STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* 11 (1998); see also Kang, *Insincerity*, *supra* note 287, at 378–81 (making a similar argument).

²⁹⁰ Kang, *Insincerity*, *supra* note 287, at 378–80.

²⁹¹ For further etymological associations that derive from "civility," see Kang, *Manliness*, *supra* note 287, at 293–94.

²⁹² ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 128–29 (1995); see also DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 196–97 (1986).

in large part from how others treat her, a belief that has found support from sociologists.²⁹³ So too it is an article of faith that has been eagerly adopted by institutions seeking to denigrate the individual's sense of self-worth for the purpose of controlling that individual.²⁹⁴ The sociologist Erving Goffman has found such examples of systematic degradation in "total institutions," institutions dedicated to the complete regulation of the individual, such as prisons, concentration camps, and mental hospitals.²⁹⁵

Given the centrality of civility to the individual's dignity, it is unsurprising that the common law of defamation, which currently finds expression in different state jurisdictions, seeks to protect "the standing of the person in the eyes of others."²⁹⁶ In *Rosenblatt v. Baer*, Justice Stewart, in a concurring opinion, asserted the morality of protecting said standing.²⁹⁷ Adjudicated in 1966, *Rosenblatt* was a defamation case that afforded the Supreme Court an opportunity to revisit the actual malice test fashioned two years before in *New York Times v. Sullivan*.²⁹⁸ The Court in *New York Times* had described the actual malice test as a means to bolster public discourse about political affairs in a democracy. Writing for the Court, Justice Brennan had commended the actual malice test as a means to facilitate a culture dedicated to the principle that political speech should be "uninhibited, robust and wide-open."²⁹⁹ By contrast, Justice Stewart in his *Rosenblatt* concurrence feared that the actual malice test empowered political speech to unjustly assault people's dignity.³⁰⁰ He wrote in his *Rosenblatt* concurrence that "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being."³⁰¹ By stating that dignity is

²⁹³ This thesis has found support from sociologists. See POST, *supra* note 292, at 128–29. The University of Chicago sociologist George Herbert Mead examined how a person derives his sense of individual identity by belonging to some group and by adopting the group's view of himself. GEORGE H. MEAD, MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST 162 (Charles W. Morris ed., 1934) ("What goes to make up the organized self is the organization of the attitudes which are common to the group. A person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct.").

²⁹⁴ See POST, *supra* note 292, at 128.

²⁹⁵ See generally ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961). Goffman observed:

The recruit comes into the [total institution] with a conception of himself made possible by certain stable social arrangements in his home world. Upon entrance, he is immediately stripped of the support provided by these arrangements. In the accurate language of some of the oldest total institutions, he begins a series of abasements, degradations, humiliations, and profanations of self. His self is systematically, if often unintentionally, mortified.

Id. at 14.

²⁹⁶ POST, *supra* note 289, at 128.

²⁹⁷ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

²⁹⁸ *Id.* at 80–83 (majority opinion).

²⁹⁹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 256, 270 (1964).

³⁰⁰ *Rosenblatt*, 383 U.S. at 91–92 (Stewart, J., concurring).

³⁰¹ *Id.* at 92.

something that is possessed by “every human being,”³⁰² Justice Stewart implied that dignity differed from honor. Honor, unlike dignity, was something that was ascribed by others to recognize an individual’s power or status.³⁰³ As observed in seventeenth-century England by the philosopher Thomas Hobbes, “the acknowledgement of power is called Honour.”³⁰⁴ “HONOURABLE are those signs for which one man acknowledgeth power or excess above his concurrent in another,” Hobbes observed.³⁰⁵ It was no wonder that “honor,” instead of dignity, was the preferred term for Hobbes, who inhabited a Britain ruled by a culture of hierarchy and monarchism.³⁰⁶

On the other hand, “dignity” was the idiom of democracy. It was something that each person, irrespective of status, was entitled to. Remember that Justice Stewart had underscored in *Rosenblatt* that dignity was that which belonged to “every human being.”³⁰⁷ Moreover, dignity for Justice Stewart was something more than an indispensable normative concept. For him, the need to protect a person’s dignity was “a concept at the root of any decent system of ordered liberty.”³⁰⁸ Justice Stewart explained that “[t]he protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.”³⁰⁹

It was this commitment to individual dignity that was threatened by defamation. In his concurrence in *Rosenblatt*, Justice Stewart thus admonished that “[w]e use misleading euphemisms when we speak of the *New York Times* rule as involving ‘uninhibited, robust, and wide-open debate,’ or ‘vehement, caustic, and sometimes unpleasantly sharp’ criticism.”³¹⁰ Let us be clear, he cautioned, “What the *New York Times* rule ultimately protects is defamatory falsehood.”³¹¹ The upshot for Justice Stewart was that “[n]o matter how gross the untruth, the *New York Times* rule deprives a defamed public official of any hope for legal redress without proof that the lie was a knowing one, or uttered in reckless disregard of the truth.”³¹² Accordingly, Justice Stewart counseled that the actual malice test “should not be applied except where a State’s law of defamation has been unconstitutionally converted into a law of seditious libel.”³¹³ With these

³⁰² *Id.* (emphasis added).

³⁰³ Kang, *Manliness*, *supra* note 287, at 296–97.

³⁰⁴ THOMAS HOBBS, *THE ELEMENTS OF LAW NATURAL AND POLITIC* 48 (J.C.A. Gaskin ed., Oxford Univ. Press 1994) (1650).

³⁰⁵ *Id.*

³⁰⁶ Kang, *Manliness*, *supra* note 287, at 276.

³⁰⁷ *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring) (emphasis added).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 93. Seditious libel is a crime that provokes dissatisfaction with the government.

words, Justice Stewart in *Rosenblatt* paid due regard to how the harm of defamation could prove devastating to a person's dignity.

Given the crucial role of civility as a means to underwrite dignity, one would expect the Court in *New York Times* to furnish a sustained justification for why the Court was willing to sacrifice civility in order to create the actual malice test. Regrettably, the Court in *New York Times* hardly even addressed the topic of civility. Writing for the Court in *New York Times*, Justice Brennan devoted his energy to an unqualified celebration of political speech, and he essentially ignored the ethical consequences of the actual malice test. Without any ambivalence, he announced: "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."³¹⁴ Justice Brennan then added that "[t]he constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'³¹⁵ Summing up, Justice Brennan penned what would become the most quoted line from his *New York Times* opinion: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."³¹⁶

As explained previously, Justice Brennan's support for the actual malice test was founded on the argument from self-government.³¹⁷ The merits of the argument from self-government have already been addressed in this Article and been found wanting.

Yet even if the argument from self-government possessed merit, Justice Brennan in *New York Times* did not explain why said argument deserved to be accorded greater weight than the counter value of civility. Justice Brennan did not even *try* to weigh the two. There was no mention whatsoever in his opinion of civility, dignity, or their correlates. Put bluntly, Justice Brennan opted to substitute pronouncements for explanations. He asserted that "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited."³¹⁸ Justice Brennan never mentioned that civility and dignity were at stake as countervalues to the right to engage in profoundly hurtful political speech.

In fact, one cannot help but feel that the Court decided to take up *New York Times v. Sullivan* on appeal—out of all the potential cases available to the Court—because the facts of *New York Times* provided a convenient narrative of Good versus Evil. This narrative made it easier for the public to accept the morally thorny consequences of the actual malice test. On one side of the *New York*

³¹⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

³¹⁵ *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

³¹⁶ *Id.* at 270 (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

³¹⁷ *See supra* Sections I.A–I.B.

³¹⁸ *N.Y. Times*, 376 U.S. at 270.

Times narrative were a group of civil rights workers who in 1964 protested racial discrimination by local officials in Montgomery, Alabama.³¹⁹ They paid the *Times* to publish what the Court dubbed an “advertisement,” albeit one that brimmed with political content.³²⁰ Consider how Justice Brennan summarized the advertisement as pregnant with political content:

Entitled “Heed Their Rising Voices,” the advertisement began by stating that “As the whole world knows by now, thousands of Southern Negro students are engaged in widespread nonviolent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.”³²¹

Another section of the advertisement also spoke of political affairs. It alleged that the protestors, “in their efforts to uphold these guarantees,” are “being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom.”³²²

L. B. Sullivan was one of the Commissioners of Montgomery.³²³ In that role, he was responsible for supervising the police.³²⁴ Sullivan alleged that some portions of the advertisement were libelous.³²⁵ Justice Brennan conceded, “It is uncontroverted that some of the statements contained in the [advertisement] were not accurate descriptions of events which occurred in Montgomery.”³²⁶ Among these statements were the following:

Although Negro students staged a demonstration on the State Capital steps, they sang the National Anthem and not “My Country, ’Tis of Thee.” Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day.³²⁷

A few other details were deemed inaccurate by the Court: “Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.”³²⁸

There are two things worth mentioning about these factually erroneous statements.

³¹⁹ *Id.* at 257.

³²⁰ *Id.* at 256.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 257.

³²⁶ *Id.* at 258.

³²⁷ *Id.* at 258–59.

³²⁸ *Id.* at 259.

First, while they might be, to quote Justice Brennan, “uninhibited, robust, and wide-open,”³²⁹ they surely do not qualify, to quote him further, as “vehement, caustic, and . . . unpleasantly sharp.”³³⁰ For by 1964, the violence being perpetuated by Alabama’s officials against King and his supporters was well known.³³¹ Moreover, Sullivan was never mentioned by name in the advertisement. Therefore, while some of the statements in the advertisement were false, the falsity did not seem material or likely to injure Sullivan’s reputation, let alone his dignity.

Second, even if the representations by the protestors were false, the Court observed that Sullivan “made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.”³³² None of the witnesses whom Sullivan called “testified that [they] had actually believed the statements in their supposed reference to respondent.”³³³ Nevertheless, a jury in Montgomery awarded Sullivan damages of \$500,000, the full amount claimed, and the Supreme Court of Alabama affirmed.³³⁴

As the above-mentioned facts suggest, the white community in Montgomery, far from seeing Sullivan as a victim whose dignity was tarnished, almost certainly saw him as an esteemed member in their community of white supremacists.³³⁵ It is quite unlikely, therefore, that Sullivan’s dignity had been impugned. Other factors also bolstered the belief that Sullivan’s dignity remained wholly intact after publication of the advertisement. For one thing, the trial judge in Sullivan’s case was Walter Burgwyn Jones, a rabid white supremacist.³³⁶ Jones was the author of *The Confederate Creed*, which read in part:

With unfaltering trust in the God of my fathers, I believe, as a Confederate, in obedience to Him; that it is my duty to respect the laws and ancient ways of my people, and to stand up for the right of my State to determine what is good for its people in all local affairs.³³⁷

The degree to which Sullivan had the support of white Alabamans was evinced by the fact that the *Times* had trouble finding a local attorney to represent

³²⁹ *Id.* at 270.

³³⁰ *Id.*

³³¹ King was in fact awarded that Nobel Peace Prize in 1964 for his efforts to advance civil rights for black Americans, chiefly in Alabama. See S. Jonathan Bass, *Martin Luther King, Jr.*, ENCYC. ALA., <http://encyclopediaofalabama.org/article/h-1426> [<https://perma.cc/64FS-2YXB>].

³³² *N.Y. Times*, 376 U.S. at 260.

³³³ *Id.*

³³⁴ *Id.* at 256.

³³⁵ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 731–32 (1986).

³³⁶ *Id.* at 731.

³³⁷ *Id.* (quoting Anthony Lewis, *Annals of Law: The Sullivan Case*, NEW YORKER, Nov. 5, 1984, at 54).

it at the trial.³³⁸ The New York counsel for the *Times*, moreover, had to register fearfully under an assumed name when he traveled to Alabama for the trial.³³⁹

Justice Black, who supported the actual malice test, brought to the fore the history of white supremacy that pervaded Montgomery. As a native of Alabama and a Klansman in his youth,³⁴⁰ Justice Black could issue the following words with authority: “Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called ‘outside agitators,’ a term which can be made to fit papers like the *Times*, which is published in New York.”³⁴¹

Justice Black added, “The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages.”³⁴² Were the characters and circumstances of *New York Times* different, public support for the actual malice test could well have been diminished. Fortunately for the Court, the facts of *New York Times* did not require the Court to justify why civility should be sacrificed for the benefit of political speech.

In *Hustler Magazine v. Falwell*, the Court was unable to enjoy the luxury afforded in *New York Times*.³⁴³ Unlike L. B. Sullivan, the plaintiff in *Hustler* had suffered at the hands of political speech an appalling injury to his dignity. The story of *Hustler* involved two men who appeared to be utter opposites:

On-air host of the “Old Time Gospel Hour,” the Reverend Jerry Falwell was a conservative and unusually influential Baptist preacher who publicly condemned pornography. Larry Flynt was the eccentric and foul-mouthed publisher of the scandalously X-rated *Hustler*.

For years, Flynt raged against Falwell and other leaders of what the former derided as “organized religion.” Flynt resented their moral denunciations of pornography and angrily mocked them as blowhard hypocrites. In November 1983 Flynt raised his loathing to new heights by publishing a now infamous parody of Falwell. The parody was meant to spoof the Campari Liqueur ads popular in the 1980s, in which a contrived interviewer asked a celebrity about her “first time,” with the latter phrase playing with the double entendre of the celebrity’s first time sipping Campari and her first time trying sex. *Hustler*’s ad parody depict[ed] Falwell casually narrating his first time having sex with his mother. The cruel ribaldry unleashed by *Hustler* against Falwell can be best conveyed by reproducing the parody in its entirety:

Falwell: My first time was in an outhouse outside Lynchburg, Virginia.

Interviewer: Wasn’t it a little cramped?

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 98–99 (1996).

³⁴¹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 294 (Black, J., concurring).

³⁴² *Id.*

³⁴³ *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988).

Falwell: Not after I kicked the goat out.

Interviewer: I see. You must tell me all about it.

Falwell: I never *really* expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, “What the hell!”

Interviewer: But your mom? Isn’t that a bit odd?

Falwell: I don’t think so. Looks don’t mean that much to me in a woman.

Interviewer: Go on.

Falwell: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that’s called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a \$100 donation.

Interviewer: Campari in the crapper with Mom . . . how interesting. Well, how was it?

Falwell: The Campari was great, but Mom passed out before I could come.

Interviewer: Did you ever try it again?

Falwell: Sure . . . lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

Interviewer: We meant the Campari.

Falwell: Oh, yeah, I always get sloshed before I go out to the pulpit. You don’t think I could lay down all that bullshit *sober*, do you?

Accompanying the parody was an unexpectedly guarded disclaimer written in tiny but readable letters at the bottom: “AD PARODY—NOT TO BE TAKEN SERIOUSLY.” *Hustler’s* table of contents also echoed that the depiction of Falwell was “Fiction” and “Ad & Personality Parody.” These lawyerly addendums were unable to salve the wounded Reverend Falwell, whose staffer had forwarded him a copy of the salacious magazine. “I somehow felt that in all of my life I had never believed that human beings could do something like this,” he rued. “I really felt like weeping.” He felt like doing something more than weeping: Falwell sued Flynt and his magazine for \$45 million.³⁴⁴

Falwell presented three causes of action against Flynt: one for invasion of privacy, the second for libel, and the third for emotional distress.³⁴⁵ Falwell lost on the first two claims.³⁴⁶ On the invasion of privacy claim, Falwell lost because he could not show, in accordance with Virginia law, that Flynt had appropriated Falwell’s name or likeness for “advertising.”³⁴⁷ After all, *Hustler’s* parody was not an advertisement, just a spoof of one.³⁴⁸ Falwell also was unable to persuade the jury that he was a victim of libel because a libel claim in Virginia required the plaintiff to show that the defendant had made an inaccurate factual representation regarding the plaintiff.³⁴⁹ But *Hustler* had never made any representations

³⁴⁴ John M. Kang, *Hustler v. Falwell: Worst Case in the History of the World, Maybe the Universe*, 12 NEV. L.J. 582, 585–86 (2012) (citing RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (1988)).

³⁴⁵ *Falwell v. Flynt*, No. 83-0155, 1985 U.S. Dist. LEXIS 20586, at *1 (W.D. Va. Apr. 19, 1985), *aff’d*, 797 F.2d 1270 (4th Cir. 1986).

³⁴⁶ *Id.* at *1–2.

³⁴⁷ *Id.* at *1.

³⁴⁸ *Id.*; see also SMOLLA, *supra* note 344, at app. I.

³⁴⁹ *Falwell*, 1985 U.S. Dist. LEXIS 20586, at *2.

of fact; it had offered only parody.³⁵⁰ The jury thus denied recovery on the cause of action for libel.³⁵¹ Falwell, however, won \$150,000 on the claim for emotional distress, a verdict upheld by the federal appellate court.³⁵² Flynt appealed the verdict on the claim of emotional distress, and the U.S. Supreme Court eventually decided in his favor.³⁵³

Chief Justice William Rehnquist, writing for the Court, did not deny that the parody was reprehensible, yet insisted that it deserved First Amendment protection.³⁵⁴ For support, he argued that offensive, even abhorrent, speech was entitled to protection under certain circumstances so that the audience would be more likely to discover the political truth.³⁵⁵ “At the heart of the First Amendment,” he declared, “is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”³⁵⁶ Here again was the argument from self-government that was on offer by Justice Brennan in *New York Times*. The protective spirit of the actual malice test was extended to the tort of intentional infliction of emotional distress.³⁵⁷ It was true that Reverend Falwell, unlike L. B. Sullivan, was not a public official, but Falwell surely exercised greater political power on a national level than did Sullivan.³⁵⁸ Therefore, while Chief Justice Rehnquist’s reference to “matters of public interest and concern”³⁵⁹ was ambiguous, the facts of the case clearly indicated that the reason the *Hustler* Court was willing to extend the protectiveness of the actual malice test to Larry Flynt was because the latter’s mockery of Falwell amounted to political speech directed against a powerful political figure. Like Justice Brennan in *New York Times*, Chief Justice Rehnquist in *Hustler* argued that access to a wider array of political opinions and ideas would help the public to arrive at more enlightened conclusions about politics. Chief Justice Rehnquist accordingly announced in *Hustler*: “[T]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth.”³⁶⁰

³⁵⁰ See *id.* at *1–2; see also SMOLLA, *supra* note 344, at app. I.

³⁵¹ *Falwell*, 1985 U.S. Dist. LEXIS 20586, at *2.

³⁵² *Id.*; see also *Falwell v. Flynt*, 797 F.2d 1270, 1273, 1275, 1278 (4th Cir. 1986).

³⁵³ *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988).

³⁵⁴ See *id.* at 50–57.

³⁵⁵ *Id.* at 50–51.

³⁵⁶ *Id.* at 50.

³⁵⁷ See *id.* at 49–50.

³⁵⁸ See Peter Applebome, *Jerry Falwell, Moral Majority Founder, Dies at 73*, N.Y. TIMES (May 16, 2007), <https://www.nytimes.com/2007/05/16/obituaries/16falwell.html> [https://perma.cc/39CC-ZY5N] (describing Falwell as having played an important role in electing conservative politicians into federal positions).

³⁵⁹ *Hustler Mag.*, 485 U.S. at 50.

³⁶⁰ *Id.* at 50–51 (quoting *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 503–04 (1984)). Note how Chief Justice Rehnquist’s justification for the right of speech is consistent with those offered by Sunstein, Meiklejohn, and Justice Brennan.

Unfortunately, Chief Justice Rehnquist, like Justice Brennan in *New York Times*, failed to explain why the search for political truth should take priority over the desire to honor the claims of civility and individual dignity. Like his fellow jurist Brennan, the Chief Justice did not even *mention* civility or dignity as things to be weighed on the other side of the search for political truth, or, as this Article has called it, the argument from self-government. In its nine pithy pages, the Court's opinion in *Hustler* made virtually no mention about the harms presented by Flynt's vicious parody.

Hustler is not the only example of how the Court protects savagely caustic words in the name of political speech. An especially unsettling illustration of the Court's zealous devotion to what it styles political speech is *Snyder v. Phelps*.³⁶¹ Albert Snyder's son was Marine Lance Corporal Matthew Snyder.³⁶² Lance Corporal Snyder was killed in Iraq while serving his country.³⁶³ Fred Phelps was the founder of the Westboro Baptist Church in Topeka, Kansas.³⁶⁴ Phelps's church "believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military."³⁶⁵ Snyder arranged for a Catholic funeral for his son in Maryland.³⁶⁶ Upon learning through newspapers that Snyder intended to hold funeral services for his son in Maryland, Phelps traveled to Maryland to picket the military, the government, and the Catholic Church.³⁶⁷ Phelps and six other Westboro Baptist parishioners stood on "public land adjacent to the public streets near . . . Matthew Snyder's funeral."³⁶⁸ The parishioners carried signs that read in part: "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."³⁶⁹

Snyder sued Phelps for intentional infliction of emotional distress.³⁷⁰ The Court denied Snyder's claim.³⁷¹ Like it did in *Hustler Magazine*, the Court emphasized that the speech at issue, while hurtful, touched on matters of public concern. The Court quoted itself from a previous case: "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'"³⁷² The *Snyder* Court also recited Justice Brennan's words from the *New York Times* case: "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

³⁶¹ *Snyder v. Phelps*, 562 U.S. 443 (2011).

³⁶² *Id.* at 448.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 449–50.

³⁷¹ *Id.* at 460.

³⁷² *Id.* at 451–52 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (Powell, J., concurring)).

open.”³⁷³ Further, the Court underscored that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”³⁷⁴ The *Snyder* Court also asserted that “[t]he arguably ‘inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.’”³⁷⁵

Armed with these prefatory remarks, the Court pronounced that “[t]he ‘content’ of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of ‘purely private concern.’”³⁷⁶ Referring to placards held by the Westboro Baptist Church, the Court sought to clarify that “[w]hile these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.”³⁷⁷ Accordingly, the placards were deemed to be of public concern, and the cause of action for emotional distress by Snyder was denied.³⁷⁸ Such was the opinion of the Court.

It was Justice Alito, writing a lone dissent, who shed light on how the Court’s uncritical devotion to political speech jarringly undermined the civility owed to Snyder. Justice Alito began his dissenting opinion with these words: “Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.”³⁷⁹ Justice Alito reminded the reader that “[p]etitioner Albert Snyder is not a public figure.”³⁸⁰ Rather, he “is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq.”³⁸¹ “Mr. Snyder,” Justice Alito continued, “wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace.”³⁸² Justice Alito elaborated:

But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew’s funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury. The Court now holds that the First Amendment protected respondents’ right to brutalize Mr. Snyder. I cannot agree.³⁸³

³⁷³ *Id.* at 452. (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

³⁷⁴ *Id.* at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (internal quotation marks omitted).

³⁷⁵ *Id.* at 453 (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)).

³⁷⁶ *Id.* at 454 (quoting *Dun & Bradstreet*, 472 U.S. at 759).

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 461.

³⁷⁹ *Id.* at 463 (Alito, J., dissenting).

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

What specifically galled Justice Alito was that Phelps felt no compulsion to defend the injury that he had caused Snyder. Under the tort of intentional infliction of emotional distress, plaintiff must show that defendant's conduct was "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."³⁸⁴ Justice Alito called attention to the fact that "the elements of the IIED tort are difficult to meet, [but Phelps] long ago abandoned any effort to show that those tough standards were not satisfied here."³⁸⁵ Indeed, "[o]n appeal, [Phelps] chose not to contest the sufficiency of the evidence."³⁸⁶ Phelps, Justice Alito reminded, "did not dispute that Mr. Snyder suffered 'wounds that are truly severe and incapable of healing themselves.'"³⁸⁷ Nor "did [Phelps and his parishioners] dispute that their speech was 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"³⁸⁸ Instead, Phelps "maintained that the First Amendment gave [him] a license to engage in such conduct."³⁸⁹ It was an argument that found favor with the Court.³⁹⁰

Political speech was elevated in *Snyder* to take priority over the moral norms of civility. The Court did not ask whether Phelps's political speech could be expressed in a less brutal manner or in a venue where its impact on Snyder would be lessened. If anything, the *Snyder* Court almost seemed as if it were trying to argue that Phelps's speech was not as objectionable as Justice Alito had suggested. In the Court's telling, Phelps and his parishioners were exceedingly peaceful and, in their way, behaved with becoming civility:

Westboro [Baptist Church] alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.³⁹¹

While the Court characterized Phelps's speech as political, Justice Alito reminded the reader of the viciousness of the latter's words, and why they were best interpreted as a tort, not as an expression of potentially valuable ideas. "It does not follow," argued Justice Alito, that speakers "may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate."³⁹² Such harms, moreover, were not inevitable. Justice Alito pointed out

³⁸⁴ *Id.* at 464 (quoting *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977)).

³⁸⁵ *Id.* at 464–65.

³⁸⁶ *Id.* at 465.

³⁸⁷ *Id.* (quoting *Figueiredo-Torres v. Nickel*, 584 A.2d 69, 75 (Md. 1991)).

³⁸⁸ *Id.* (quoting *Harris*, 380 A.2d at 614).

³⁸⁹ *Id.*

³⁹⁰ *Id.* at 461.

³⁹¹ *Id.* at 457 (majority opinion).

³⁹² *Id.* at 464 (Alito, J., dissenting).

that alternatives were available for Phelps to express his political views without devastating Snyder and his family. According to Justice Alito, Phelps “could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country.”³⁹³ Tellingly, the *Snyder* Court never even bothered to acknowledge these alternatives. The Court instead acted as if the very thought that Phelps had to change the venue for his protest was irrelevant as a legal matter because the issue of Snyder’s emotional welfare was also irrelevant. What mattered for the Court was that “political” speech should be empowered to express itself, however hurtful and savage its message.

B. Threat to Truth

The foregoing discussion has illustrated how the Court’s excessive protection for political speech has come at the expense of dignity and civility. Political speech can also paradoxically thwart possibilities for deriving political truth. The proposition might strike the reader as odd. After all, much of the argument in favor of the priority of political speech, as this Article has suggested, hinges on the notion that said priority is crucial for helping people to arrive at better conclusions about how to order their government. Upon closer inspection, however, it becomes evident that the Supreme Court’s privileging of political speech can also impede opportunities to find political truth.

Return to the actual malice test. The test provides extraordinary protection to political speech in order to enrich public discourse. If the speaker’s defamatory comments related to a public official acting within her official capacity, the official would have to prove that the speaker made the statement knowing it was false or with reckless disregard for its falsity. The burden on the speaker was thus formidable; but Justice Brennan in *New York Times* defended that the point of the actual malice test was to further the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³⁹⁴

Exhibiting an uncritical confidence, Justice Brennan did not recognize how the actual malice test is logically barbed. By making officials fair game for fierce verbal abuse, the actual malice test could produce the unintended effect of impoverishing the marketplace of ideas. Consider how a parent who wishes to improve primary schools in her neighborhood might very well be afraid to seek public office as a member of the school board, in part because the actual malice test would render her vulnerable to vicious defamation without the benefit of legal redress. Should that parent hazard to become a public official, the actual malice test can have the effect of discouraging her from making controversial

³⁹³ *Id.* at 466.

³⁹⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

public statements for fear that her statements might provoke an onslaught of vitriolic defamation. Justice Brennan himself acknowledged that the actual malice test protects speakers when they wantonly subject public officials to “vehement, caustic, and sometimes unpleasantly sharp attacks.”³⁹⁵ The actual malice test—a contrivance that has been lauded for promoting “uninhibited, robust, and wide-open”³⁹⁶ debate about politics—can theoretically cause a person to refrain from publicly sharing her political views for fear of fierce retribution by offended members of the public.

In this fashion, the Supreme Court’s special protection for political speech can have the effect of chilling speech, the very antithesis of what the Court sought to do in *New York Times*. Justice White, dissenting in *Gertz v. Robert Welch*, gave voice to this concern.³⁹⁷ He penned this disquieting reflection:

I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media. If anything, this trend may provoke a new and radical imbalance in the communications process. It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems.³⁹⁸

That the majority of the *Gertz* Court did not even acknowledge the reasons for Justice White’s worry is evidence of the myopic worldview that gave rise to the actual malice test.

There is another way, one that is more palpable of late, in which the Supreme Court’s privileging of political speech has impoverished the marketplace of ideas and hindered opportunities to discern political truth. Namely, by indiscriminately treating all political speech as worthy of higher protection than other categories of speech, the Court has failed to supply the jurisprudential tools for how to manage the swell of political misinformation, especially on the internet, from inundating the public square, and thus subverting the search for political truth.³⁹⁹

Political misinformation has existed as long as politics has existed, but the volume of political misinformation has become breathtaking with the advent of the internet. In *Gertz*, Justice White worried that “[t]he case against razing state libel laws is compelling when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few.”⁴⁰⁰ Justice White offered this observation in 1964, prior to the advent of the modern internet. Today, an obstacle to the search for political truth stems less from the fact that mass media is located in “a select few,”⁴⁰¹ but from the opposite scenario: a seemingly infinite proliferation of messages on

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369 (1974) (White, J., dissenting).

³⁹⁸ *Id.* at 399–400.

³⁹⁹ See Wu, *supra* note 14, at 25–31.

⁴⁰⁰ *Gertz*, 418 U.S. at 402 (White, J., dissenting).

⁴⁰¹ *Id.*

social media.⁴⁰² Unlike traditional broadcast media, the internet is available worldwide and does not require government-issued licenses to operate.⁴⁰³ Moreover, much of the content online is published by anonymous authors who can evade accountability for their speech.⁴⁰⁴ This combination of easy anonymity and vast access has fostered a marketplace of ideas that has become inundated with false political speech whose principal aim is to instill confusion, sow paranoia, and promote exhaustion.⁴⁰⁵

The event that marked the contemporary beginnings of this crisis was the so-called Birther Movement. The Birther Movement was organized around the false assertion that Barack Obama was born in Kenya and was therefore ineligible to become President.⁴⁰⁶ While the allegation lacked merit, whoever uttered it would be protected under the actual malice test because the substance of the claim concerned a public official acting within his official capacity. Notwithstanding its falsity, or because of the lurid possibility that it might be true, the birthers' allegation captured the public's attention and President Obama found himself having to respond to it repeatedly.⁴⁰⁷ Hoping to quell the controversy, he provided a copy of his longform birth certificate from Hawaii.⁴⁰⁸ President Obama attended the disclosure with a member of his Administration responding: "At a time of great consequence for this country—when we should be debating how we win

⁴⁰² See Wu, *supra* note 14, at 31. See generally JAMES GLEICK, *THE INFORMATION: A HISTORY, A THEORY, A FLOOD* (2011).

⁴⁰³ As Emily Bazelon has observed: "The founding ethos of the internet was to treat sources of information equally. Cut loose from traditional gatekeepers—the publishing industry and the government—the web would provide the world's first neutral delivery of content." Bazelon, *supra* note 24.

⁴⁰⁴ See Lee Rainie et al., *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RSCH. CTR. (Mar. 29, 2017), <https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/> [<https://perma.cc/5GPH-RBNW>]; see also Wu, *supra* note 14, at 25–28.

⁴⁰⁵ See Wu, *supra* note 14, at 25–31; see also Adrian Chen, *The Real Paranoia-Inducing Purpose of Russian Hacks*, NEW YORKER (July 27, 2016) <https://www.newyorker.com/news/new-s-desk/the-real-paranoia-inducing-purpose-of-russian-hacks> [<https://perma.cc/N3QK-J42T>]; Amandeep Dhir et al., *Online Social Media Fatigue and Psychological Wellbeing—a Study of Compulsive Use, Fear of Missing Out, Fatigue, Anxiety and Depression*, 40 INT'L J. INFO. MGMT. 141 (2018); Mark Satta, *3 Reasons for Information Exhaustion—and What to Do About It*, BIG THINK (Nov. 26, 2020), <https://bigthink.com/mind-brain/information-exhaustion/> [<https://perma.cc/J5WS-5YC9>].

⁴⁰⁶ Adam Serwer, *Birtherism of a Nation*, ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978/> [<https://perma.cc/CZ4N-K6DB>].

⁴⁰⁷ The MIT Media Lab has found that false stories spread much faster than true ones. Dizikes, *supra* note 15.

⁴⁰⁸ Michael D. Shear, *With Document, Obama Seeks to End "Birther" Issue*, N.Y. TIMES (Apr. 27, 2011), <https://www.nytimes.com/2011/04/28/us/politics/28obama.html> [<https://perma.cc/J25FZ-XQTW>].

the future, reduce our deficit, deal with high gas prices, and bring stability to the Middle East, Washington, DC, was once again distracted by a fake issue.”⁴⁰⁹

One year after this statement was published online, Donald Trump, prior to his presidential ascension, tweeted in 2012 that “[a]n ‘extremely credible source’ has called my office and told me that @BarackObama’s birth certificate is a fraud.”⁴¹⁰ The then reality TV actor never disclosed the identity of his “credible source,” casting doubt about the existence of the source. Undaunted, in 2014, Trump again challenged the authenticity of President Obama’s birth certificate, but this time Trump called upon others to commit a criminal offense to uncover the truth: “Attention all hackers: You are hacking everything else so please hack Obama’s college records (destroyed?) and check ‘place of birth.’”⁴¹¹ Again, no reliable evidence of foreign birth was procured. Nevertheless, the political speech at the heart of the Birther Movement found purchase in the general public. In 2016, the *New York Times* reported that fifty-six percent of Republican voters refused to accept that President Obama had been born in the United States.⁴¹² That this survey was conducted after President Obama had served nearly eight years in the White House lends credence to the thesis that inaccurate political speech, even after credible evidence has been offered to refute it, can become entrenched as inviolable truth in the public’s mind. The jarring result of the survey should therefore prompt a reconsideration of the normative desirability of bestowing the highest protection to political speech.

How heightened protection for political speech can lead people to embrace outlandish political ideas is on display in the QAnon Movement as well. A core tenet endorsed by QAnon is that President Obama, former Secretary of State Hillary Clinton, and various Hollywood elites like Tom Hanks are part of a cabal of cannibal child molesters who have used the “deep state” to gratify their lust.⁴¹³ Because the substance of this statement is about public officials and public

⁴⁰⁹ Dan Pfeiffer, *President Obama’s Long Form Birth Certificate*, WHITE HOUSE BLOG (Apr. 27, 2011, 8:57 AM), <https://obamawhitehouse.archives.gov/blog/2011/04/27/president-obama-as-long-form-birth-certificate> [https://perma.cc/8GE4-QBNZ].

⁴¹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 6, 2012, 2:33 PM), <https://twitter.com/realDonaldTrump/status/232572505238433794> [https://perma.cc/Y8MX-PDB2].

⁴¹¹ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 6, 2014, 3:06 AM), <https://twitter.com/realDonaldTrump/status/508194635270062080> [https://perma.cc/7NWP-ZALJ].

⁴¹² Kyle Dropp & Brendan Nyhan, *It Lives. Birtherism Is Diminished but Far from Dead*, N.Y. TIMES (Sept. 23, 2016), <https://www.nytimes.com/2016/09/24/upshot/it-lives-birtherism-is-diminished-but-far-from-dead.html> [https://perma.cc/7VCF-GUHN].

⁴¹³ See Ciara O’Rourke, *Old Photos of Barack Obama Misused to Fuel Baseless Child Sex-Trafficking Conspiracy*, POLITIFACT (Aug. 21, 2020), <https://www.politifact.com/factchecks/2020/aug/21/viral-image/old-photos-barack-obama-misused-fuel-baseless-child/> [https://perma.cc/EE4X-7VSG]; Laurence Arnold, *QAnon, the Conspiracy Theory Creeping into U.S. Politics*, WASH. POST (Aug. 24, 2020), https://www.washingtonpost.com/business/qanon-the-conspiracy-theory-creeping-into-us-politics/2020/08/21/1a1d4940-e3dd-11ea-82d8-5e55d47e90ca_story.html [https://perma.cc/D4SC-H4Z4]; Katie Rogers & Kevin Roose, *Trump Says QAnon Followers Are People Who “Love Our Country,”* N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/us/politics/trump-qanon-conspiracy-theories.html> [https://perma.cc/7A33-B35F].

figures and a matter of public concern, the QAnon Movement, as with the Birther Movement, can rest assured knowing that the actual malice test will protect its outrageous claims. Moreover, as *Hustler Magazine* underscored, none of the prominent people who were victims of QAnon's speech will succeed in a lawsuit for emotional distress because the logic of the actual malice test has been extended to the tort of emotional distress as well. On the other hand, President Trump need not feel aggrieved by QAnon because in the latter's narrative he is cast in the most positive of lights as an unsung hero who is secretly toiling to bring the left-wing pedophiles to justice.⁴¹⁴ Conspiracy theorists like the flamboyant right-wing radio host Alex Jones have insisted with ferocious conviction that the narrative is true.⁴¹⁵ Dismayingly, President Trump, far from denouncing QAnon's morbid fantasy, provided indirect approval in tweets and public remarks.⁴¹⁶

While the President's indulgence of QAnon's misinformation is appalling in its own right, the number of Americans who have embraced QAnon as a force for good in society is equally disturbing.⁴¹⁷ QAnon's conspiracy theory culminated in what has become known as "PizzaGate."⁴¹⁸ A pivotal figure in PizzaGate was Edgar M. Welch, a twenty-eight-year-old resident of North Carolina.⁴¹⁹ He armed himself with a military-style rifle and a handgun and drove to a

⁴¹⁴ Jane Coaston, *QAnon, the Scarily Popular Pro-Trump Conspiracy Theory, Explained*, VOX (Aug. 21, 2020, 1:59 PM), <https://www.vox.com/policy-and-politics/2018/8/1/17253444/qanon-trump-conspiracy-theory-4chan-explainer> [https://perma.cc/VR5L-3JE9].

⁴¹⁵ Eli Rosenberg, *Alex Jones Apologies for Promoting "Pizzagate" Hoax*, N.Y. TIMES (Mar. 25, 2017), <https://www.nytimes.com/2017/03/25/business/alex-jones-pizzagate-apology-com-et-ping-pong.html> [https://perma.cc/A9PA-KEMN].

⁴¹⁶ See Arnold, *supra* note 413; see also Rogers & Roose, *supra* note 413 ("For years, Mr. Trump and his campaign have flirted with the QAnon movement."). According to the *New York Times*, President Trump

has done little to discourage QAnon's followers. He has described QAnon adherents—several of whom have been charged with murder, domestic terrorism or planned kidnapping—as "people that love our country." His children have posted social media messages related to the conspiracy theory, and aides have made barely disguised appeals to its followers. The most recent came last week when Stephen Miller, a top Trump aide, claimed without evidence that Mr. Biden would "incentivize" child trafficking if elected.

Matthew Rosenberg, *A QAnon Supporter Is Headed to Congress*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/2020/11/03/us/politics/qanon-candidates-marjorie-taylor-greene.html> [https://perma.cc/2NSW-QHUS].

⁴¹⁷ The *New York Times* described PizzaGate's presence on the Internet as follows:

The conspiracy theory took the Internet by storm. YouTube clips pushed the false story, racking up hundreds of thousands of views. Tens of thousands of individuals subscribed to message boards, feeding into theories with fake news reports and crowd-driven detective work. The police refuted the claims of an online pedophile ring running out of Comet Ping Pong, but the theories continued.

Gregor Aisch et al., *Dissecting the #PizzaGate Conspiracy Theories*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/interactive/2016/12/10/business/media/pizzagate.html> [https://perma.cc/2LJ7-26NT].

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

pizzeria called Comet Ping Pong in Washington, D.C.⁴²⁰ Welch's purpose in going to Comet was to liberate children whom he believed, based on QAnon chat boards, were being held captive in the basement of the pizzeria.⁴²¹ Welch demanded to see the children and fired his rifle inside the pizzeria.⁴²² No basement existed; no children were held captive.⁴²³ Police arrested Welch shortly after he discharged his weapon.⁴²⁴ This frightening event occurred on December 4, 2016.⁴²⁵ Alarming, four years after the bizarre details of Welch's arrest came to public light, the Pew Research Center concluded that forty-one percent of Republicans and those leaning Republican nonetheless believed that QAnon is "somewhat good" or "very good" for the United States.⁴²⁶ Some of these faithful have acted on their political views by electing in 2020 at least a dozen Republican congressional candidates who have expressed a degree of support for QAnon.⁴²⁷ The example of QAnon illustrates how political speech, a category of expression that has been exalted for its ability to enlighten the public, has impoverished, if not perverted, public discourse in ways that may be irreparable for years.⁴²⁸

While social media has played a powerful role in spreading political misinformation, President Trump himself has inaugurated a frenzy of political misinformation. There is no more alarming example of how political speech can diminish the possibilities for finding truth than the unproven claims by President Trump and his lawyers that his loss to President Joe Biden was owing to fraud.⁴²⁹

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ Amanda Robb, *Anatomy of a Fake News Scandal*, ROLLING STONE (Nov. 16, 2017, 3:07 PM), <https://www.rollingstone.com/feature/anatomy-of-a-fake-news-scandal-125877/> [<https://perma.cc/BB4D-7ZE6>].

⁴²⁵ *Id.*

⁴²⁶ *5 Facts About the QAnon Conspiracy Theories*, PEW RSCH. CTR. (Nov. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/11/16/5-facts-about-the-qanon-conspiracy-theories/> [<https://perma.cc/AM9Q-VTTQ>]; see also Andrew Romano & Caitlin Dickson, *New Yahoo News/YouGov Poll: Half of Trump Supporters Believe QAnon's Imaginary Claims*, YAHOO NEWS (Oct. 20, 2020), <https://www.yahoo.com/lifestyle/new-yahoo-news-you-gov-poll-half-of-trump-supporters-believe-q-anons-imaginary-claims-124025042.html> [<https://perma.cc/MV2L-56FN>] ("A full 50 percent of President Trump's supporters now believe the bizarre, made-up claims about an international ring of child sex traffickers at the core of the extremist conspiracy theory known as QAnon, according to a new Yahoo News/YouGov poll—a disturbing sign of how susceptible partisans have become to bogus stories in an age of rampant polarization and unbridled social media.").

⁴²⁷ See Rosenberg, *supra* note 416.

⁴²⁸ Dismayingly, the PizzaGate story has not diminished in popularity, four years later. See Cecilia Kang & Sheera Frenkel, "PizzaGate" Conspiracy Theory Thrives Anew in the TikTok Era, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/06/27/technology/pizzagate-justin-bieber-qanon-tiktok.html> [<https://perma.cc/2N2R-6QAP>].

⁴²⁹ Hope Yen et al., *Fact-Checking Trump's Distortions and Outright Lies About the 2020 Election and COVID-19 Vaccine*, CHI. TRIB. (Nov. 14, 2020, 2:59 PM), <https://www.chicagotribune.com/election-2020/ct-fact-check-trump-election-20201114-ty3d4ki3czegdfp6nkunjclgoq-story.html> [<https://perma.cc/N62T-S3LA>].

Angrily, President Trump tweeted in all caps on November 7, 2020, “I WON THIS ELECTION, BY A LOT!”⁴³⁰ On the same day, he tweeted, again in all caps: “BAD THINGS HAPPENED WHICH OUR OBSERVERS WERE NOT ALLOWED TO SEE. NEVER HAPPENED BEFORE. MILLIONS OF MAIL-IN BALLOTS WERE SENT TO PEOPLE WHO NEVER ASKED FOR THEM!”⁴³¹ Twitter flagged this tweet as “disputed.”⁴³² President Trump has made other harrowing allegations. He tweeted on December 26, 2020: “A young military man working in Afghanistan told me that elections in Afghanistan are far more secure and much better run than the USA’s 2020 Election. Ours, with its millions and millions of corrupt Mail-In Ballots, was the election of a third world country. Fake President!”⁴³³ So far, President Trump has been unable to prove in court any of his provocative claims,⁴³⁴ a result that has failed to quell the paranoid impulses of many of his followers who suspect that every loss for President Trump is the handiwork of a malicious deep state.⁴³⁵

The culmination of President Trump’s political misinformation occurred on January 6, 2021, the day that Congress was scheduled to certify the ballots of the presidential election. During the normally routine, if staid, affair, a mass of President Trump’s supporters charged the Capitol Building, smashed open doors, and vandalized and stole federal property.⁴³⁶ Five people died as a result, including a police officer who was trying to block the rioters.⁴³⁷ The event was shocking to

⁴³⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 7, 2020, 7:36 AM), <https://twitter.com/realdonaldtrump/status/1325099845045071873> [<https://perma.cc/89XC-ZNKY>].

⁴³¹ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 7, 2020, 1:53 PM), <https://twitter.com/realdonaldtrump/status/1325194709443080192> [<https://perma.cc/CU8M-D33K>].

⁴³² *Id.*

⁴³³ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 26, 2020, 6:00 AM), <https://twitter.com/realdonaldtrump/status/1342832582606598144> [<https://perma.cc/2ACJ-WEVQ>].

⁴³⁴ Jim Rutenberg et al., *Trump’s Fraud Claims Died in Court, but the Myth of Stolen Elections Lives on*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> [<https://perma.cc/3S8L-CXQW>].

⁴³⁵ *Id.*; see also Gromer Jeffers, Jr., *Donald Trump’s Dallas-Area Supporters Won’t Accept His Loss, Say Populist Movement Continues*, DALL. MORNING NEWS (Dec. 23, 2020, 5:30 AM), <https://www.dallasnews.com/news/politics/2020/12/23/donald-trumps-dallas-area-supporters-wont-accept-his-loss-say-populist-movement-continues/> [<https://perma.cc/Z58C-AE BP>]. Stunningly, Republican leaders, while urging “unity,” refuse to acknowledge that President Biden won the election fairly, thus creating the impression that the election was the result of manipulation by the deep state. See Amy B. Wang, *Republicans Call for Unity but Won’t Acknowledge Biden Won Fairly*, WASH. POST (Jan. 17, 2021, 6:00 PM), <https://www.washingtonpost.com/politics/2021/01/17/republicans-call-unity-wont-acknowledge-biden-won-fairly/> [<https://perma.cc/C83P-28LZ>].

⁴³⁶ Spencer S. Hsu, *Jan. 6 Riot Caused \$1.5 Million in Damage to Capitol—and U.S. Prosecutors Want Defendants to Pay*, WASH. POST (June 3, 2021, 3:19 PM), https://www.washingtonpost.com/local/legal-issues/capitol-riot-defendants-pay-damages-restitution/2021/06/03/74691812-c3ec-11eb-93f5-ee9558eef4b_story.html [<https://perma.cc/6DWA-WJ45>].

⁴³⁷ Kenya Evelyn, *Capitol Attack: The Five People Who Died*, GUARDIAN (Jan. 8, 2021, 2:30 PM), <https://www.theguardian.com/us-news/2021/jan/08/capitol-attack-police-officer-five-deaths> [<https://perma.cc/7QMJ-8S2S>].

witness, but, in hindsight, it seemed an almost inevitable denouement of a vigorous campaign to spread political misinformation. After all, “[f]or weeks, President Trump and his supporters had been proclaiming Jan. 6, 2021, as a day of reckoning.”⁴³⁸ As reported by the *Times*, President Trump had called January 6 the day “to gather in Washington to ‘save America’ and ‘stop the steal’ of the election he had decisively lost, but which he still maintained—often through a toxic brew of conspiracy theories—that he had won by a landslide.”⁴³⁹ On the appointed day, President Trump “rallied thousands of his supporters with an incendiary speech. Then a large mob of those supporters, many waving Trump flags and wearing Trump regalia, violently stormed the Capitol to take over the halls of government and send elected officials into hiding, fearing for their safety.”⁴⁴⁰ In spite of the fact that they were founded on false assumptions, Trump’s summons to “Stop the Steal” had galvanized a Stop the Steal group on Facebook, “realizing at one point 100 new members every 10 seconds. The group swelled to 320,000 followers before Facebook shut it down.”⁴⁴¹ In the words of Representative Liz Cheney, Republican from Wyoming, “There’s no question the [P]resident formed the mob. . . . The [P]resident incited the mob. The [P]resident addressed the mob. He lit the flame.”⁴⁴² Here, then, was frightening affirmation of the power of political speech to spread misinformation and to have individuals act with maniacal conviction upon that misinformation. Gripped with concern that President Trump within his final two weeks in office might use social media to incite further civil unrest, Twitter decided to permanently suspend his account.⁴⁴³ Earlier, Facebook had done the same.⁴⁴⁴

While these social media companies had silenced President Trump, the Supreme Court would have regarded his statements as fully protected because they were prominent examples of political speech. His accusations, it bears emphasizing, were not only instances of political speech but political speech voiced by the highest-ranking public official in the nation, and thus entitled to the strongest of protection. The degree to which President Trump’s statements would have been protected are worthy of reflection. President Trump’s accusations about fraud bristled with inflammatory rhetoric and were issued by someone who enjoyed the political trappings of a monarch. Therefore, it is reasonable to infer that

⁴³⁸ Dan Barry & Sheera Frenkel, “*Be There. Will Be Wild!*”: Trump All but Circled the Date, N.Y. TIMES (July 27, 2021), <https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html> [<https://perma.cc/KAD9-PC7Z>].

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² Maggie Haberman, *Trump Told Crowd “You Will Never Take Back Our Country with Weakness,”* N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html> [<https://perma.cc/M6UE-9L9Y>].

⁴⁴³ *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html [<https://perma.cc/W3MB-2GKK>].

⁴⁴⁴ Mark Zuckerberg, FACEBOOK (Jan. 7, 2021), <https://www.facebook.com/zuck/posts/10112681480907401> [<https://perma.cc/Z64G-PTP7>].

they had caused significant damage to the public's faith in the integrity of the electoral process, and, by extension, constitutional democracy itself. But because President Trump's assertions were political speech, they would not have been denied constitutional protection unless they amounted to a clear and present danger, an unrealistic possibility.⁴⁴⁵ To qualify as a clear and present danger, President Trump's allegations of voter fraud would have to have been construed as advocacy of imminent unlawful conduct, and such conduct would have to have been likely to occur.⁴⁴⁶ Were President Trump's tweets commercial speech—say, advertisements for his Trump Hotels—they would have received lesser protection than political speech such that the advertisements would have been denied protection simply for being false.⁴⁴⁷

Even if wholly without merit, President Trump's charges about voter fraud would have been entitled to the highest protection. Partly as a consequence of such protection, many Americans now agree with him that constitutional democracy had faltered during the presidential election. According to a Quinnipiac poll, 77% of Republicans believe there was “widespread voter fraud during the November [presidential] election.”⁴⁴⁸ A Monmouth University poll similarly determined that 77% of Trump supporters feel that Biden's victory was attributable to “fraud.”⁴⁴⁹ An *Economist/YouGov* poll recorded that a stunning 88% of Trump voters believe that Biden's victory was “not legitimate.”⁴⁵⁰ Finally, a poll conducted by the universities at Northeastern, Harvard, Rutgers, and Northwestern concluded that 33% of all voters believe that Trump in fact won the election or are not sure who won legitimately.⁴⁵¹

⁴⁴⁵ See Eugene Volokh, *Incitement and Ordinary Speakers; Duty and Political Leaders*, VOLOKH CONSPIRACY (Jan. 7, 2021, 11:09 AM), <https://reason.com/volokh/2021/01/07/incitement-ordinary-speakers-duty-and-political-leaders/> [<https://perma.cc/SD85-ZD5X>].

⁴⁴⁶ *Id.*

⁴⁴⁷ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way.”).

⁴⁴⁸ Christopher Keating, *Quinnipiac Poll: 77% of Republicans Believe There Was Widespread Fraud in the Presidential Election; 60% Overall Consider Joe Biden's Victory Legitimate*, HARTFORD COURANT (Dec. 10, 2020), <https://www.courant.com/politics/hc-pol-q-poll-republicans-believe-fraud-20201210-pcie3uqqvrvhyvnt7geohhsyep-story.html> [<https://perma.cc/9KQ4-8HZ9>].

⁴⁴⁹ *More Americans Happy About Trump Loss Than Biden Win*, MONMOUTH UNIV. POLLING INST. (Nov. 18, 2020), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_111820/ [<https://perma.cc/KJ5M-KF5Y>].

⁴⁵⁰ Kathy Frankovic, *Trump Voters Still See Biden's Victory as Illegitimate*, YOUGOV/AMERICA, (Nov. 19, 2020, 2:10 PM), <https://today.yougov.com/topics/politics/articles-reports/2020/11/19/trump-voters-biden-poll> [<https://perma.cc/7HQP-C3L9>].

⁴⁵¹ KATHERINE OGNANOVA ET AL., THE COVID STATES PROJECT: A 50-STATE COVID-19 SURVEY REPORT #29: ELECTION FAIRNESS AND TRUST IN INSTITUTIONS (2020), <https://news.northeastern.edu/wp-content/uploads/2020/12/COVID19-CONSORTIUM-REPORT-29-ELECTION-DEC-2020.pdf> [<https://perma.cc/7QWC-CDH9>].

CONCLUSION

The assumption that so-called political speech deserves heightened protection has been a mainstay of the Supreme Court's jurisprudence. This Article has argued that such protection is unjustified. Despite efforts by scholars and jurists, there is little evidence to suggest that the Constitution's framers believed that political speech was entitled to the strongest protection. Nor is there a viable philosophical argument from self-government that can be enlisted by political speech. Even if political speech were entitled to special protection, the concept of "political" speech is too difficult to define. The Supreme Court, moreover, has provided little guidance for what qualifies as political speech. In addition, this Article has shown that the Court's practice of privileging political speech has frequently come at the cost of undermining civility and the dignity of individuals.

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