AGAINST HYPERINDIVIDUALISM: ON THE COMMUNITY'S RIGHT TO REGULATE SPEECH

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INTRODUCTION

The chief justification for an individual's right of speech has generally rested on the conviction that the right is essential for helping the public to arrive at the truth.[1] According to this justification (the

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1. *See* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) ("The most influential argument supporting the constitutional commitment to freedom of speech is the contention that speech is valuable because it leads to the discovery of truth."). The First Amendment scholar Frederick Schauer has also commented: "Throughout the ages many diverse arguments have been employed to attempt to justify a principle of freedom of speech. Of all these, the predominant and most persevering has been the argument that free speech is particularly valuable because it leads to the discovery of truth." FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15 (1982). Professor C. Edwin Baker also writes: "Marketplace notions are not the only strains to be heard in the chorus of Court pronouncements on the [F]irst [A]mendment . . . . Nevertheless, the marketplace theory dominates; and its rejection would have major implications for [F]irst [A]mendment interpretation." C. Edwin Baker, *Scope of the First Amendment: Freedom of Speech*, 25 UCLA L. REV. 964, 973–74 (1978). Furthermore, there are consonant iterations from jurists. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (urging a judicial attitude toward political speech that has faith in "the power of reason as applied through public discussion"), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (advocating that competing political perspectives "should be given their chance and have

justification from truth, one may call it), protection of the right of speech is thought to promote a diversity of ideas and viewpoints.[2] Doubts may exist about whether the justification from truth achieves its promised ends, but the substance of the justification logically comports with the enterprise of constitutional democracy.[3] This is because the Constitution was founded on the thesis that the people, and neither their leaders nor a privileged minority, are sovereign.[4] In order to intelligently exercise their right of sovereignty, the people would likely benefit from having access to a va-

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their way"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (defending political speech on the view that "the best test of truth is the power of the thought to get itself accepted in the competition of the market").

2. The classic formulation of this view is from the philosopher John Stuart Mill. *See* JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 53–54 (Stefan Collini ed., Cambridge Univ. Press 1995) (1859) (arguing for the benefits of a diversity of viewpoints in the search for truth). Mill's influence in this regard is evident from the number of times that the Supreme Court has cited him. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995); Holder v. Hall, 512 U.S. 874, 900 (1994); Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 189 (1973) (Brennan J., dissenting); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272, 279 (1964); Poe v. Ullman, 367 U.S. 497, 514–15 (1961) (Douglas, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 151 (1959) (Black, J., dissenting); Jordan v. De George, 341 U.S. 223, 241 (1951); *see also* LEE C. BOLLINGER, THE TOLERANT SOCIETY 45 (1986); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785–86 (2d ed. 1988).

3. There is no greater authority on this point than Alexander Meiklejohn. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 6, 7, 16–17, 22–34, 66 (2008) (orig. 1948) (hereinafter MEIKLEJOHN, FREE SPEECH); *see also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408–11 (1986) (arguing that the principal purpose of the right of speech is to enrich public discourse, not to function as an exercise in individual autonomy); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1045 n.1 (arguing that an amendment abolishing the right of speech would be unconstitutional because said abolishment would dramatically limit political criticism).

4. *See* John M. Kang, *In Praise of Hostility: Antiauthoritarianism as Free Speech Principle*, 35 HARV. J.L. & PUB. POL'Y, 351, 388–91 (2012). For a grand discussion of popular sovereignty in the Constitution, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5–19 (2005). *See also infra* Part III (discussing how evidence from textualism, originalism, and case precedent support a communitarian approach to the Constitution).

riety of ideas and viewpoints, or so the justification from truth presupposes.[5] Seen in this light, the justification from truth was rooted in the right of the community to obtain useful information for its collective benefit, not in the unfettered right of the individual to say whatever he wanted.[6]

Starting in the early 1970s, however, the justification from truth was frequently put aside by the Supreme Court, or, if invoked, was done in a manner that did not reflect the substance of the Constitution. What had largely replaced the justification from truth in the Court's opinions was an ideology that prioritized the individual speaker over the community.[7] This ideology—what this Article calls hyperindividualism—was radical and unprecedented in the Court's First Amendment jurisprudence.[8] Hyperindividualism impelled the Court to oppose efforts by the community to regulate dangerous or extremely hurtful speakers, even if the community's efforts were modest.[9]

A curious aspect about the hyperindividualism that has animated a substantial part of the Court's approach to the right of speech is that such hyperindividualism does not trace its juridical origins to arguments about why the right of speech should be protected. Instead, the hyperindividualism under consideration owes its origins to the Court's opinion in *Lochner v. New York*, a case that concerns

5. *See* Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

6. *See id.*; *see also* MEIKLEJOHN, FREE SPEECH, *supra* note 3, at 6, 7, 16–17, 22–34, 66; Fiss, *supra* note 3, 1408–11; ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 7, 187, 269–276, 297–302 (1995).

7. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (protecting the right of a speaker to parade profanity in a courthouse); Gooding v. Wilson, 405 U.S. 518 (1972) (protecting the right of a speaker to hurl racist threats at police officers who posed no danger to him); Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (protecting the right of a teacher to publicly use the F-word repeatedly in front of children in a school auditorium); Buckley v. Valeo, 424 U.S. 1 (1976) (protecting the expenditure of money for political campaigns as pure speech under the First Amendment); *see also infra* Part II.

8. *See infra* Part II.

9. *Id.*

the right of contract, not the right of speech. *Lochner* is now condemned as one of the worst decisions in the Court's history.[10] The conventional explanation for this conclusion is that *Lochner* had armed judges with the precedential mandate to indulge in judicial activism, which has been colloquially derided as legislation from the bench.[11] This Article opts for a different explanation. The problem with *Lochner*, this Article suggests, is that it established the jurisprudential basis for hyperindividualism and its corresponding antipathy for the rights of the community.[12] To be sure, there is at least one basic difference between the right of contract, which does not find explicit mention in the Constitution, and the right of speech, which does. This Article will argue, however, that a right that is explicitly mentioned in the Constitution can also succumb to hyperindividualism. An enumerated right can also be interpreted by the Court in ways that unjustifiably encroach upon the rights of the community.

Hyperindividualism, as defined by this Article, is a zealous ideology that insists that the individual possesses an inviolable prior-

10. *See infra* Part I.

11. *See* Obergefell v. Hodges, 576 U.S. 644, 694 (2015) (describing *Lochner* as an example of "the unprincipled tradition of judicial policymaking") (Roberts, C.J., dissenting); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990) (arguing that *Lochner* is "the symbol, indeed the quintessence, of judicial usurpation of power"); WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 205 (1987) (arguing that *Lochner* is "one of the most ill-starred decisions that [the Court] ever rendered"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 50 YALE L.J. 920, 943–44 (1973) (suggesting that *Lochner* and *Roe* are both examples of judicial activism); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 282 (1973) (arguing that *Lochner* reflected the personal preferences of the Justices). Scholars have also harped on *Lochner*'s relation to the First Amendment, but these efforts were aimed at making claims about judicial activism. *See* Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1243 (2020) (summarizing that scholars tend criticize the resurrection of *Lochner* in the Supreme Court's First Amendment decisions because the Court has engaged in judicial activism). This Article focuses on how *Lochner* should be condemned for affording hyperindividualism a place in Supreme Court caselaw.

12. *See infra* Part I.

ity over the community. Unlike the justification from truth, hyperindividualism is not derived from a formal philosophy.[13] Hyperindividualism is rather a state of perpetual uneasiness that bristles against the community, irrespective of what the latter aspires to do.[14] Thus described, hyperindividualism is inherently problematic as a political phenomenon. The Supreme Court has made hyperindividualism even more truculent by rendering it hyper*sensitive*.[15] That is, the hyperindividualism that underpins the Supreme Court's decisions in several of the most famous speech cases since 1971 rests on a hypersensitive trigger that propels the Court to overturn otherwise reasonable laws that have been passed by the community.[16]

One more thing deserves mention at the outset. While hyperindividualism might style itself as the ideology of the bracing individual who is willing to stand on his own against the government, hyperindividualism is actually the opposite. Hyperindividualism, as this Article will show, relies on the apparatus of the unelected federal judiciary for protection against the democratic aspirations of

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13. The hyperindividualism under review is, therefore, not related to a sophisticated theory of individual rights advanced by esteemed scholars in political philosophy. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (arguing for the virtues of a minimalist state in which the individual enjoys robust freedom); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1990) (arguing that individuals should be permitted to exercise their right to deliberative autonomy against the state); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986) (arguing for the right of individuals to fashion their own life plans against the oppression of the state).

14. Hyperindividualism should not be confused with individualism. The distinction can be clarified in part by turning to the observations of Alexis de Tocqueville. Writing in the mid-nineteenth century, the young Frenchman had remarked on the phenomenon of "individualism" among the Americans in their new republic. Whereas the French were prone to "selfishness," Tocqueville reported that the Americans tended toward individualism, "a reflective and peaceable sentiment that disposes each citizen to isolate himself from the mass of those like him . . . [and to] willingly abando[n] society at large to itself." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 482 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835). Hyperindividualism does not keep to itself. It aggressively seeks to overturn laws which the majority supports simply because these laws bristle against its relentless impulse to do whatever it desires.

15. *See infra* notes 48–51 and accompanying text.

16. *Id.*

the community. The community can also rely on an unelected judiciary to enforce the community's laws. However, what makes hyperindividualism's reliance on the unelected judiciary different is that hyperindividualism eschews efforts to engage the community and instead seeks an oppositional relationship with the latter. Individuals in a community seek to persuade each other to support their respective normative positions. If these individuals are unable to do so, these individuals often accept the consequences and abide the majority's wishes as the price of getting along with others in a shared community. However, the hyperindividualist takes a different tack. He relies on the administrative machinery of an unelected judiciary to settle his differences with others by overturning one law after another as violative of some right, even if such violation is dubious. In this sense, hyperindividualism depends crucially on judicial activism. Of course, if hyperindividualism were sanctioned by the Constitution, it would not matter legally whether it relied on judicial activism. This Article argues, however, that hyperindividualism lacks any support from the Constitution, and that the Constitution supports instead the presumptive right of the community to regulate speech.

This Article is organized as follows. Part I traces the genesis of hyperindividualism to the Court's decision in *Lochner v. New York*. The *Lochner* Court overturned the community's law as an unreasonable attempt to regulate an individual in relation to the right of contract, even though the community had good reasons to believe that the individual could enter contracts that would be extremely detrimental for the individual and his community. In a judicial opinion that rejected the valid arguments of the community, the *Lochner* Court established a precedent for hyperindividualism as the ideology for deciding cases.

By 1955, *Lochner* seemed to have died a dishonorable death at the Supreme Court.[17] But Part II shows that the hyperindividualism

17. *See infra* notes 58–65 and accompanying text.

birthed in *Lochner* was merely lying dormant. In 1971, the hyperindividualism in *Lochner* reappeared.[18] This time, hyperindividualism was liberated by the Supreme Court from the confines of contract law in *Lochner*, and permitted to establish a presence for itself in First Amendment jurisprudence.[19] Absorbed in *Lochner*'s ideology of hyperindividualism, the Court began in 1971 to support the rights of a disparate lot of speakers whose speech was harmful to the community: a Black protestor who hurled racist death threats at white police officers;[20] a white supremacist who terrorized a Black family;[21] an ultrarich individual who tried to skew political elections in his favor;[22] a multibillion-dollar brewery that sought to entice those gripped by alcoholism to purchase the most potent alcoholic beverages;[23] a brazen charlatan who falsely presented himself as a war hero.[24] Part II critically examines the unpersuasive arguments employed by the Court to support these hyperindividualist speakers.

Part III argues that hyperindividualism as a judicial ethos is antithetical to the Constitution. Part III shows that the Constitution, properly understood, substantially favors the rights of the community over those of the individual. Part III discusses the Constitution's text, how the Framers and the Founding generation interpreted the Constitution, and how the Supreme Court traditionally interpreted the Constitution before the Court became seduced by the charms of hyperindividualism. By drawing on these sources, Part III introduces what this Article calls a communitarian approach to rights. Under this approach, the community may regulate an individual's right according to the principle that membership in the community logically requires the individual to surrender his right to do whatever he pleases. Specifically, the communitarian

18. *See infra* Part II.
19. *Id.*
20. *See infra* notes 90–105 and accompanying text.
21. *See infra* notes 106–112 and accompanying text.
22. *See infra* Part IV.C.
23. *See infra* notes 295–315 and accompanying text.
24. *See infra* Part IV.D.

approach requires the individual to bear the "implied obligation" to refrain from action that injures the community.

Part IV enlists the communitarian perspectives in Part III and utilizes them to explain how the Court should decide cases involving the right of speech. Part IV examines public profanity, racist speech, alcohol advertisement, campaign expenditures, and more. Part IV shows that in all of these instances, the communitarian approach, unlike hyperindividualism, can produce outcomes that are more concordant with the Constitution. Part V explains how the communitarian approach is not an excuse to suppress the right of speech. Part V outlines the constitutional limits of the communitarian approach. The Article offers concluding thoughts in Part VI.

I. THE BIRTH OF HYPERINDIVIDUALISM: *LOCHNER* AND ITS LEGACY

The right of speech is not only cherished for what it does, but for its intellectual pedigree. Support for the right in the Anglo-American tradition has been traced at least as far back as the English philosophers John Milton and John Stuart Mill.[25] But the ideology of hyperindividualism, which has influenced the Court's First Amendment jurisprudence since 1971, finds its origins in the Supreme Court's opinion in *Lochner v. New York* from 1905.

In contrast to the esteem enjoyed by Milton and Mill, the Supreme Court's decision in *Lochner*[26] is now treated, along with *Dred Scott v. Sanford*,[27] as one of the worst opinions in the Supreme Court's

25. For a discussion of the authoritative words of the seventeenth-century English philosopher John Milton as a precursor for the right of speech in the U.S. Constitution, *see* Thornhill v. State of Alabama, 310 U.S. 88, 97 (1940); Lovell v. City of Griffin, Georgia, 303 U.S. 444, 451 (1938); Jones v. City of Opelika, 316 U.S. 584, 601 (1942); Grosjean v. Am. Press Co., 297 U.S. 233, 245 (1936); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988). For a discussion of the equally authoritative words of the nineteenth-century English philosopher John Stuart Mill, *see* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985); Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 93 F.3d 1530, 1539 n.7 (7th Cir. 1996), Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1201 n.2 (9th Cir. 2010) (Wardlaw, J., dissenting).

26. Lochner v. New York, 198 U.S. 45 (1905).

27. Dred Scott v. Sanford, 60 U.S. 393 (1857).

history.[28] As one scholar has remarked, "[n]othing can so damn a decision as to compare it to *Lochner* and its ilk."[29] The facts of *Lochner* were as follows. In the early nineteenth century, bakers in New York often worked in basement facilities with virtually no ventilation.[30] New York worried that the flour dust in bakeries would damage the bakers' lungs if the bakers were permitted to work excessive hours.[31] New York therefore passed a law that forbade a bakery owner from contracting with a baker for the latter to work more than 10 hours a day or 60 hours a week.[32] Joseph Lochner, a bakery owner, argued that New York had violated his constitutional right of contract. The Supreme Court agreed.[33] Writing for the Court, Justice Peckham pronounced that the statute "*necessarily* interferes with the right of contract."[34]

With the foregoing statement, Justice Peckham launched one of the most hated judicial opinions in history. Much of the criticism for Peckham has gathered around the thesis that he invented a right

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28. *See* Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court 1888–1921*, 5 LAW & HIST. REV. 249, 250 (suggesting that *Lochner* "is still shorthand in constitutional law for the worst sins of subjective judicial activism") (1987); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (describing *Lochner* along with *Dred Scott* as some of the "worst decisions" in the Supreme Court's history).

29. Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 295 (1985); *see also* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 40 (1991) ("For a modern judge, one of the worst insults is that she is reenacting the sin originally committed by the pre-New Deal Court in cases like *Lochner v. New York*."); David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 1 (2003)("Avoiding '*Lochner*'s error' remains a primary focus of constitutional law and constitutional scholarship."); TRIBE, *supra* note 2, at 567 (2d ed. 1988) ("'Lochnerizing' has become so much an epithet that the very use of the label may obscure attempts at understanding.").

30. *See* IAN MILLHISER, INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED 91–94 (2015); *see also* Matthew S.R. Bewig, *Laboring in the "Poisonous Gases": Consumption, Public Health, and the* Lochner *Court*, 1 N.Y.U. J.L. & LIBERTY 476, 482 (2005).

31. *See Lochner*, 198 U.S. at 52; *see also* David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1475 (2005) (describing the bleak conditions under which bakers in New York had to work at the time of *Lochner*).

32. *Lochner*, 198 U.S. at 52.

33. *Id.* at 65.

34. *Id.* at 52 (emphasis added).

of contract without any support from the text of the Constitution.[35] This thesis maintains that Justice Peckham's opinion is objectionable because it sets a precedent for judicial activism, which is the belief that judges may ignore the Constitution in favor of their own preferences.[36]

An additional explanation for why Justice Peckham's opinion should be rejected is available, however. Justice Peckham's opinion, this Article argues, should be discounted because it creates the precedent that hyperindividualism is a legitimate basis for overturning sensible laws passed by the community. While *Lochner* was purportedly a case about the right of contract, most of Justice Peckham's discussion did not seriously engage the subject of contract. Instead, Justice Peckham was preoccupied with hyperindividualism. There was no explicit mention of "hyperindividualism" in *Lochner*, but Justice Peckham was missing only the term, not the idea. Protesting the community's right to regulate the baker's hours, Justice Peckham argued:

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35. As late as 2022, the Supreme Court warned of the "freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*." Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2248 (2022). For additional criticisms of *Lochner* as an example of judicial activism, see Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass'n., 110 F.3d 547, 554 (8th Cir. 1996) (calling *Lochner* a "pivotal case of judicial activism"); Armendariz v. Penman, 75 F.3d 1311, 1318 (9th Cir. 1996) (describing the *Lochner* Court as "engaged in a level of judicial activism which was unprecedented in its time and unmatched since"); In re Chateaugay Corp., 53 F.3d 478, 487 (2d Cir. 1995) (criticizing a previous case as embodying "the long-discredited era of *Lochner*-style judicial activism").

36. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 940 (1973) (arguing that both *Lochner* and *Roe v. Wade* rely on judicial activism that lacks support from the Constitution); 8 OWEN M. FISS, HISTORY OF THE SUPREME COURT OF AMERICA: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 10 (1993) (discussing how comparisons to *Lochner* were made to criticize the Warren Court for judicial activism); James W. Ely, Jr., *Economic Due Process Revisited*, 44 VAND. L. REV. 213, 214 (1991) (reviewing PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK (1990)) (discussing how prominent conservatives have criticized *Lochner* as "inappropriate judicial activism"); *see also Armendariz*, 75 F.3d at 1318 ("The Supreme Court's opinion in *Lochner v. New York* . . . now symbolizes an era in which the Court, invalidating economic legislation, engaged in a level of judicial activism which was unprecedented in its time and unmatched since.") (citation omitted)

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action.[37]

Consider how Justice Peckham elevated the individual baker over the desires of the community. Justice Peckham announced that the individual baker was owed deference by the state for the baker's "independence of judgment."

There are two problems with Justice Peckham's assertion. First, Justice Peckham failed to acknowledge that the community's restriction on the hours that the baker could work was justified by the community's valid concern that the baker might have been suffering from a lack of bargaining power, a condition that could have been exploited by the bakery owner.[38] Justice Peckham's failure was especially noteworthy given the Supreme Court's own precedent, including *Holden v. Hardy*, decided just seven years before *Lochner*.[39] *Holden* involved a law that restricted the hours that miners could work underground and in smelters.[40] The Court upheld the law, and the rationale offered by the Court is illuminating. For *Holden*

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37. *Lochner*, 198 U.S. at 57.

38. The Supreme Court itself had recognized—seven years before *Lochner*—that the Court could uphold laws which endeavor to remedy inequalities in bargaining power between employers and employees. *See* Holden v. Hardy, 169 U.S. 366, 397 (1898); *see also* Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 LAW & HIST. REV. 275, 285 (2013) (discussing how fidelity by the Court to the view that labor markets were fair prevented legislatures from trying to remedy the imbalance of power between employers and employees). Notwithstanding Justice Peckham's suggestion that bakers wanted to work as many hours as possible, it is worth noting that "journeymen bakers in 1886 and 1887 agitated for a bakers' ten-hour bill. When the bill reached the State Assembly, however, it was defeated by a vote of 56–45. After the defeat of 1887, the N.Y. bakers would not submit a shorter-hours bill to the state legislature for eight years." Matthew S. Bewig, *Lochner v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and The Constitution: A Case Study in the Social History of Legal Thought*, 38 AM. J. LEGAL HIST. 413, 431 (1994).

39. 169 U.S. 366 (1898).

40. *Id.* at 380.

declared that "[t]he fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality."[41]

As *Holden* underscores, the Court in 1898 was quite willing to honor the community's desire to regulate contracts between employers and employees if the Court felt that the employer enjoyed unequal bargaining power over the employee. As will be discussed more later, the majoritarian sentiments in *Holden* were consonant with the larger dedication to communitarianism in the Constitution.[42] For the time being, it may suffice to make one observation regarding Justice Peckham's position in *Lochner*. In light of *Holden*, a case can be made that Justice Peckham's assertion about the baker not needing "the protecting arm of the state" misunderstands the Court's precedent for deferring to the community in instances of perceived economic inequality.

Another problem is that Justice Peckham ignored how the constitutionality of the labor regulation in *Lochner* could turn on the right of the community to prevent injuries to the baker's health. In 1898, the Court had held in *Holden* that the community may regulate labor contracts "where the public health demands that one party to the contract shall be protected against himself."[43] Justice Peckham expressed almost no regard to the potential injuries suffered by bakers. What mattered for him was that the Court protected the

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41. *Id.* at 397.

42. *See infra* Part III.

43. *Holden*, 169 U.S. at 397. The injury to bakers was far from speculative. Professor Matthew Bewig writes, for example:

> For the bakers, the hours issue was a health issue with ramifications for what, in the late 20th century, would be termed "quality of life." Indeed, as one letter-writer to *John Swinton's Paper* saw it, of three reasons for shorter hours, two were directly related to health, and the third to the bakers' weakness as a group: "In the bakers' trade there is the most extreme strain upon the nervous and physical system of the stoutest of us. A few years of this continual strain sends many of us into the consumptive's graves, or racks us with rheumatism. Don't strain us so hard!"

Bewig, *supra* note 39, at 435.

right of two individuals to enter a contract.[44] As Justice Peckham asserted in *Lochner*, "[w]e think the limit of the police power has been reached and passed in this case."[45] He added that "[t]here is . . . no reasonable foundation for holding [New York's ordinance] to be necessary or appropriate as a health law to safeguard . . . the health of the individuals who are following the trade of a baker."[46]

In *Lochner*, Justice Peckham displayed a defense of hyperindividualism. While Justice Peckham harped on the rights of the individual, he hardly mentioned the community's right to regulate the individual. The role that Justice Peckham in *Lochner* had assigned the community was for it to do the impossible. Justice Peckham demanded that, to justify its law, the community had to show that "bakers as a class are not equal in intelligence" to "men in other trades" or that bakers as a class cannot "care for themselves without the protecting arm of the state."[47]

While formally a demand for evidence, Justice Peckham's demand was, in practical effect, a purely rhetorical ploy that was meant to create an impossibly high bar for the community to regulate individual rights. For, as a matter of common sense, it was impossible for the community to show that "bakers as a class are not equal in intelligence" to "men in other trades," or that bakers as a class could not "care for themselves without the protecting arm of the state." By emphasizing these contrived questions of intelligence, Justice Peckham tacitly refused to acknowledge that the validity of a community's law regulating working hours need not turn on whether the community had made a proper assessment about the mental fitness of a group of workers.[48] Put bluntly, by making *Lochner* turn on issues of mental fitness, Justice Peckham practically guaranteed that the individual baker would defeat the community in court.

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44. *Lochner v. New York*, 198 U.S. 45, 53–54 (1905).

45. *Lochner*, 198 U.S. at 58.

46. *Id.*

47. *Id.* at 57.

48. It is true Justice Peckham acknowledged that, in the abstract, the public's "safety, health, morals, and general welfare" could be objects for legislation but that, in *Lochner*, "the interest of the public is not in the slightest degree affected by such an act." *Id.*

Justice Peckham's elevation of hyperindividualism—and his corresponding diminishment of the community—was expressed elsewhere in *Lochner*. He declared: "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual."[49] Did New York's law really amount to a "meddlesome interference?" Remember that the law at issue in *Lochner* forbade bakers from working more than 60 hours a week or 10 hours a day in their unventilated basement facilities.[50] A baker, under the terms of the regulation, could work from 9 a.m. to 6 p.m. *every* day from Monday to Sunday.[51] These were substantial hours for any worker, let alone for one inhaling flour dust in an unventilated basement.[52]

Justice Peckham's hyperindividualism defied the community's attempts to safeguard the health of bakers. At times, this opposition to the community appeared to be commingled with paranoia. For instance, Justice Peckham warned in *Lochner* that, if the Court upheld New York's law, the state "would assume the position of a supervisor, or *pater familias*, over *every* act of the individual."[53] This was a strange non sequitur. The *Oxford English Dictionary* states that a *pater familias* is said to be "[t]he male head of a family or household, having absolute legal authority over its members."[54]

It was absurd, however, to argue that the community in *Lochner* was exerting "absolute legal authority over its members." Justice Peckham's characterization of the state as a *pater familias* insinuated that, should the Court uphold New York's limit on working hours,

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49. *Id.* at 61. The irony here is that the hyperindividualist must necessarily rely on the quintessential state apparatus of the federal judiciary—who is *not* accountable to the community.

50. *Id.* at 45.

51. *Id.*

52. *But see* David E. Bernstein, *Class Legislation, Fundamental Rights, and* Lochner, 26 GEO. MASON L. REV. 1023, 1035 (2019) (observing that Lochner's attorney presented evidence that bakers' work conditions were not dangerous to their health, which the state failed to rebut).

53. *Lochner*, 198 U.S. at 62 (emphases added).

54. *See Paterfamilias*, OXFORD ENGLISH DICTIONARY ONLINE, https://doi.org/10.1093/OED/5603368627 [https://perma.cc/DE9B-7JQJ].

the very idea of individual autonomy would be imperiled in subsequent cases. Justice Peckham went so far as to argue that New York's law was prompted by something vaguely sinister: "[I]t gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare."[55]

If Justice Peckham's fealty to hyperindividualism was based on unfounded suspicions, it was also pungently ironic. For the irony of hyperindividualism, despite hyperindividualism's protestations to the contrary, is that it does not shun government intervention. The opposite is true. Hyperindividualism *craves* government intervention and cannot survive without it. Specifically, hyperindividualism relies on judicial activism to overturn laws adopted by the community.[56] Consider how Joseph Lochner, the bakery owner, had to rely on the federal judiciary to protect his right to disobey a law passed by the community that everyone had to obey. Lochner's successful appeal to the Supreme Court illustrated how hyperindividualism—having positioned itself against the community—had to seek an ally in an activist judiciary.

In this way, hyperindividualism does not quite embody the ideology of individual fortitude against the government. Rather, hyperindividualism is paradoxically reliant on the power of the very *pater familias* state that Peckham had condemned in *Lochner*. Worth emphasizing in this context is how the proper point of distinction in *Lochner* is not between the individual and the legislature, but between the community (as represented by a legislature that was accountable to the members of the community) and the unelected, life-tenured federal judiciary (which was not accountable to the community).

Written in 1905, Justice Peckham's *Lochner* opinion would be rejected by the Supreme Court in 1955. In *Williamson v. Lee Optical*,[57] the Supreme Court, as it had with *Lochner* in 1905, adjudicated a

55. *Lochner*, 198 U.S. at 63.

56. This is not to suggest that there are no circumstances in which the individual speaker may justifiably seek to overturn the law. *See infra* Part V.

57. 348 U.S. 488 (1955).

case that involved the right of contract. This time, the community had passed a law that forbade opticians—but not ophthalmologists and optometrists—from fitting lenses without a prescription written by an ophthalmologist or optometrist.[58] (An ophthalmologist is a licensed physician, and an optometrist examines eyes for refractive error, while an optician is an artisan who is qualified to grind lenses.[59])

It was not entirely clear to Justice Douglas, writing for the *Williamson* Court, why the community had passed the law.[60] However, demonstrating deference to the community, Justice Douglas declared that "the legislature *may have* concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert."[61]

Clearly, Justice Douglas placed emphatic regard upon the will of the community in 1955. In *Lochner*, Justice Peckham had required the community to prove the impossible by showing that bakers "as a class [were] not equal in intelligence and capacity to men in other trades or manual occupations."[62] As if he were responding to Justice Peckham, Justice Douglas declared in *Williamson* that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[63] In an expression of support for the right of the community to regulate the individual, Justice Douglas in *Williamson* stressed that "it is for the legislature, not the courts, to balance the advantages and

58. *Id.* at 486. *Williamson* was the culmination of efforts to grant more power to the legislature and to move away from *Lochner*'s devotion to hyperindividualism. For an earlier effort, *see W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) (arguing that the right of contract is qualified and subject to legislative supervision).

59. *See Williamson*, 348 U.S. at 486.

60. *Id.* at 487.

61. *Id.* (emphasis added).

62. Lochner v. New York, 198 U.S. 45, 57 (1905).

63. *Williamson*, 348 U.S. at 488.

disadvantages [of a law]."[64] Significantly, Justice Douglas did not even discuss *Lochner*, as if Justice Peckham's 1905 opinion was an unmentionable mistake that was best left, without commentary, in the dustbin of history.

It should be acknowledged that the meaning of *Williamson* is not unequivocal. Justice Douglas's words, which were brief, lend themselves to the proposition that the Court was opposed to hyperindividualism, but they can also be seen as a condemnation of judicial activism or of the Court's attempt to weigh individualism in favor of communitarianism. This Article cannot definitively resolve this ambiguity, but this Article will suggest that *Williamson* fits into this Article's larger narrative that the Court has historically opposed hyperindividualism in favor of communitarianism.

II. HOW HYPERINDIVIDUALISM CAME TO GOVERN THE FIRST AMENDMENT

As suggested by Justice Douglas in *Williamson*, the hyperindividualism that had been invented by Justice Peckham in *Lochner* appeared to have been repudiated by the Court in 1955.[65] By then, hyperindividualism seemed to have died a just death at the Court. But like a horror movie ghoul who refuses to perish, the hyperindividualism concocted by Justice Peckham in 1905 was only lying dormant. Hyperindividualism was defiantly resurrected by the Supreme Court in 1971.[66] This time, the Court liberated hyperindividualism from the confines of contract law in *Lochner* and empowered hyperindividualism to establish a domain for itself in the First Amendment.[67]

The case in which hyperindividualism made its First Amendment debut was *Cohen v. California*.[68] A surly nineteen-year-old named Paul Robert Cohen wore a jacket emblazoned with the words "Fuck

64. *Id.* at 487.
65. *Williamson*, 348 U.S. at 488.
66. *See* Cohen v. California, 403 U.S. 15 (1971).
67. *See id.*
68. *Id.*

the Draft"—in a courthouse, of all places.[69] Cohen was convicted of disturbing the peace.[70] California provided two reasons for the conviction. First, California argued that Cohen, by parading his profanity, willfully undermined the effort by the community to consecrate their courthouse as a place of peaceful public gathering.[71] Second, California argued that Cohen had violated the community's moral expectation that its members should abstain from public profanity in spaces where they would reasonably expect women and children to be present as members of a captive audience.[72] As in *Lochner*, an individual in *Cohen* was doing something that violated the community's law. Indeed, what the adolescent Cohen was doing seemed arguably more violative of the community's morals, which found expression in the law, than what the bakery owner had done in *Lochner*.[73]

Nonetheless, Justice Harlan, writing for the Supreme Court, overturned Cohen's conviction.[74] Coursing through Justice Harlan's opinion was an unbridled ethos of hyperindividualism. Justice Harlan asserted, without a hint of self-consciousness, that young Cohen had every right to wear a jacket that said "Fuck" in a *courthouse* that contained young children because "it is nevertheless often true that one man's vulgarity is another's lyric."[75] Justice Harlan added that "[i]ndeed, we think it is largely because government officials cannot make principled distinctions in this area [of fashion] that the Constitution leaves matters of *taste* and *style* so largely to the *individual*."[76] For Justice Harlan, it was the individual speaker—Cohen—who mattered, not the community. Harlan suggested that

69. *Id.* at 16.

70. *Id.*

71. Brief for Respondent at 17, Cohen v. California, 403 U.S. 15 (1971) (No. 299), 1970 WL 136796, at *17.

72. *Id.* at 8, 13, 18.

73. *Id.* at 18 ("Parents have the *obligation* to protect their children from the language used by appellant.") (emphasis added).

74. *Cohen*, 403 U.S. at 26.

75. *Id.* at 25.

76. *Id.* (emphases added).

the conflict in *Cohen* boiled down to *one man's* opinion versus *another man's* opinion about the inherently contestable issue of "taste and style." Embedded in this seeming bromide was the axiom that one man could assert his normative position against the community simply because standards for aesthetics were inherently contestable.

Justice Harlan embraced hyperindividualism even more zealously than had Justice Peckham. In an effort to prop up hyperindividualism, Justice Peckham had contended that the Court should uphold the community's law limiting working hours for bakers only if the community could show that bakers "as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State."[77] What Justice Peckham required of the community was the fulfillment of a standard that was, realistically speaking, impossible to satisfy. In *Cohen*, Justice Harlan also disempowered the community. But whereas Justice Peckham, in his effort to enable hyperindividualism, had required the community to meet an impossible burden of proof, Justice Harlan's attempt to empower hyperindividualism adopted a different method. Justice Harlan changed the entire paradigm of the case to ensure that hyperindividualism would prevail over the rights of the community. He did not characterize the conflict in *Cohen* as between an ill-mannered adolescent trying to shock his community and a community that was held as a captive audience to the former's profanity. Justice Harlan redescribed the case as one involving *fashion*—a case about "matters of taste and style."[78]

Utilizing this sartorial paradigm, Justice Harlan could easily declare that the community had no legitimate claims against Cohen. After all, it was because "government officials cannot make principled distinctions in this area that the Constitution leaves matters of *taste* and *style* so largely to the *individual*."[79] Seen through this par-

77. Lochner v. New York, 198 U.S. 45, 57 (1905).

78. *Cohen*, 403 U.S. at 25.

79. *Id.* (emphases added).

adigm of individual taste and style, the community's effort to punish Cohen for his public profanity would indeed have amounted to conduct that a Justice Peckham in *Lochner* would have condemned as "meddlesome."[80] The community, in Justice Harlan's depiction, was restricting speech in a place where the community had no right to do so, and it was the nineteen-year-old Cohen, Justice Harlan urged, who had every right to wear his profane jacket in a courthouse.

An allegiance to hyperindividualism impelled Justice Harlan to characterize the community as something akin to the *pater familias* in Justice Peckham's *Lochner* opinion. For Justice Harlan described the entire case of *Cohen* as one in which "the States, acting as guardians of public morality [a *pater familias*, of sorts], may properly remove this offensive [F-word] from the public vocabulary."[81] In Justice Harlan's imagination, the obnoxious Cohen was exercising his right to express his political conscience. Depressingly, Justice Harlan ignored the fact that Cohen had chosen to express his profanity in a courthouse, one of the few places in public life that is for the community a place of sanctity.[82] The community did not intend to

80. *Lochner*, 198 U.S. at 61.

81. *Cohen*, 403 U.S. at 23.

82. Here, the U.S. Courts Design Guide is instructive. The Guide "sets forth the federal Judiciary's requirements for the design, construction, and renovation of court facilities." U.S. Courts Design Guide, JUD. CONF. OF THE U.S. (Mar. 2021), https://www.uscourts.gov/file/31049/download [https://perma.cc/LUT8-ECE2] (last visited Aug. 4, 2024). According to the Guide, "[t]he architecture of federal courthouses should *promote respect* for the tradition and purpose of the American judicial process. To this end, a courthouse facility should express *solemnity*, integrity, rigor, and fairness." *Id.* at 3-2. For similar sentiments, see Kenneth P. Nolan, *Keep Your Nose Clean*, 46 LITIGATION 62, 62 (2020) ("the courthouse [is] a sacred temple"); Christopher J. Vidrine, *The Zoom Paradox: Schrodinger's Witness*, 82 LA. L. REV. 311, 356 (2021) (discussing "the solemnity of the courthouse"). *See also* Jonathan D. Rosenbloom, *Social Ideology as Seen Through Courtroom and Courthouse Architecture*, 22 COLUM.-VLA J.L. & ARTS 463, 513 (1998) (discussing courthouse of the Southern District of New York as creating "the perception that the courthouse is a place apart from society, necessary to objectively resolve the disputes generated from within society and within the grids"); James M. Mayo & Nils Gore, *Confronting the Terrain of Politics in Architectural Practice: Assessing Strengths and Weaknesses*, 30 J. ARCHITECTURAL & PLAN. RES. 245, 249 (2013) (discussing county courthouses as special cultural places of solemnity).

Robert J. Conrad and Justine Parry Welch offer salient observations:

prohibit Cohen from expressing public profanity across the breathtaking vista of the state of California.[83] By ignoring the latter detail, Justice Harlan revived Justice Peckham's view of the community as a threat to individual liberty.[84]

One may object that the attempt to analogize *Cohen* and *Lochner* is unwarranted given that the former concerned a right of contract that is not explicitly mentioned in the Constitution whereas the latter concerned the right of speech that is. Whereas hyperindividualism is not an appropriate judicial philosophy for the Supreme Court in relation to the right of contract, the argument runs, hyperindividualism may be appropriate for the right of speech. There may be, for some, a facial appeal to this objection, but it is ultimately unpersuasive. For the right of speech is different from the right of contract. The right of contract is meant for the parties to the contract. However, the right of speech, as will be discussed at length subsequently, is meant not only for the speaker, but the community.[85] The speaker is granted the right of speech, in part, so that he may enlighten the community to make informed decisions in the interests of self-government.[86]

One year after the Court decided *Cohen*, the Court continued its

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> Ultimately, the "fittings," or organizational configurations, of the courtroom matter. They symbolize and reflect "the source of the courtroom authority." When members of the public come to court, they should find that the layout confirms the hierarchical nature of the power inherent in American democracy . . . As the Preamble to the Constitution communicates in its first three words, the American people are at the center of our nation, and their central placement in the courtroom reflects and communicates this foundational belief and spirit: "We the people. . . ."

Robert J. Conrad, Jr. & Justine Parry Welch, *Taking Center Stage: The Virginia Revival Model Courtroom*, 105 JUDICATURE 55, 59 (2021) (citations omitted).

83. *Cohen*, 403 U.S. at 25.

84. It was Justice Peckham, the reader will remember, who had suggested back in 1905, that the community's law "gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare." *Lochner*, 198 U.S. at 63.

85. *See infra* Part V.

86. *See id.*

campaign to establish hyperindividualism as a governing force in the field of the First Amendment. In *Gooding v. Wilson*, a Black war protestor named Johnny C. Wilson unlawfully barred inductees from entering a military recruitment center.[87] The "inductees" were not random people from the neighborhood; they were drafted recruits who were legally obliged to report to the military recruitment center.[88] Wilson yelled to a police officer, who [was] attempting to restore access to [the recruitment center], "White son of a bitch, I'll kill you," and "[y]ou son of a bitch, I'll choke you to death," and [said] to an accompanying officer, "[y]ou son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."[89] Bear in mind that the police officers who were the victims of Wilson's racist threats were doing nothing more provocative than trying to clear a path to the military recruitment center. Wilson was arrested for his alarming profanity and his threats to kill the police officers.[90]

It may come as a surprise, therefore, that Wilson's conviction was overturned by the Supreme Court.[91] How Justice Brennan rationalized the Court's decision in *Wilson* brought to the fore the degree to which the Court in 1972 had embraced hyperindividualism. Writing in 1971, Justice Harlan had characterized Cohen's public profanity as an expression of "taste and style" that deserved constitutional protection. One year after *Cohen* was decided, Justice Brennan in *Wilson* took a decidedly furtive approach. He did not mention *anything* about the substance of Wilson's threats. Justice Brennan's omission was, in effect, a cynical admission that Wilson's speech was violative of the community's norms.[92]

Regardless, Brennan, for the Court, argued that Wilson's conviction should be overturned because the law that punished Wilson

87. 405 U.S. 518, 519 n. 1 (1972).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 528.

92. A summary of the facts was found only in the dissenting opinion by Justice Blackmun. *See id.* at 534–35 (Blackmun, J., dissenting).

was so vague that no reasonable person could discern what it forbade.[93] In *Wilson*, the law forbade a person from saying, without provocation, to another words that are "opprobrious" or "abusive."[94] Justice Brennan claimed that it was impossible for Wilson, fulminating with his racist death threats, to know if those statements were "opprobrious" or "abusive" as these terms were understood by the community.[95] Justice Brennan complained that the community's statute "sweeps too broadly" and that "more sensitive tools" were necessary to regulate offensive speech like that of Wilson.[96] It was the community—not Wilson—who was at fault, Justice Brennan concluded.[97] Justice Brennan's attitude toward the right of speech resonates with that of Justice Peckham's in *Lochner*. It is true that Justice Brennan left open the possibility that the community could pass a better law, one which was less vague.

But the law on offer by Georgia was arguably not unduly vague. Compare, for example, Georgia's law with the one in the case which created the undue vagueness doctrine: *Coates v. Cincinnati*.[98] In *Coates*, Cincinnati had passed a law that made it a criminal offense for "three or more persons to assemble. . . on any of the sidewalks. . . and there conduct themselves in a manner annoying to persons passing by."[99] The Supreme Court struck down the law "because it subjects the exercise of the right of assembly to an unascertainable standard,. . . ."[100] Georgia's law, by contrast, was more detailed, and was not an "unascertainable standard." Yet by treating Georgia's law as such, Justice Brennan seemed to share an affinity with Justice Peckham's hyperindividualism.

Another point merits mention. Wilson styled himself an activist who opposed the military, and, therefore, in his way, he presented

93. *Id.* at 521.
94. *Id.* at 519.
95. *Id.* at 521.
96. *Id.* at 527-28.
97. *Id.* at 528.
98. 402 U.S. 611 (1971).
99. *Id.* at 611.
100. *Id.* at 614.

himself as an individual who stood up against the state. In fact, Wilson was the antithesis of such an individual. It was not the "state," in some detached, monolithic sense, but the community, using its elected representatives, that had passed the law which forbade those like Wilson from resorting to ghastly language in public. Wilson defied a law which everyone in the community had to follow, and he did so by turning to the unelected federal judiciary to thwart the community's aspirations to create a shared public life based on mutual respect and civility. As in *Lochner*, judicial activism intervened to assist hyperindividualism.

Wilson was decided in 1972.[101] A testament to hyperindividualism's enduring foothold on the Supreme Court, the Court continued to protect extremely offensive speakers who were intent on violating the norms of the community. The embrace of hyperindividualism by the Supreme Court was also on display in *R.A.V. v. St. Paul*, a case from 1992.[102] *R.A.V.* involved a white supremacist who terrorized a Black family.[103] Robert Viktora, a vicious white supremacist, conspired with his friends to place a burning cross on the lawn of the lone Black family in the neighborhood, a family whom Viktora had tormented repeatedly.[104] For erecting the burning cross, Viktora was convicted of having violated a law passed by the community that forbade an individual from placing on private property various symbols, including a burning cross, that the individual knew would likely arouse anger, alarm, or resentment on the basis of, among other traits, race.[105] Writing for the Court, Justice Scalia overturned the law as violative of the First Amendment.[106] Evidence of hyperindividualisms growing allure

101. *Wilson*, 405 U.S. at 518.

102. 505 U.S. 377 (1992).

103. *See* Ruth Marcus, *A Family's Nightmare: Cross-Burning in St. Paul*, WASH. POST (Dec. 1, 1991), https://www.washingtonpost.com/archive/politics/1991/12/01/a-familys-nightmare-cross-burning-in-st-paul/0cf813cc-342c-4223-944b-ae305008e588/ [https://perma.cc/G8LE-HBQU].

104. *Id.*

105. *R.A.V.*, 505 U.S. at 380 (citing ST. PAUL, MINN., CODE § 292.02 (1990)).

106. *Id.* at 391.

across political preferences, Justice Scalia, a conservative jurist, resembled the liberal Justice Harlan in *Cohen* and the liberal Justice Brennan in *Wilson* in advancing the position that the community must yield before the hyperindividualist speaker who wants to assail the moral aims of the former.

A morally reasonable person would have been thoroughly appalled by the white supremacist Viktora. But Justice Scalia, while stressing "that burning a cross in someone's front yard is reprehensible[,]" faulted the community.[107] Justice Scalia objected to the community's law because he saw it as a double-standard.[108] Justice Scalia argued that the law permitted those who opposed white supremacy to use antiracist language that was likely to cause anger, alarm, or resentment in the white supremacist, but prohibited those like Viktora from doing the same by using racist language toward the Black family in *R.A.V.*[109] In Justice Scalia's words, "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[110]

Like Justice Harlan in *Cohen* and Justice Peckham in *Lochner*, Justice Scalia in *R.A.V.* introduced a paradigm that reordered the terms of the conflict between the individual and the community in a manner that reflected a devotion to hyperindividualism. According to Justice Scalia, one was not witnessing in *R.A.V.* an attempt by the community to regulate a hyperindividualist speaker who violated the community's expectation that its members treat each other with basic civility. What one was witnessing, Justice Scalia suggested improbably, was a *boxing match* between two individuals.[111] Like Justice Peckham in *Lochner*, Justice Scalia changed the paradigm such that the community—not the individual—had to answer for its actions.

In Justice Scalia's formulation, the community was not trying to

107. *Id.* at 396.
108. *See id.* at 391–93.
109. *Id.* at 391–92.
110. *Id.* at 392.
111. *Id.*

protect a Black family, one with a young child, from a white supremacist, or, if the community were trying to do that, it was completely irrelevant in terms of assessing the law's constitutionality. For in Justice Scalia's telling, the community was a referee in a boxing match, and, in that capacity, the community was helping one boxer cheat while requiring the other boxer to adhere to the rules. Scalia thus proffered a metaphor that was animated by the ethos of hyperindividualism. By introducing this metaphor, Scalia discursively erased the community as an entity with its own moral values which deserved recognition.

The next section will discuss how a proper interpretation of the Constitution requires the Supreme Court to shun hyperindividualism. In hyperindividualism's stead, the Constitution has, from its beginning, embraced a communitarian approach to individual rights.

III. THE ORIGINS OF THE RIGHTS OF THE COMMUNITY

This section limns the intellectual origins of the community's right to regulate the individual. The section first examines the Constitution's text, and what the Framers and the Founding generation thought about communitarianism. Then the section discusses how the Supreme Court has traditionally interpreted the Constitution to support the rights of the community over those of the individual.

A. The Constitution's Text and the Founding Fathers

Votaries of hyperindividualism fail to consider that the First Amendment's protections for the individual speaker must be interpreted in the context of what the Constitution, in its totality, was meant to do. Were one to consult this overarching purpose, one would grasp that the Constitution was dedicated principally to the welfare of the community, not principally to the individual.

To determine the Constitution's purpose, there is no better place to consult than the Constitution's Preamble. The Preamble reads:

> We, the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility,

> provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[112]

As Sanford Levinson has stressed, the Preamble is "*the single most important part* of the Constitution."[113] "The reason is simple: It announces the *point* of the entire enterprise."[114] The Preamble stated that the Constitution's primary purpose was not to ensure that the anomalous individual would be afforded a presumptive exemption from those laws that everyone in the community had to abide. According to the Preamble, the Constitution was made for *We, the people*—we, the community, in other words. Further, the Constitution was created to form a "more perfect *Union*," and, hence, the Constitution was created to improve our collective national community. The Preamble also announced that the Constitution was made to promote "domestic tranquility," a state of *collective* wellbeing. Likewise, the Preamble was dedicated to the *general* welfare and to the *common* defense, ends that spoke to the best interests of the community, not the individual.

So too the *Federalist Papers* suggest that the Constitution was not created primarily to protect the outlier individual who demanded an exemption from a law that everyone in the community had agreed to follow. Drafted by the formidable trio of Framers in James Madison, Alexander Hamilton, and John Jay, the *Federalist Papers* were intended to persuade New York to ratify the newly-drafted Constitution.[115] Far from harping on how the Constitution will protect the anomalous likes of Paul Robert Cohen or Robert A. Viktora, the *Federalist Papers* reassured New Yorkers that the Constitution would protect the right of the community to regulate such individuals. *Federalist 57* declared that the Constitution benefits "the mass

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112. U.S. CONST. pmbl.

113. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 13 (2006).

114. *Id.*

115. *See* George W. Carey & James McClellan, *Editor's Introduction* to THE FEDERALIST: THE GIDEON EDITION xvii, xlv (George W. Carey & James McClellan eds., 2001).

of people," not "the few."[116] For *Federalist 57*, the "aim of every political constitution is, or ought to be, . . . to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good."[117] Elsewhere, *Federalist 10* warned of a faction of citizens "who are united and actuated by some common impulse of passion, or of interest, adverse to . . . the permanent and aggregate interests of the community."[118]

No less an authority than the authors of the *Federalist Papers* was James Wilson. He was a Supreme Court Justice, a member of the Constitutional Convention, and a signer of the Declaration of Independence.[119] In sum, Wilson was an exceptionally influential figure at the Republic's Founding.[120] A citizen of Pennsylvania, Wilson endeavored to assuage the concerns of his fellow Pennsylvanians that the new Constitution, which was awaiting their ratification, was in their best collective interests.[121] Wilson made his argument by resorting to what was in the eighteenth century a familiar philosophical prop. Namely, Wilson invoked the state of nature, the condition that precedes the establishment of government. "It is true," Wilson announced in a speech, "that in a state of nature, any one individual may act uncontrolled by others; but it is equally true, that in such a state, every other individual may act uncontrolled by him."[122]

Note what was missing in Wilson's state of nature: a community. By definition, a community is defined by rules and norms which require its members to refrain from doing whatever they please.[123]

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116. THE FEDERALIST NO. 57, at 295 (James Madison) (George W. Carey & James McClellan eds., 2001).

117. *Id.*

118. THE FEDERALIST NO. 10, at 43 (James Madison) (George W. Carey & James McClellan eds., 2001).

119. *See* Kermit L. Hall, *Introduction* to 1 COLLECTED WORKS OF JAMES WILSON xiii, xiii (Kermit L. Hall & Mark David Hall eds., 2007).

120. *Id.*

121. *Id.*

122. James Wilson, Speech at the Pennsylvania Convention (Nov. 24 1787), *in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787–1788 71, 79 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

123. Some of these rules and norms derive from the community's expectation that its members will treat each other with a basic level of civility. As the philosopher Thomas

For Wilson, a state of nature—a condition bereft of a community authorized to pass laws—was also a state of hyperindividualism where no individual possessed the legal right to make claims on another. Wilson contended that, far from being a romantic utopia, such a state of hyperindividualism would be unbearable. "Amidst this universal independence, the dissensions and animosities between interfering members of the society would be numerous and ungovernable."[124] Wilson elaborated, "The consequence would be, that each member, in such a natural state, would enjoy less liberty, and suffer more interruption, than he would in a regulated society."[125]

For Wilson, a state of nature where hyperindividualism reigned would imperil an individual's liberty. "Hence," Wilson reasoned, there exists the need for "the universal introduction of governments of some kind or other into the social state."[126] Wilson then suggested that an individual can best preserve his liberty by agreeing to accept the terms of a political community. Put bluntly, for Wilson, the "happiness of man"—without the benefit of a community—was a chimera.[127] Wilson concluded: "In forming this government, and carrying it into execution, it is *essential* that the *interest and authority* of the whole community should be binding on every part of it."[128] Wilson did not dismiss the premise that an individual enjoyed rights against the community. But Wilson, an illustrious

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Hobbes morosely observed long ago, without civility the life of man is "poor, nasty, brutish, and short." THOMAS HOBBES, 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 LAW & LITERATURE 371, 378–81 (2003) (arguing that civility is the basis for civil society) [hereinafter Kang, *The Uses of Civility*]; 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 and the Constitution*].

124. James Wilson, Remarks in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787, *in* 1 COLLECTED WORKS OF JAMES WILSON 178, 186 (Kermit L. Hall & Mark David Hall eds., 2007).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (emphasis added).

constitutional Framer, argued that the individual's right was presumptively circumscribed by the community. For Wilson, an individual's right to liberty could not exist without the protection of a community, and, in exchange for said protection, the individual had to follow the laws that applied to everyone.

Other leaders in the Founding generation aired similar sentiments. David Ramsay was a member of the Continental Congress and an eminent historian. Like Wilson, Ramsay attempted to convince his countrymen to ratify the Constitution. Also like Wilson, Ramsay enlisted the state of nature as an intellectual prop. "In a state of nature," said Ramsay, "each man is free and may do what he pleases; but in society, every individual must sacrifice a part of his natural rights."[129] Ramsay elaborated that in society, "the minority must yield to the majority, and the collective interest must control particular interests."[130] For those like John Adams, the issue was more straightforward. Adams declared that "government is a frame, a scheme, a system, a combination of powers for a certain end, namely—the good of the whole community."[131]

B. The State Constitutions and the Founding Generation

Adams was a Founding Father, and one might wonder whether what those like him had said was representative of the generations of Americans who ratified the Constitution. There was, in fact, evidence to suggest that the Founding generation had also endorsed a strong belief in communitarianism as a background principle to interpret the Bill of Rights. Before the Constitution was ratified, the States had ratified their own Bill of Rights, which were occasionally dubbed "declarations of rights."[132] Virginia in 1776 passed "the first true Bill of Rights in the modern American sense, since it [was] the first protection for the rights of the individual to be contained in a

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129. David Ramsay, An Address to the Freeman of South Carolina on the Subject of the Federal Constitution, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 1787-1788, 12, 12 (Paul Leicester Ford ed., 1888).

130. *Id.*

131. John Adams, The Earl of Clarendon to William Pym, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 51, 53 (C. Bradley Thompson ed., 2000).

132. *See* PA. CONST. of 1776; MD. CONST. of 1776; N.C. CONST. of 1776.

Constitution adopted by the people acting through an elected convention."[133] Virginia's Declaration of Rights included protections for the right of religion and the right to property.[134] Tellingly, there was no reference to a right of speech in Virginia's Declaration of Rights. Instead, Virginia's Declaration of Rights underscored that "government is, or ought to be, instituted for the *common* benefit, protection and security of the people, nation or community."[135] Moreover, Virginia's Declaration of Rights wished the public to know that:

> "[o]f all the various modes and forms of Government, that is best, which is capable of producing the *greatest degree* of happiness and safety,. . . and that whenever any government shall be found inadequate or contrary to these purposes, a *majority of the community* hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the *public weal*."[136]

The New Jersey Constitution, ratified in 1776, also did not refer to the right of speech. But the document emphasized that "all the constitutional authority ever possessed by the Kings of *Great-Britain* over these Colonies . . . was, by Compact, derived from the People, and held of them for the *common* Interest of the *whole* society."[137]

The absence of the right of speech in New Jersey's Constitution and Virginia's Declaration was similarly replicated by other states. This communitarian ethos was on display in 1776 in North Carolina's Declaration of Rights. The latter document held that "all political power is vested in and derived from the people only" and that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."[138] North Carolina's Declaration of Rights

133. United States v. Payne, 492 F.2d 449, 459–60 (4th Cir. 1974) (Widener, J, concurring in part and dissenting in part).

134. VA. DECLARATION OF RTS. of 1776, §§ I, XVI.

135. VA. DECLARATION OF RTS. of 1776, § III (emphases added).

136. *Id.* (emphases added).

137. N.J. CONST. of 1776, pmbl. (emphases added).

138. N.C. DECLARATION OF RTS. of 1776, § III.

did mention rights that the people possessed, but these were related to criminal justice; the right of speech was not included.[139]

Likewise, most of the rights in Georgia's 1777 Constitution were limited to criminal due process; the right of speech was excluded.[140] Nor could one find any mention of the right of speech in New Hampshire's Bill of Rights from 1783.[141] What one did find were communitarian aspirations for New Hampshire's government to be made for "the general good."[142] "When men enter into a state of society," the New Hampshire Bill of Rights continued, "they surrender up some of their natural rights to that society, in order to insure the protection of others; and, without such an equivalent, the surrender is void."[143] Delaware's Declaration of Rights read: "That all government of right originates from the people, is founded in compact only, and instituted *solely* for the good of the whole."[144] Individuals were guaranteed a right of private property and a right to a fair trial, but there was no mention of a right of speech.[145]

In keeping with the communitarianism of its sister states, Pennsylvania ratified a Declaration of Rights in 1776 asserting that "all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights."[146] "Natural rights," in this instance, did not entail the right of the hyperindividualist against the community. Natural rights for Pennsylvania meant the idea that "the *people* have a right, by *common* consent" to "alter or abolish the government if it did not serve the great ends"

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139. *See* N.C. DECLARATION OF RTS. of 1776, §§ VII–XV.

140. GA. CONST. of 1777, arts. XIX, XXXIX (empowering governor to grant temporary reprieves and suspension of fines, and requiring that accused be tried in county where crime was committed).

141. N.H. BILL OF RTS. of 1783.

142. N.H. BILL OF RTS. of 1783, § I.

143. N.H. BILL OF RTS. of 1783, § III.

144. DEL. DECLARATION OF RTS. of 1776, § 1 (emphasis added).

145. DEL. DECLARATION OF RTS. of 1776, § 10.

146. PA. CONST. of 1776, pmbl.

for which government was established.[147] The communitarian aspect of Pennsylvania's Declaration found additional expression in the statement that "government is, or ought to be, instituted for the *common* benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community."[148]

There was an explicit mention of the right of speech by the Pennsylvania Declaration.[149] Yet whether the right was meant to be wielded by an individual against his community was doubtful. For the right was said to belong to "the people" to express "their sentiments."[150] The plural form might be interpreted as suggestive of the idea that the right of speech was, for Pennsylvania, meant to be understood as an instrument of democracy. For example, a speaker may have wished to persuade the community to oppose a measure by a cabal of legislators who sought to enrich themselves at the community's expense, or, in less conspiratorial terms, a speaker may have sought to use the right of speech to prompt the community to reconsider the utility of a recently passed law.[151] This interpretation of the right of speech as a means to further democracy, rather than hyperindividualism, obtained a degree of purchase from how the right of assembly was framed in the Pennsylvania Declaration. The right of assembly—a close cousin of the right of speech—was described by the Pennsylvania Declaration as a means for the people "to consult for their *common good*, to instruct their *representatives*, and to apply to the *legislature* for redress of grievances."[152] So phrased, the right of assembly, and perhaps too the right of speech, was meant to empower people to gather with others to persuade public officials to do what was best for the community.

147. PA. CONST. of 1776, pmbl.(emphases added).

148. PA. CONST. of 1776, § I.V.

149. PA. CONST. of 1776, § I.XII.

150. PA. CONST. of 1776, § I.XII.

151. More about the democratic properties of the right of speech will be discussed later. *See infra* Part V.

152. PA. CONST. of 1776, § I.XVI (emphases added).

Other states drafted their Declarations of Rights in a manner that resembled Pennsylvania's commitment to communitarianism. In 1776, Maryland's Declaration of Rights announced that governments are "instituted solely for the good of the whole."[153] Maryland's Declaration of Rights included a right of speech, but the right was quite limited. The right was enjoyed exclusively by state legislators and only during official meetings.[154] Maryland's restriction was illuminating. For Maryland, the Declaration of Rights was precious as a means to enable elected officials to discuss issues candidly and without fear of criminal prosecution for purposes of passing laws that could help the community. The right of speech, in Maryland's conception, was not vital because it guaranteed the right of hyperindividualist speakers like Paul Robert Cohen to subject a captive audience to his public profanity. Similar to Maryland, Massachusetts ratified a constitution in 1780 that limited the right of speech to legislators and only for formal meetings.[155] Here, too, Massachusetts' purpose for including the right was to further democratic deliberation that would benefit the community: "The freedom of deliberation, speech and debate in either House of the Legislature, is so essential to the rights of *the people*, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other Court or place whatsoever."[156] This assertion by the Massachusetts Constitution also tacitly supplied the people with the legal justification to take political action against the legislature for failing to act on behalf of "the people," or, in the vernacular of this Article, the community.

In addition to state constitutions and their attendant declarations of rights, other evidence was also available regarding what the Founding generation of Americans thought about the right of

153. MD. CONST. of 1776, § I.

154. MD. CONST. of 1776, § VIII ("That freedom of speech and debates, or proceedings, in the l egislature, ought not to be impeached in any other court or judicature.").

155. MASS. CONST. OF 1780, art. XXI.

156. MASS. CONST. OF 1780, art. XXI.

speech. This evidence came from the Sedition Act of 1798.[157] A careful examination of this law and the circumstances surrounding it will reveal that the Founding generation generally supported the rights of the community over those of the individual in relation to the right of speech.[158] According to the Sedition Act, "if any person shall write . . . any false, scandalous and malicious writing . . . against the government 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."[159] One may infer that the reference to seditious writings "against the government of the United States" connoted an injury to the community rather than solely against the apparatus of the state. The Sedition Act will seem excessive for the modern American. But, back in its day, sedition laws were commonplace, and had existed in England since 1275.[160] The British iteration was far more draconian than its American counterpart.[161] The former required the speaker to prove his innocence, whereas the latter required the government to show that the speaker had a seditious tendency, a question for the judge, not a jury.[162] Even so, the Sedition Act, a law passed by Congress, evinced the sentiment that the community should take presumptive priority over the individual speaker.

The circumstances surrounding the Sedition Act are important. For both those who supported the Act *and* those who opposed it believed that the community should take presumptive priority over the individual. Two iconic founders —- James Madison and Thomas Jefferson—penned state resolutions arguing against the Sedition Act. Jefferson was a citizen of Virginia and, under the cover of anonymity, he composed the Kentucky Resolution that protested

157. An Act for the Punishment of Certain Crimes Against the United States (Sedition Act of 1798), ch. 74, 1 Stat. 596 (1798) (expired 1801).

158. *See* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 14–15 (2021).

159. Sedition Act of 1798, § 2.

160. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 42 (2004).

161. *Id.*

162. *Id.* at 44.

the Sedition Act.[163] Madison penned the Virginia Resolution to protest the same.[164] Some have misinterpreted what Jefferson and Madison sought to convey as expressions in support of the individual's right of speech and perhaps even the right of hyperindividualist speech.[165] But a careful review of the Kentucky and Virginia Resolutions will show that they were actually proclamations for states' rights. As such, neither the Virginia Resolution nor the Kentucky Resolution was chiefly an effort to protect the right of the individual speaker against his community. According to both resolutions, a state had the power to nullify federal laws that were unconstitutional from the perspective of the respective state. Specifically, Jefferson and Madison insisted that the Constitution was not, contrary to the views of those like Chief Justice Marshall, the product of all Americans, but the creature of the states.[166] Stated in these terms, it was up to the states—not the national government—to discern if a federal law was inconsistent with the Constitution.[167] And, if so, the states—a discrete community—could nullify the federal law.[168]

Over time, Jefferson and Madison, as authors of their respective resolutions, have been miscast as supporters of the individual's

163. Douglas C. Dow, *Virginia and Kentucky Resolutions of 1798*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Aug. 4, 2024), https://firstamendment.mtsu.edu/article/virginia-and-kentucky-resolutions-of-1798/ [https://perma.cc/3XDW-KLFH].

164. James Madison, Virginia Resolutions Against the Alien and Sedition Acts (Dec. 21, 1798), *reprinted in* JAMES MADISON: WRITINGS 589, 589 (Jack Ravkov ed., 1999).

165. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 132 (1993); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting).

166. Jefferson's Kentucky Resolution read: "That the several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction. . . ." Thomas Jefferson, Kentucky Resolution of 1799, *reprinted in* THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/kenres.asp [https://perma.cc/P5GW-ZNU9] (last visited Aug. 4, 2024).

167. Jefferson's Kentucky Resolution read: "that a nullification, by those sovereignties [states], of all unauthorized acts [by the federal government] done under colour of that instrument, is the rightful remedy. . . ." *Id.*

168. Jefferson's Kentucky Resolution read: "that a nullification, by those sovereignties [states], of all unauthorized acts [by the federal government] done under colour of that instrument, is the rightful remedy. . . ." *Id.*

right of speech against the wishes of the community.[169] This assumption, unfortunately, fails to grapple with the ironic fact that both Jefferson and Madison—citizens of Virginia—had refrained from rebuking the sedition act in their own state, an act that was much harsher than the Sedition Act passed by Congress.[170] The opposition by Jefferson and Madison to the Sedition Act can be more accurately interpreted as stemming from the perspective of states' rights, rather than from the perspective of an individual's right of speech. That is, the protest by Jefferson and Madison was made in the name of the states to regulate their own citizens with regard to political speech. Seen in this sense, both Jefferson and Madison therefore provided support for the view that the community, however conceived, should be permitted to exercise a degree of control over the individual speaker.

It is true that Jefferson and Madison and others who opposed the Sedition Act were greeted with widespread rebuke, but these rebukes did not center on advocating for the right of the hyperindividualist speaker.[171] Instead, the rebukes centered on whether the community for purposes of self-governance should be defined locally or nationally.[172] According to states other than Kentucky and Virginia, Congress had the authority to pass the Sedition Act and

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169. *See* John M. Kang, *Against Political Speech*, 22 NEV. L.J. 803, 812–17 (2022) (discussing how prominent thinkers on both the Political Left and the Political Right have misconstrued the meaning of the Virginia and Kentucky Resolutions) [hereinafter Kang, *Against Political Speech*].

170. The historian Forrest McDonald helpfully observed that by permitting truth as a defense and requiring proof of malicious intent, the terms of the Sedition Act of 1789 "were more lenient than those of the common-law offense of seditious libel that prevailed in every state." 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." FORREST MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876 41 (2000). 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*. *See also* WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 105–106 (1970) (arguing that opposition to the Sedition Act was rooted in support for states' rights rather than the right of speech).

171. *See* MCDONALD, *supra* note 172, at 41; *see also* BERNS, *supra* note 172, at 105–106.

172. *See* MCDONALD, *supra* note 172, at 41; *see also* BERNS, *supra* note 172, at 105–106.

efforts to invalidate it by Virginia and Kentucky were unjustified.[173] States other than Virginia and Kentucky thus argued that the national community had the right to regulate regional communities like Kentucky and Virginia. Put differently, the dispute regarding the Sedition Act was less about the right of speech and more about federalism.[174]

Other evidence from the Founding generation also suggested that the right of speech was best understood in terms of communitarian values rather than hyperindividualism. Consider the comments of Harrison Gray Otis. An eminent Federalist Congressman from Massachusetts, Congressman Otis declared in a speech in 1798 that the right of speech was "nothing more than the liberty of writing, publishing, and speaking one's thoughts, *under the condition* of being answerable to the injured party, whether it be the Government or an individual, for false, malicious, and seditious expressions, whether spoken or written. . . ."[175] For Congressman Otis, the right of speech, like the right of property for Justice Harlan, was enmeshed in a relationship of duties. An individual was not permitted to do whatever he wanted. The speaker, as Congressman Otis explained, had to refrain from publicly sharing views that would harm the community. Put differently, a speaker who indulged in public speech that portrayed an individual in the speaker's community in terms that were "false" and "malicious" had, in effect, abridged the community's dedication to the norms of civility whereby each member of the community was treated as deserving equal dignity.

Congressman Otis was not alone. John Allen was a Congressman from Connecticut and, like Congressman Otis, a Federalist.[176] Like Congressman Otis, Congressman Allen subscribed to a communi-

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173. *See* KANG, *Against Political Speech*, *supra* note 171, at 817–21.

174. See *id.* at 812–21.

175. 8 ANNALS OF CONG. 2147 (1798) (statement of Rep. Harrison Gray Otis).

176. *Allen, John*, HIST. ART & ARCHIVES, UNITED STATES OF REPRESENTATIVES, https://history.house.gov/People/Listing/A/ALLEN,-John-(A000129)/ [https://perma.cc/ZPL7-D6G8] (last visited Aug. 4, 2024).

tarian view of the right of speech. "Because the Constitution guarantees the right of expressing our opinions," Congressman Allen wondered, "am I at liberty to falsely call you a thief, a murderer, or an atheist?"[177] Congressman Allen posed rhetorically, "[b]ecause I have the liberty of locomotion, of going where I please, have I a right to ride over the footman in the path?"[178] Congressman Allen answered his own queries: "The freedom of the press and opinions was never understood to give the right of publishing falsehoods and slanders, nor of exciting sedition, insurrection, and slaughter with impunity."[179] Similar to Congressman Otis, Congressman Allen argued that the right of speech did not extend to words that undermined the community's expectation that its members should live in peace and be able to require that all members treat each other with dignity.

To be clear, neither Congressman Allen nor Congressman Otis argued that an individual lacked the right to express negative opinions. Both men limited their criticisms to speech that was "false, malicious, and seditious," to speech, in other words, that was arguably hyperindividualist and antithetical to the community's basic morals.[180] By arguing that no one had the First Amendment right to publicly utter such harmful speech, Congressmen Allen and Otis, in contrast to the modern Supreme Court, brought to the fore the importance of community values as something that should be considered in weighing whether a speaker had the right to say something.

Congressmen Allen and Otis, as members of the Federalist Party, favored the federal government over the states, but those who were Republicans, and hence favored the states over the federal government, also embraced the communitarian approach to the right of speech. The Republican Congressman Edward Livingston of New York announced in a speech in 1798 that "[e]very man's character is protected by law, and every man who shall publish a libel on any

177. 8 ANNALS OF CONG. 2098 (1798) (statement of Rep. John Allen).
178. *Id.*
179. *Id.*
180. 8 ANNALS OF CONG. 2147 (1798) (statement of Rep. Harrison Gray Otis).

part of the Government, is liable to punishment."[181] Today, contrary to Congressman Livingston's wishes, a speaker is protected by the First Amendment when he libels the government.[182] Congressman Livingston's assertion is not enlisted in this instance to show the merits of making people liable for libeling the government, but to suggest how those like Congressman Livingston in the Founding generation cherished the notion that government as a representative of the community should be afforded due respect.

Another Republican Congressman, John Nicholas, of Virginia echoed Congressman Livingston's communitarianism. "If there could be safety in adopting the principle," Congressman Livingston proposed, "that no man should publish what is false, there certainly could be no objection to it."[183] Congressman Nicholas, therefore, did not oppose the substance of the Sedition Act. What he resented was how the Sedition Act was a creature of the federal government, and thus an affront to the right of states to engage in self-government. Specifically, Congressman Nicholas and other Republicans opposed the practice of federal marshals—rather than state officials—choosing the jurors who were tasked with deciding whether a speaker had violated the Sedition Act.[184] It was not unreasonable for Congressman Nicholas and other Republicans to fret that the federal marshals, to the detriment of the state, were following orders from the President and selecting jurors who would be favorable to the latter's wishes.[185] For Republicans like Congressman Nicholas, then, the objection to the Sedition Act thus turned on the position that the local community, not the national community, should determine if a speaker was guilty of sedition. This preoccupation with the identity of the relevant community caused Nicholas to protest that "it was not the intention of the people of this country to place any power of this kind in the hands of the

181. 8 ANNALS OF CONG. 2153 (1798) (statement of Rep. Edward Livingston).
182. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 299 (Goldberg, J., concurring).
183. 8 ANNALS OF CONG. 2140 (1798) (statement of Rep. John Nicholas).
184. *See* 8 ANNALS OF CONG. 2164 (1798) (statement of Rep. Albert Gallatin).
185. *Cf. id.*

General [federal] Government. . . ."[186] As suggested by Nicholas, the problem for some in the Founding generation with the Sedition Act was not that the Act suppressed what the Article has called hyperindividualism, but that the Act impinged on the rights of the local community to decide its own political affairs.

C. Supreme Court Precedent

The skeptical reader might object that the aforementioned authorities, while esteemed, have limited value for the task of formulating a theory of constitutional adjudication. The reader might insist that one must look instead to the Supreme Court for guidance. Fortunately, notwithstanding *Lochner* and its judicial progeny, there is ample evidence from the Supreme Court for the constitutional precept that the community takes priority over the individual. Start with the authoritative words of Chief Justice John Marshall. A few decades after the Constitution's ratification, Chief Justice Marshall underscored the central place of the community in the Constitution. In the landmark case of *McCulloch v. Maryland*, he declared in 1819: "The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit."[187] Chief Justice Marshall thus reaffirmed the words in the Constitution's Preamble that the Constitution was made for *We, the people*. In *McCulloch*, Chief Justice Marshall also announced that "laws are but means to promote the legitimate end of all government—the felicity of the people."[188] So forceful in *McCulloch* was Chief Justice Marshall's regard for the community that he meant community in the largest sense possible, the *national* community: "All powers are given to the national government, as the people will."[189] That the powers of the national community were enumerated in the Constitution did

186. 8 ANNALS OF CONG. 2140 (1798) (statement of Rep. John Nicholas).
187. 17 U.S. 316, 404–05 (1819).
188. *Id.* at 384.
189. *Id.*

not mean that the Framers intended to hamstring the national community, stressed Chief Justice Marshall.[190] "It was impossible for the [F]ramers of the Constitution to specify, prospectively, all these means, both because it would have involved an immense variety of details, and because it would have been impossible for them to foresee the infinite variety of circumstances. . . ."[191] Using *McCulloch* as his platform, Chief Justice Marshall furnished an account of the national community's expansive right to regulate its members.

Subsequent to *McCulloch*, the Supreme Court continued to interpret the Constitution in terms of deference for the community. *Munn v. Illinois* from 1876 is an exemplar.[192] In *Munn*, the Illinois legislature, in an attempt to curb price fixing, capped prices for the storage of grain in warehouses.[193] In upholding the law, Chief Justice delivered an instructive opinion.[194] He started with an observation about what it meant to be a member of the community. "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain," Chief Justice Waite announced.[195] In an interesting move, Chief Justice Waite recited the Massachusetts Constitution in *Munn* so that he could refine what he believed the U.S. Constitution meant by a political community: "A body politic . . . is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[196]

Given Chief Justice Waite's broad view in *Munn* of the community's prerogative under the Constitution to regulate the individual, it follows logically that Chief Justice Waite would conceive the community's "police powers" under the Tenth Amendment in a correspondingly capacious manner. "From this source come the police powers, which . . . 'are nothing more or less than the powers of

190. *Id.* at 385.
191. *Id.*
192. 93 U.S. 113 (1876).
193. *Id.* at 123.
194. *Id.* at 136.
195. *Id.* at 124.
196. *Id.* (quoting MASS. CONST. of 1780, pmbl.).

government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.'"[197] Chief Justice Waite applied this interpretation of the Constitution to the facts of *Munn*. Munn had argued that Illinois had violated the Fourteenth Amendment's Due Process Clause by abridging his right to sell space in his grain elevator for rates that were higher than those permitted by Illinois.[198] Writing for the Court, Chief Justice Waite rejected Munn's claim and responded in a way that situated the right of the individual in the context of his membership in a community. "Property," Chief Justice Waite explained, "does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."[199] A right—even a right as indispensable as the right to property—was not something that one possessed as a matter of hyperindividualism, Chief Justice Waite suggested. "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."[200]

Subsequent cases reaffirmed the deference to the community that was articulated in Chief Justice Waite's *Munn* opinion. Twelve years later, in 1887, the Supreme Court took up *Mugler v. Kansas*.[201] Kansas forbade its residents from making or selling liquor.[202] The Supreme Court upheld this prohibition.[203] The author of the Court's opinion was none other than Justice John Marshall Harlan I, the grandfather of Justice John Marshall Harlan II, who had authored the paean to hyperindividualism in *Cohen*.[204] The hyperindividual-

197. *Id.* at 125 (quoting Thurlow v. Massachusetts (*License Cases*), 46 U.S. 504, 583 (1847)).

198. *Id.* at 123.

199. *Id.* at 126.

200. *Id.*

201. 123 U.S. 623 (1887).

202. *Id.* at 670.

203. *Id.* at 675.

204. *See id.* at 653.

ism that the grandson had wrought in 1971 had been ardently opposed by the grandfather in 1887.[205] Like *Munn*, *Mugler* involved property rights.[206] The elder Justice Harlan, writing in 1887, did not treat this crucial right trivially, but he sought to articulate the proper place of individual rights in the community. Justice Harlan wrote in *Mugler*:

> The principle, that no person shall be deprived of life, liberty, or property, without due process of law . . . has never been regarded as incompatible with the principle, *equally vital*, because essential to the peace and safety of society, that all property in this country is held under the *implied obligation* that the owner's use of it shall not be injurious to the community.[207]

The above passage, published 18 years before Justice Peckham's *Lochner* opinion, was unusually illuminating. Embedded in Justice Harlan's passage were the earlier thoughts expressed by Chief Justice Marshall, the *Federalist Papers*, James Wilson, and others. Like these other authorities, Justice Harlan stated in *Mugler* that the community took precedence over the individual.

Justice Harlan, however, took the additional step of providing a nuanced interpretation of the general principle regarding the priority of the community. He announced that an individual's "right" was not really a right at all, at least as hyperindividualists understood it. An individual's "right" was actually an amalgam of license and *duty*. For Justice Harlan, an acceptance of this conception of individual rights was the price of membership in a community that affords the individual crucial benefits, including protection, social meaning, and, indeed, opportunities for the individual to exercise his personal freedom without interference by others, as in James Wilson's state of nature. This is why Justice Harlan in *Mugler* declared that an individual's right was attended by "the implied obligation" that the individual will not use his right in a manner that was "injurious to the community."[208] Justice Harlan stressed in

205. *See id.* at 665.
206. *See id.* at 657.
207. *Id.* at 665 (emphases added).
208. *Id.*

Mugler that there were "limits beyond which legislation cannot rightfully go."[209] However, Justice Harlan also stressed that "*every* possible presumption is to be indulged in favor of the validity of the statute."[210] The only exception, Justice Harlan wrote in *Mugler*, was when there is "no real or substantial relation" to what the state purported to do in terms of "public health, the public morals, or the public safety."[211]

Twelve years after Justice Harlan's *Mugler* opinion, the Supreme Court in *Holden v. Hardy* continued to uphold the principles delineated by Justice Harlan.[212] The reader will recall that *Holden* concerned a law that limited the hours that miners could work underground and in smelters.[213] The safety of the miners was the point of the law. Justice Brown, writing for the Court, upheld the law in 1898.[214] Justice Brown took note in *Holden* of the Utah Supreme Court's conclusion that "[t]he conditions with respect to health of laborers in underground mines doubtless differ from those in which they labor in smelters and other reduction works on the surface."[215]

Justice Brown next clarified the circumstances under which the Court could overturn legislation that tried to protect the community. He argued in *Holden* that "[t]he question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its actions be a *mere excuse* for an unjust discrimination, or the *oppression or spoliation* of a particular class."[216] With these words, Justice Brown underscored in *Holden* the deference that the community was owed under the Constitution. Justice Brown, in effect, turned Justice Peckham's *Lochner* opinion on its head. Justice Peckham had insinuated, without any evidence, that the community's attempt to regulate the hours of

209. *Id.* at 661.
210. *Id.* (emphasis added).
211. *Id.*
212. 169 U.S. 366, 397 (1898).
213. *See supra* notes 40–43 and accompanying text.
214. *Holden*, 169 U.S. at 398.
215. *Id.* at 396 (quoting State v. Holden, 46 P. 1105, 1105–06 (Utah 1896)).
216. *Id.* at 398 (emphases added).

bakers should be struck down because it "[gave] rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare."[217] By contrast, Justice Brown refused to indulge such baseless speculation.

Justice Brown also generously furnished a political theory to underwrite *Holden*'s decision in favor of the community. In *Holden*, Brown cited as authoritative the words of Chief Justice Lemuel Shaw of the Massachusetts Supreme Court, the father-in-law of the novelist Herman Melville.[218] Penned in 1851, Shaw's words, prefiguring Harlan's *Mugler* opinion in 1887, were edifying:

> We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified his title, holds it under the *implied liability* that its use may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.[219]

By quoting these words from Chief Justice Shaw, Justice Brown in *Holden* put on offer three tenets.

First, civil society should aspire to be "well-ordered," rather than a collection of individuals who seek to be exempted from rules that everyone has to follow. Second, an individual's right to do something does not exist prior to society in some fabled state of nature as a "natural right." Instead, the right is something that exists in civil society and that is embedded in the web of duties that one owes to one's community. This is why an individual holds a right "under the implied liability" that it shall not be used to hurt others. Third, the community, like the individual, has rights of its own and can exercise these rights against an individual who is dangerous to the community.

There was another portion of Chief Justice Shaw's opinion that

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217. Lochner v. New York, 198 U.S. 45, 63 (1905).

218. *Holden*, 169 U.S. at 392.

219. *Id.* (quoting Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84–85 (1851)) (emphasis added).

Justice Brown excerpted in *Holden*. This excerpt alluded to what kinds of regulations the community could pass:

> Rights of property, like all other social and conventional rights, are subject to such *reasonable* limitations in their enjoyment, as shall prevent them from being injurious, and to such *reasonable* restraints and regulations by law as the legislature, under the . . . power vested in [it] by the Constitution, may think necessary and expedient.[220]

Chief Justice Shaw's emphasis on reasonableness was suggestive. It drew a legal line for what the community could do, but it also underscored the presumptive priority of the community over the individual.

As Chief Justice Shaw, Justice Brown, and the elder Justice Harlan demonstrated, there existed a train of case precedent that eschewed hyperindividualism in favor of a communitarian approach. The next section applies the communitarian approach to the right of speech and offers examples in which the Supreme Court had at times adopted aspects of the communitarian approach in relation to the right of speech, only to abandon much of these efforts in the ensuing years.

IV. APPLYING THE COMMUNITARIAN APPROACH TO THE RIGHT OF SPEECH

In 1971, *Cohen v. California* heralded the Supreme Court's resurrection of hyperindividualism in the domain of the First Amendment.[221] But decades before, the Court had already fashioned a First Amendment jurisprudence that drew from the communitarian approach articulated by the Court in *Holden*, *Mugler*, and similar cases.

Chaplinsky v. New Hampshire is a paradigmatic case.[222] Decided in 1942, *Chaplinsky* held that "fighting words" did not merit protection under the First Amendment.[223] Justice Murphy, writing for the

220. *Id.*
221. *See supra* notes 70–89 and accompanying text.
222. 315 U.S. 568 (1942).
223. *Id.* at 573.

Court, explained why fighting words were unprotected: "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[224] Justice Murphy brought to the fore the rights of the community, and he did so very suggestively. Justice Murphy argued that the individual's right of speech should be assessed in terms of whether it was likely to contribute to the community's search for truth and whether it was likely to hurt the community's "social interest in order and morality."

Justice Murphy's prioritization of the community affirmed prior iterations of such a notion. *Federalist 10*, for example, had clarified that the Constitution forbade individuals from undermining "the permanent and aggregate interests of the community."[225] Similarly, Chief Justice Waite had reminded citizens that "[a] body politic . . . is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[226] And Congressman Harrison Gray Otis had explained in 1798 that the right of speech was "nothing more than the liberty of writing, publishing, and speaking[] one's thoughts, *under the condition* of being answerable to the injured party, whether it be the Government or an individual, for false, malicious, and seditious expressions, whether spoken or written."[227] Like Congressman Otis, Justice Murphy in *Chaplinsky* did not treat the right of speech as something that existed in a social

224. *Id.* at 572. In asserting the right of judges to carve out a category of unprotected speech, there is a facial similarity between what Justice Murphy did in *Chaplinsky* and what Justice Peckham did in *Lochner*. However, there is one critical difference. Justice Peckham indulged in judicial activism by overturning the law passed by the community, whereas Justice Murphy upheld a law passed by the community. Justice Peckham's act as a jurist was to protect the individual against the community, whereas Murphy's act as a jurist was to do the reverse.

225. THE FEDERALIST NO. 10, at 42–43 (James Madison) (George W. Carey & James McClellan eds., 2001).

226. Munn v. Illinois, 93 U.S. 113, 124 (1876) (quoting MASS. CONST. of 1780, pmbl.).

227. 8 ANNALS OF CONG. 2148 (1798) (statement of Rep. Harrison Gray Otis) (emphasis added).

vacuum. For Justice Murphy, the substance and limits of the right were informed by the community's values. Accordingly, the right of speech was not just something to be protected by the state—by, that is, an unelected federal judge—but something that was better understood in the context of its effects on the community.

In *Chaplinsky*, Justice Murphy provided an alternative to Justice Harlan's position in *Cohen v. California* that "one man's vulgarity is another's lyric."[228] Justice Harlan had deployed this aphorism to block the community from asserting its right to regulate Cohen from using profanity in a courthouse.[229] Justice Harlan confessed as much in his opinion: "Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of *taste* and *style* so largely to the *individual*."[230] Such a celebration of hyperindividualism abraded against the Court's traditional dedication to the rights of the community to regulate the individual, as expressed by Justice Murphy's opinion in *Chaplinsky* from 1942.[231]

Two years before *Chaplinsky* was decided, the Court had decided another First Amendment case and had fashioned an opinion that also resonated with the communitarianism on offer from the Court in *Mugler*, *Munn*, and *Holden*, along with the views of the Founding generation. This communitarian opinion appeared in *Cantwell v. Connecticut*.[232] In *Cantwell*, a Jehovah's Witness named Newton Cantwell was convicted of breach of the peace as he tried to proselytize new members.[233] However, unlike in *Chaplinsky*, the conviction in *Cantwell* was overturned.[234] That being said, *Cantwell* did not reflect the hyperindividualism that had directed the Court's opinion in *Cohen v. California*, *Gooding v. Wilson*, and their ilk.[235] Authoring the Court's *Cantwell* opinion, Justice Roberts concluded that

228. Cohen v. California, 403 U.S. 15, 25 (1971).
229. *See supra* notes 70–87 and accompanying text.
230. *Cohen*, 403 U.S. at 25 (emphases added).
231. *See supra* note 225 and accompanying text.
232. 310 U.S. 296 (1940).
233. *See id.* at 300.
234. *Id.* at 311.
235. *See id.* at 309–11.

Cantwell did not violate the norms of the community.[236] Justice Roberts explained that Cantwell, while eager to convert new Jehovah's Witnesses, did not engage in speech that was "profane, indecent, or abusive" toward "the person of the hearer."[237] One could not say the same of Johnny C. Wilson, the foul-mouthed and threatening war protestor or of the white supremacist Robert Viktora. Unlike such speakers, Cantwell expressed "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, [and] no personal abuse."[238]

Had Cantwell resorted to speech that resembled the speech proffered by Wilson or Viktora, he would have reneged on what Justice Brown identified in *Holden* as an "implied liability" for individuals to exercise their rights in a manner that is not "injurious to the rights of the community."[239] True, Justice Roberts explained in *Cantwell*, "the tenets of one man may seem the rankest error to his neighbor," but the Jehovah's Witness Cantwell did not impose his religious tenets on others such that he would have violated the moral expectations of the community for people to behave with basic civility.[240] Notice how Justice Roberts—writing in 1940 and in an uncanny anticipation of Justice Harlan's reckless assertion in *Cohen* that "one man's vulgarity is another's lyric"[241]—argued that the First Amendment protects the individual's right of speech even in instances where the speaker visibly offends his community. However, unlike Justice Harlan in *Cohen*, Justice Roberts situated an individual's right of speech in the web of obligations that the individual owes to his community in relation to the norms of civility and mutual respect.

The next section gathers the communitarian insights articulated by Harlan and others, and applies them to a series of Supreme

236. *Id.*
237. *Id.* at 309.
238. *Id.* at 310.
239. Holden v. Hardy, 169 U.S. 366, 392 (1898).
240. *Cantwell*, 310 U.S. at 310.
241. Cohen v. California, 403 U.S. 15, 25 (1971).

Court cases whose outcomes were initially decided by a hyperindividualist approach to the right of speech.

A. Public Profanity

In *Cohen v. California*, the foulmouthed nineteen-year-old Paul Robert Cohen, attired in his profane jacket, had been arrested for "maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."[242] Judged from the communitarian approach, there was nothing, to quote Justice Brown's words from *Holden*, suggesting that the law was "a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."[243] The law in *Cohen* was meant to enforce the expectation by the community that its members should treat each other with civility and respect, things that no community can do without.[244]

Regrettably, Justice Harlan, while writing for the *Cohen* Court, mischaracterized what the community of Californians was trying to do. According to Justice Harlan, the community of Californians had "act[ed] as guardians of public morality" and tried to "remove this offensive word from the public vocabulary."[245] Consider the implausibility of Justice Harlan's allegation. He suggested that the community of Californians was trying to erase the F-word from public discourse. How could California—how could *anyone*—accomplish such a breathtaking feat in 1971? Justice Harlan's ominous depiction of the community was the paranoid heir to Justice Peckham's portrayal of the community as a "*pater familias*, over *every* act of the individual . . . ."[246] If in fact the community in *Cohen* were trying to pursue the unrealistic ends ascribed to it by Justice Harlan, then Cohen's conviction should have been overturned as glaringly unreasonable.[247] But Justice Harlan's description of what

242. *Id.* at 16 (quoting CAL. PENAL CODE § 415 (West 1970))

243. *Holden*, 169 U.S. at 398.

244. *See* Kang, *The Uses of Insincerity*, *supra* note 124, at 378–81; Kang, *Manliness and the Constitution*, *supra* note 124, at 293–96.

245. *Cohen*, 403 U.S. at 22–23.

246. Lochner v. New York, 198 U.S. 45, 62 (1905) (second emphasis added).

247. At the very least, California's law, if Justice Harlan's characterization of it was

the community was doing in *Cohen* was inaccurate. California explicitly stated in its brief that, under its law, individuals would not be punished for using the F-word outside the courthouse.[248] Therefore, back in the Los Angeles of 1971, Cohen enjoyed an abundance of lawful opportunities to parade his vulgar jacket in any number of venues: at a boisterous political rally in UCLA's Bruin Plaza, at a smoky night club on Sunset Boulevard, or at a raucous Doors concert at the Hollywood Bowl. Cohen was free to proudly show off his profanity in these and other places. However, those "present in the corridor of the Los Angeles County Courthouse were *not* free to avoid the appellant's jacket" and "[t]hese individuals were a 'captive audience' forced to observe appellant's offensive conduct."[249]

Cohen would have been decided differently under the communitarian approach. Under the communitarian approach, the individual has to be mindful of his responsibility to his community. Chief Justice Waite in *Munn* had remarked in 1876:

> When . . . one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.[250]

One might object that the right of property is not equivalent to the right of speech. While there are no doubt differences between property and speech, both the right of property and the right of speech are explicitly protected by the Constitution. It would seem difficult to imagine what constitutional democracy would look like without the right of property or the right of speech. However, neither right is absolute and, as this Article has suggested, an exercise of both rights is circumscribed by the individual's obligations to the community. Be that as it may, there was evidence from the Founding

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accurate, would have been struck down as substantially overbroad. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 854 (1991).

248. Brief for Respondent at 8, 13, 16, 18, Cohen v. California, 403 U.S. 15 (1971) (No. 299) (arguing that public profanity was not permitted for captive audiences that included children).

249. *Id.* at 18.

250. Munn v. Illinois, 94 U.S. 113, 126 (1876).

generation that a reckless exercise of the right of speech was not one's for the asking. As Congressman John Allen declared in 1798, "[t]he freedom of the press and opinions was never understood to give the right of publishing falsehoods and slanders, nor of exciting sedition, insurrection, and slaughter, with impunity."[251]

With such views in mind, return to *Cohen*. In *Cohen* the speaker sought out one of the most sacred of civic forums—a courthouse—and, before a captive audience that included children, decided to parade the F-word on his jacket. By these actions, Cohen, to quote Chief Justice Waite, "in effect, grant[ed] to the public an interest in that use [of the right of speech], and [had] to be controlled by the public for the common good."[252] And the "common good" required Cohen to refrain from wearing his profane jacket in a courthouse.

So, too, the elder Justice Harlan had argued in *Mugler* back in 1887 that, notwithstanding the guarantees afforded by the Due Process Clause, there exists the constitutional principle that an individual exercises his right "under implied obligation that the owner's use of it shall not be injurious to the community."[253] As applied to *Cohen*, this principle meant that Cohen bore the implied obligation to comport himself with the premise that there was a right place and a right time to say something, and that the operating hours of a community's courthouse were neither the right place nor the right time for his profanity. Unfortunately, wedded to hyperindividualism, Justice Harlan, on behalf of the *Cohen* Court, recklessly pronounced that "one man's vulgarity is another's lyric," as if this trite aphorism could negate the community's demand for civility and mutual respect in places of public solemnity.[254]

A communitarian approach can also be applied to other cases involving public profanity. Return to the menacing rhetoric of Johnny C. Wilson, the Black war protestor in *Gooding v. Wilson*.[255] Wilson had hurled racist threats of violence against white police officers

251. 8 ANNALS OF CONG. 2097 (1798) (statement of Rep. John Allen).
252. *Munn*, 94 U.S. at 126.
253. Mugler v. Kansas, 123 U.S. 623, 665 (1887).
254. Cohen v. California, 403 U.S. 15, 25 (1971).
255. 405 U.S. 518, 518 (1972).

who had prevented him from blocking the entrance to a military recruitment center.[256] Wilson had yelled, "White son of a bitch, I'll kill you," and "[y]ou son of a bitch, I'll choke you to death," and said to an accompanying officer, "[y]ou son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."[257] For these appalling words, Wilson was prosecuted under a Georgia statute that forbade a person from saying "opprobrious" or "abusive" words to another.[258] A hyperindividualist approach by Justice Brennan impelled the Court to declare the community's statute unconstitutional because it "sweeps too broadly" and failed to utilize "more sensitive tools" for punishing offensive speech.[259] The community, in other words, had to endure the racist and threatening Wilson and had to devise a statute for him that was more refined, or so the hyperindividualism on offer by Justice Brennan demanded.[260]

The communitarian approach would take a different tack. To recite Justice Brown's words from *Holden*, the communitarian approach would counsel that "[t]he question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its actions be a *mere excuse* for an unjust discrimination, or the *oppression or spoliation* of a particular class."[261] It is plain that the community did not pass its law forbidding speakers from saying things that were "opprobrious" or "abusive" to one

256. *Id.* at 519 n.1.

257. *Id.*

258. *Id.* at 518–19.

259. *Id.* at 527, 528.

260. The skeptical reader might object that this characterization of Justice Brennan is unfair and that *Wilson* was in fact a pedestrian example in which the law, if rehabilitated with precision, could survive Justice Brennan's objection. There are two potential problems with this generous reading of Justice Brennan. First, as stated previously, the law passed by Georgia was much less vague than that which was struck down in *Coates v. Cincinnati*, the case that created the undue vagueness doctrine. *See supra* notes 101–103 and accompanying text. Second, Justice Brennan, inexplicably, never mentioned *anything* about what Wilson had yelled to the police officer, as if doing so might jeopardize the persuasiveness of his opinion. The relevant details of Wilson's racist threats were found in Justice Blackmun's dissenting opinion. *See Wilson*, 405 U.S. at 534–37 (Blackmun, J., dissenting).

261. Holden v. Hardy, 169 U.S. 366, 398 (1898) (emphases added).

another as a "mere excuse" to stifle criticism "by a particular class" of speakers who opposed America's involvement in the Vietnam war or the military draft.

From the communitarian approach, the Court could have pondered what an average person in the community would likely regard as "opprobrious" or "abusive" words.[262] The meanings of "opprobrious" or "abusive" are amenable to more than one interpretation. What the words in a statute like the one in *Wilson* require from a communitarian perspective is for the Court to imbue them with the meaning that is necessary to render them compatible with the First Amendment.[263] In *Wilson*, the Court could have easily done so. A Johnny C. Wilson who simply criticized the police as "racist" would have been protected,[264] as would a Johnny C. Wilson who called them "pigs" or "bullies."[265] While coarse, such denouncements would have amounted to criticism of the government, the sort of speech that the Constitution was designed to protect.[266] The *Wilson* Court could have narrowed the meaning of the

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262. Precedent exists for relying on a reasonable person standard. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Miller v. California, 413 U.S. 15 (1973).

263. A perceptive reader might wonder whether this invitation for the Court to imbue the Constitution with meaning is consistent with the Article's earlier criticisms of judicial activism. *See supra* notes 11, 15, 29, 36–37, 66, 105, 227, 364 and accompanying text. There is a basic difference between the invitation here and the criticism there. The former turns on a judge's reasonable perception that the community seeks to regulate a hyperindividualist party, whereas the latter turns on a judge who seeks to empower the hyperindividualist party. Moreover, there is precedent for such narrowing by the Court in *Chaplinsky* and *Cantwell*. The respective statutes in both cases were at least as vague as the one in *Wilson*, if not more so, but the Court narrowed their meaning by meditating on what a reasonable person would think about their meanings. *See supra* notes 227 and 240–41 and accompanying text.

264. To prohibit such speech would amount to viewpoint discrimination. *See* Marjorie E. Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99 (1996).

265. Such words would be protected as long as they are not, as interpreted in context, fighting words or incitement to clear and present danger. *See Chaplinsky*, 315 U.S. at 573 (defining fighting words); Brandenburg v. Ohio, 395 U.S. 444, 447 (defining clear and present danger).

266. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272–73 (1964) (arguing that the right of speech is intended chiefly to protect criticism of public officials); Hartzel v. United States, 322 U.S. 680, 690 (1944) (Reed, J., dissenting)("The right to criticize the Govern-

community's statute to accommodate political criticism while prohibiting Wilson's frightening and racist threats of violence. Further, while one might sympathize with Wilson's hostility toward the military and the police, Wilson also bore the responsibility under a communitarian approach to eschew words that would be injurious to the community.[267] Wilson could have expressed his contempt for the white police officers without resort to violent threats of death that were spiked with racism. Such threats were plainly injurious to the community. For they violated the basic tenet of the community that its members should treat each other with equal respect and refrain from viciously undermining each other's dignity.

One final case remains for reexamination in the realm of extremist speech: *R.A.V. v. St. Paul*.[268] Robert Viktora was a brutal white supremacist who had terrorized the Joneses, the only Black family in his St. Paul neighborhood.[269] A series of vandalisms and racist slurs foreshadowed for the Joneses what Viktora and his white supremacist friends would eventually do.[270] Eventually, they planted a burning cross in the middle of the night on the Jones's front lawn.[271] Justice Scalia, writing for the Court, in an unapologetic mood of hyperindividualism, had overturned the community's law as an instance of viewpoint discrimination.[272] His condemnation hinged on the metaphor of a referee in a boxing match: "St. Paul has no such

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ment . . . is not questioned"); Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 516 (2004) ("A fundamental principle of First Amendment jurisprudence is that a speaker may never be punished for criticizing the government"); Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 852 (1984) (arguing that right to criticize government would amount to seditious libel); *see also* Houston v. Hill, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers").

267. *See* Mugler v. Kansas, 123 U.S. 623, 665 (1887) (discussing implied obligation not to injure one's community).

268. 505 U.S. 377 (1992).

269. *See* Marcus, *supra* note 107.

270. *Id.*

271. *R.A.V.*, 505 U.S. at 379.

272. *Id.* at 391, 395.

authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[273] Justice Scalia shifted a case about the right of a community to protect a Black family from being terrorized by a white supremacist into the vernacular of hyperindividualism. Justice Scalia described the case as a boxing match between two individuals, a match in which the city government of St. Paul was supposed to stand aloof as a morally numb referee, rather than as the representative of a collection of conscientious citizens who endeavored to define the ethical character of their community.

If *R.A.V.* was decided in terms of a communitarian approach, St. Paul's law would be upheld. In *R.A.V.*, the community passed an ordinance that restricted a speaker from expressing an idea—like a burning cross—that the speaker knew would likely arouse anger, alarm, or resentment on the basis of race.[274] Under the communitarian approach, such an ordinance would be judged, as Justice Brown wrote in *Holden*, for "the common good and general welfare."[275] St. Paul's law was intended to prevent racists from spewing savagely hurtful speech against racial minorities.[276] It is true that St. Paul's ordinance was vague because the ordinance did not make unequivocally clear what kinds of statements on the basis of race would arouse "anger," "alarm," or "resentment." But the meanings of these terms could have been narrowed by the Court.[277] In the eyes of any reasonable person, a white supremacist burning a cross on a Black family's front lawn qualified as something that would arouse "anger," "alarm," or "resentment" on the basis of race. On the other hand, suppose Viktora had given a racist speech in a public park in St. Paul. Or, suppose that Viktora, proclaiming that whites were the

273. *Id.* at 392.

274. *Id.* at 379, 380.

275. Holden v. Hardy, 169 U.S. 366, 392 (1898).

276. Brief for Respondent at 5, R.A.V. v. St. Paul, 505 U.S. 377 (1992) (No. 90-7675), 1991 WL 530764.

277. In *Chaplinsky* and *Cantwell*, the Supreme Court encountered laws that are more vague but, instead of overturning them, the Court thoughtfully engaged the facts of both cases and, in effect, narrowed the meaning of the respective laws in both cases. *See supra* notes 225–43 and accompanying text.

superior race, had passed out racist leaflets in front of St. Paul's Macalester College. In either hypothetical, Viktora's speech would be protected under the First Amendment as expressions of discontent toward the norms of racial egalitarianism.[278] Phrased differently, a flat ban on any criticism of reigning social beliefs would be akin to the virtual abolishment of the right of speech.[279]

What Viktora did to the Jones family, however, was not the stuff of political criticism. He was trying to terrorize the Joneses by erecting a burning cross in the middle of the night. Under a communitarian approach to the First Amendment, a speaker holds his right "under the implied obligation that the owner's use of it shall not be injurious to the community."[280] From the communitarian perspective, Viktora bore the implied obligation to respect *basic* norms of civility that every member of the community owed to every other. Viktora could have voiced his white supremacist views in locales that were far from the Jones's residence and in a manner that would not have caused the lone Black family in the neighborhood to fear for its safety.[281] In its brief, St. Paul formulated its argument in terms of the communitarian approach: "On balance, the minimal First Amendment rights of one who clandestinely burns a cross in an African American's yard are far outweighed by the rights of the victims to live where they wish in peace."[282] It was unfortunate that the *R.A.V.* Court, gripped by the ideology of hyperindividualism, discounted the merits of this affirmation of communitarianism.

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278. As long as Viktora's words did not amount to fighting words, clear and present danger, or some other category of unprotected speech, he would be protected in saying such things. *See Chaplinsky*, 315 U.S. 568, 572 (1942) (defining fighting words as those which are likely to incite an immediate breach of the peace and that are not essential for the exposition of ideas); *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (defining speech that is a clear and present danger as that which advocates imminent lawless action and is likely to produce such action).

279. This was in fact St. Paul's argument. Brief for Respondent at 35, R.A.V. v. St. Paul, 505 U.S. 377 (1992) (No. 90-7675), 1991 WL 530764, at *35.

280. Mugler v. Kansas, 123 U.S. 623, 665 (1887).

281. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 368 (2003) (striking down statute that forbade cross burnings as long as they were done on the owner's property).

282. Brief for Respondent at 6, R.A.V. v. St. Paul, 505 U.S. 377 (1992) (No. 90-7675), 1991 WL 530764.

B. Commercial Speech

As with its approach to extremist speech,[283] the Supreme Court has adopted a hyperindividualist approach to commercial speech. In 1976, the Court stressed that the free flow of commercial information was "indispensable to the proper allocation of resources in a free enterprise system" because commercial information informs the private decisions that drive said system.[284] By "commercial speech," the Court had in mind, among other things, information about products available for purchase. As the Court subsequently stated, "we observed that a 'particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'"[285]

Nonetheless, the Court acknowledged that commercial speech was entitled to less protection than political speech because there was a higher risk that commercial speech, more so than political speech, could be misleading given the speaker's profit motive.[286] Instead of applying strict scrutiny, the Court settled on an ostensibly less demanding standard, created in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[287] The *Central Hudson* test stipulated that a law regulating commercial speech had to satisfy certain requirements. First, the state had to assert a "substantial interest to be achieved by restrictions on commercial speech."[288] Second, the restriction had to "directly advance the state interest involved."[289] Third, "if the governmental interest could be served

283. *See infra* Part IV.A.

284. Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

285. Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995).

286. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of N.Y., 447 U.S. 557, 566 (1980).

287. *See id.* at 557.

288. *Id.* at 565.

289. *Id.* at 564.

as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[290] On its face, the *Central Hudson* test may not appear manifestly deferential to the community. However, the test, which was formulated in 1980, was more deferential than strict scrutiny.[291]

Things took a different turn by 1995. By then, the *Central Hudson* test had adopted the animating ethos of hyperindividualism, a change that was on display in *Rubin v. Coors Brewing Co.*[292] Congress, the political body charged with acting on behalf of the national community, passed a law that prohibited beer labels from displaying alcohol volume.[293] The purpose of the law was "to suppress the threat of 'strength wars' among brewers, who, without the regulation, would seek to compete in the marketplace based on the potency of their beer."[294] Such competition among brewers, the community feared, could "lead to greater alcoholism and its attendant social costs."[295]

Justice Thomas, writing for the Court, acknowledged that the federal law furthered a substantial interest under the *Central Hudson* test, but Justice Thomas ultimately declared the law unconstitutional.[296] He asserted that the restriction on advertising alcohol content failed the *Central Hudson* test because the restriction did not "directly advance" the substantial government interest and was "more extensive than necessary" to serve said interest.[297] Justice Thomas declared that "the Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.'"[298] This burden, as Justice

290. *Id.*

291. *See* Leslie Gielow Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 LEWIS & CLARK L. REV. 1081, 1109 (2017).

292. 514 U.S. 476 (1995).

293. *Id.* at 478.

294. *Id.* at 479.

295. *Id.* at 485.

296. *Id.* at 478.

297. *Id.* at 486.

298. *Id.* at 487 (quoting Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)).

Thomas quoted from a previous case, "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will *in fact* alleviate them to a *material* degree."[299] Justice Thomas cautioned that "this requirement was critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'"[300]

Parse Justice Thomas's language, with its fulsome devotion to hyperindividualism. Without anything broaching a coherent justification, Justice Thomas put the burden on the community to justify its law. Worse, he required the community to satisfy an impossible standard of proof. Silently embedded in Justice Thomas's arguments was the hyperindividualism that was first introduced in Justice Peckham's *Lochner* opinion. A vexed Justice Peckham had demanded that, in order to justify its labor law, New York had to satisfy an impossible standard of proof.[301] Justice Peckham, the reader will recall, had required New York to prove that "bakers as a class are not equal in intelligence and capacity to men in other trades."[302] "They are in no sense wards of the state," Justice Peckham admonished.[303] It was this heedless enthusiasm for hyperindividualism that also impelled Justice Thomas's opinion in *Coors Brewing*. Justice Thomas began with the unjustified assumption that the consumer of malt liquor—even a consumer who was an incorrigible alcoholic and who was, quite literally, drinking himself to death—should have untrammeled access to information about which variety of malt liquor contained the most alcohol. Justice Thomas was willing to facilitate an alcoholic's insatiable craving even though alcohol consumption "played a role in at least 7.1% of emergency department visits and 17.4% of deaths due to opioid

299. *Id.* (quoting *Edenfield*, 507 U.S. at 770–71) (emphases added).
300. *Id.* (quoting *Edenfield*, 507 U.S. at 771).
301. *See supra* notes 38–47 and accompanying text.
302. Lochner v. New York, 198 U.S. 45, 57 (1905).
303. *Id.*

overdoses in 2020"[304] and "more than 178,000 [annual] deaths . . . [are] attributable to excessive alcohol use, making alcohol one of the leading preventable causes of death in the United States."[305] What was at stake here was not the stuff of political speech that could help the public to make sense of what was true about the relevant candidates running for office. What was at stake were not even policy arguments about whether malt liquors posed a danger to communities of color. What was at stake was the bare stuff of profit and opportunity for a target audience seeking cheap, highly-potent alcohol.[306]

In *Coors Brewing*, Justice Thomas never acknowledged the bleak reality that there existed members of the community who were gravely prone to or grimly enduring victims of alcoholism. Nor did he discuss the conspicuous point that malt liquors—with their high alcohol content and their carbonation—form a particularly pernicious combination for those overwhelmed by alcoholism.[307] Nor, for that matter, did Justice Thomas mention how inexpensive but potent drinks like malt liquors disproportionately hurt poor communities of color.[308] Rather than honoring the aspiration by the

304. *Alcohol-Related Emergencies and Deaths in the United States*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM (Nov. 2024), https://www.niaaa.nih.gov/alcohols-effects-health/alcohol-topics/alcohol-facts-and-statistics/alcohol-related-emergencies-and-deaths-united-states [https://perma.cc/538E-SYSJ]. These statistics are admittedly a number of years removed from *Coors Brewing*.

305. *Id.* Psychological studies suggest that consumers often act on the basis of instant gratification without considering the long-term harms, especially with regard to activities like smoking, drinking, and overeating. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 7, 44, 68–69, 74–75, 78–79, 237–38 (2009).

306. *See infra* Part V. (addressing the difference between political speech and the sort of predatory commercial speech at issue in *Coors Brewing*).

307. *See* Lois Raffel, *Malt Liquor, Fortified Wine Threaten Youth*, L.A. TIMES (Apr. 13, 1997), https://www.latimes.com/archives/la-xpm-1997-04-13-me-48284-story.html [https://perma.cc/R2Y5-8KYR].

308. *See* Kathryn A. Kelly, *The Target Marketing of Alcohol and Tobacco Billboards to Minority Communities*, 5 U. FLA. J.L. & PUB. POL'Y 33, 58–59 (1992) (discussing the history of breweries targeting Blacks for inexpensive malt liquors); Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1025–28 (1995) (arguing that breweries targeted advertising for communities of color).

community to protect its members from the dangers of alcohol abuse, Justice Thomas in *Coors Brewing* opted to immerse himself in the same hyperindividualism structuring Justice Peckham's assertion that exploitable employees in the bakery industry "are in no sense wards of the state."[309] Given such a commitment to hyperindividualism, Justice Thomas in *Coors Brewing* naturally placed all of the burden of proof on the community to justify its restrictions on the individual corporation. Hence, Justice Thomas demanded that the community prove its restriction "will *in fact* alleviate [alcohol abuse] to a *material* degree."[310]

Reflect on what Justice Thomas was demanding from the community. What sort of fantastical cause-and-effect experiment—with its myriad control and experimental variables—could possibly be commissioned to assay whether the community's labeling law "will *in fact* alleviate [alcohol abuse] to a *material* degree"?[311] What Justice Thomas required in *Coors Brewing* was an unrealistic relationship between the means and the ends.

Coors Brewing could have been adjudicated to comport with the Constitution if the Court had adopted the communitarian approach. This suggestion is not meant as a pretext for revising the *Central Hudson* test. It is meant to reject the *Central Hudson* test and to suggest that Justice Thomas in *Coors Brewing* could have, to borrow Justice Brown's words from *Holden*, required the community to show that its law was not a palpably unreasonable attempt to curb excess drinking.[312] Applied to the facts of *Coors Brewing*, one cannot say that the community's effort to curb alcohol abuse was palpably unreasonable. After all, it is entirely conceivable that some consumers, especially chronic alcoholics, choose to purchase a specific malt liquor based on its alcohol volume. Justice Thomas could have also adjudicated *Coors Brewing* by adopting the communitarian expectation that the individual speaker–the Coors Brewing

309. Lochner v. New York, 198 U.S. 45, 57 (1905).

310. Rubin v. Coors Brewing, 514 U.S. 476, 487 (1995) (quoting Edenfield v. Fane, 507 U.S. 761, 770–71 (1993)) (emphases added).

311. *Id.*

312. *Holden v. Hardy*, 169 U.S. 366, 392 (1898).

company, in this instance—exercise its right of speech "under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others . . . nor injurious to the rights of the community."[313] As applied to the facts of *Coors Brewing*, a multibillion dollar corporation like Coors Brewing would have to show that the advertising alcohol volume on its malt liquor will not be injurious to the community, which is trying to prevent alcohol abuse, something that today is one of the leading causes of preventable death in America.[314]

Those who find the communitarian approach, as applied to *Coors Brewing*, to be a potential threat to the individual consumer's right to determine his fate would do well to remember what the community was *not* doing. The community in *Coors Brewing* was *not* trying to prevent its members from imbibing malt liquor, something that they, at any rate, had no constitutional right to do.[315] *Nor* was the community trying to prevent the advertising of malt liquor. The *only* thing that the community endeavored to do was to prevent malt liquors—products known for their alcoholic potency—from advertising their alcohol volume.

By any reasonable standard, the community in *Coors Brewing* was enormously respectful of those who wished to imbibe malt liquors, including the strongest varieties thereof. The community tried only to nudge those members who were suffering from or prone to alcoholism from abusing a product that could have hurt them further, and, over time, lead to their deaths or, through drunk driving, the deaths of others. Astonishingly, it was for *this* modest effort by the community that Justice Thomas struck down the law. Pay attention in this regard to the oddly severe tenor of his opinion. Justice Thomas struck down the community's prohibition against wealthy beer companies' advertising of alcohol content because the community had failed to show that its law "*will in fact* alleviate [the harms

313. *Id.*

314. *See Alcohol-Related Emergencies and Deaths in the United States*, *supra* note 298.

315. *Cf.* David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373, 384 (1997) (reviewing RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996)).

caused by alcohol] to a *material degree*."[316] Seen from one angle, Justice Thomas did not strike down the law chiefly because it abridged the right of Coors Brewing to publicize the alcohol volume on its malt liquors. In an homage to hyperindividualism, Justice Thomas, one might say, struck down the community's law because the community did not achieve its *own* stated objective of preventing alcohol abuse.

C. The Wealthy Political Donor

The degree to which the Supreme Court is wedded to hyperindividualism was made evident in the Court's eagerness to extend the right of speech for a species of conduct that, by any reasonable measure, could not even have qualified as "speech." The case at issue was *Buckley v. Valeo*.[317] In *Buckley*, Congress passed the Federal Election Campaign Act (the "Campaign Act").[318] The purpose of the Campaign Act was to prevent financially powerful individuals from unduly influencing political elections. Congress was "attempting, by limiting the influence of wealthy supporters[,] . . . to democratize federal elections."[319] Specifically, "the objective was to lessen the disproportionate advantage, the distorting effect, of wealthy special interest groups, and to increase opportunities for meaningful participation by ordinary citizens, as voters, supporters and candidates."[320]

One provision in the Campaign Act provided that "'[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.'"[321] The Cam-

316. *Coors Brewing*, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 770–71 (1993)) (emphases added).

317. 424 U.S. 1 (1976).

318. *Id.* at 7.

319. Brief for Respondent at 72, Buckley v. Valeo, 424 U.S. 1 (1975), (Nos. 75-436, 75-437), 1975 WL 171459, at *23.

320. *Id.*

321. *Buckley*, 424 U.S. at 39 (quoting 18 U.S.C. § 608).

paign Act exempted political parties and campaign organizations.[322] This provision of the Campaign Act—the expenditure provision—was declared unconstitutional by the *Buckley* Court.[323]

To so declare, the Court took the radical step of concluding that spending money for a political cause was a form of *pure* speech, and, hence, entitled to the highest protection by the First Amendment.[324] The *Buckley* Court tried to justify its assertion by arguing that there was a world of difference between the spending of money (which the *Buckley* Court dubbed an instance of pure speech) and the willful burning of a military draft card in order to protest the draft (which the *Buckley* Court dubbed an amalgam of speech and *conduct*).[325] The *Buckley* Court's attempt to develop this distinction was clumsy. Here is the *Buckley* Court's proffered explanation for why the giving and spending of money for political causes amounted to pure speech: "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."[326]

On its face, this was a feeble argument. That the Court had "never suggested" a particular proposition did not necessarily mean that the Court enjoyed the unrestricted freedom to declare the existence of that proposition to be valid precedent.[327] The flaws of *Lochner* are illustrative in this regard. Just because the Court had "never suggested" that the right of contract was *not* a fundamental right did not mean that the right suddenly *became* a fundamental right as a

322. *See id.* at 40.

323. *Id.* at 44.

324. *See id.* at 16–17.

325. See *id.*

326. *Id.* at 16.

327. It is instructive in this regard that the Court has, in the context of federalism, taken a different approach by refraining from creating doctrines in such a haphazard manner as the Court did in *Buckley*. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012) (arguing that the absence of any explicit restriction against the Court defining "commerce" for purposes of the Commerce Clause does not mean that the Court may then define "commerce" however the Court chooses).

matter of precedent.[328] So, too, just because the Court had never declared that spending money was not pure speech did not necessarily mean that the former was an instance of the latter.

Undaunted by the constraints of logic, the *Buckley* Court declared the Campaign Act unconstitutional. "Even if," proclaimed the Court, "the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet [constitutional muster] because the governmental interests advanced in support of the [Campaign Act] involve 'suppressing communication.'"[329] How was the Campaign Act "suppressing communication?" The Court explained itself as follows: "Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at *equalizing the relative ability* of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups."[330]

The *Buckley* Court made this claim even though the Campaign Act left open ample opportunities for wealthy hyperindividualists to spend endless piles of money to support any given political cause as along as their donations did not *clearly* identify a political candidate running for office.[331] That the Court should characterize the Campaign Act as an attempt to "equaliz[e] the relative ability" between the ultrarich and everyone else was revealing,[332] for it demonstrated the depth to which the *Buckley* Court had embraced hyperindividualism. The Cout was oblivious to the language of the Campaign Act at issue in *Buckley*. The Campaign Act's expenditure provision—to repeat—stated that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000."[333] Political parties and campaign

328. *Cf. Buckley*, 424 U.S. at 16.
329. *Id.* at 17.
330. *Id.*(emphasis added).
331. *See id.* at 13.
332. *Id.* at 26–27.
333. *Id.* at 39.

organizations were exempted from the Campaign Act.[334]

Notice how much freedom the wealthy hyperindividualist enjoyed under the Campaign Act. He could have spent a *limitless* amount of money on *any* political cause for *any* year for the entirety of his life as long as the money was not spent on a "clearly identified candidate."[335] Under the Campaign Act, the hyperindividualist billionaire, for example, could have spent as much money as he wanted on television, radio, and social media to spread beliefs which were consonant with either the Republican Party or the Democratic Party, beliefs which were clearly aligned with one party over the other. Moreover, under the Campaign Act, no limits were imposed on how much money the hyperindividualist, operating indirectly through a political party or campaign organization, could contribute to a clearly defined political candidate. The wealthy hyperindividualist therefore, under the Campaign Act, enjoyed significant freedom to sway an election. It was simply not true that, as the *Buckley* Court forebodingly warned, the Campaign Act had the effect of "equalizing the relative ability" between the wealthiest individuals in the world and the rest of us.[336]

For these reasons, the Campaign Act seemed to have been nothing more than a formal—and flimsy—limit on the wealthy hyperindividualist. Therefore, it was startling to read the statement by the *Buckley* Court that "[t]he expenditure limitations contained in the Act represent *substantial* rather than merely theoretical restraints on the *quantity* and *diversity* of political speech."[337] Not a scintilla of evidence was marshalled by the Court to support this claim. The *Buckley* Court speculated irresponsibly on the potential dangers presented by the community's law. "Given the important role of contributions in financing political campaigns," the Court announced, "contribution restrictions *could have* a severe impact on

334. *Id.* at 40.
335. *Id.* at 55.
336. *Id.* at 17.
337. *Id.* at 19 (emphasis added).

political dialogue."[338] This was akin to saying that a law that forbade sexual harassment should be struck down because it "*could have* a severe impact" on the possibility for consenting adults to consummate genuinely loving relationships. After all, according to *Buckley*'s logic, how could one foretell what repercussions a law *could have*?

On offer by the *Buckley* Court was a subversion of the communitarian approach articulated by the Court in *Williamson v. Lee Optical* in 1955.[339] There, the Court had upheld the community's law regulating who may fit new lenses into old frames.[340] Justice Douglas, in an emphatic repudiation of the hyperindividualism in *Lochner*, remarked that "the legislature *may have* concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert."[341] In *Buckley*, the Court, resurrecting the hyperindividualism in *Lochner*, put the burden completely on the community to justify its law.[342] Further, the *Buckley* Court shunned the elder Justice Harlan 1887 opinion in *Mugler* that there existed an "implied obligation" for a member of the community to exercise his right in a manner that "shall not be injurious to the community."[343] If the *Buckley* Court had adhered to the communitarian approach, the Court would have recognized that, if there is a member of the community who should shoulder an implied obligation to the community, it should be the wealthiest—and hence, the most powerful and the most privileged—member of the community. The wealthiest member of the community, the communitarian approach would maintain, should bear an implied obligation to ensure that his fellow citizens also possess an opportunity to have their voices heard about the relative merits of political candidates.

338. *Id.* at 21 (emphasis added).
339. 348 U.S. 483 (1955).
340. *Id.* at 487.
341. *Id*. (emphasis added).
342. Buckley v. Valeo, 424 U.S. 1, 55 (1976).
343. Mugler v. Kansas, 123 U.S. 623, 665 (1887).

The fulfillment of such an obligation by a community's wealthiest members would be the essence of civic virtue in a democracy. Unfortunately, all of this was utterly lost on a *Buckley* Court that was gripped by hyperindividualism.

Another point needs to be made. The *Buckley* Court was arrogantly indifferent to the basic principle of the separation of powers. In requiring Congress to prove that its law "would have" a "dramatic" effect on the funding of political campaigns, the Court effectively legislated from the bench on behalf of the hyperindividualist speaker.[344] Traditionally, the community has been afforded substantial deference by the Court to pass laws which were meant to improve its lot.[345] As we have seen in *Cohen*, *Wilson*, and *R.A.V.*, the Court's commitment to hyperindividualism can lead the Court to overturn otherwise proper laws made by the community. That is one of the insights worth stressing. One of the dangers of hyperindividualism is that it operates on a self-serving logic. A law does not violate the First Amendment because it fails to satisfy some balancing test between the benefits to the community and the benefits to the individual speaker. Under hyperindividualism, a law is deemed to violate the First Amendment because the law chafes against its hypersensitive sensibilities.[346]

D. The Charlatan

At issue in *United States v. Alvarez* was a law that forbade a person who was never awarded a military commendation from displaying said commendation on his person in order to hoodwink the public into believing that he was a war hero.[347] Passed by Congress, the Stolen Valor Act read: "Whoever falsely represents himself or herself, verbally in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than

344. *Buckley*, 424 U.S. at 21.
345. *See supra* Part III.
346. *See supra* notes 15–16, 47–49 and accompanying text.
347. 569 U.S. 709 (2012).

six months, or both."[348] There was an enhanced punishment if the offender wore the Congressional Medal of Honor, the highest award for valor.[349]

In front of the Walnut Valley Water District Board of Directors in California, Xavier Alvarez, who would eventually become a member of the Board, claimed to be a recipient of the Congressional Medal of Honor.[350] Shamelessly, he told the Board: "I'm a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."[351] The Congressional Medal of Honor is the most sacred honor that the national community of America can bestow on one of its own citizens as gratitude for his military valor on behalf of the community.[352] Alvarez had never even served in the military, but a publicly-available photograph shows him, beaming with unearned pride, and wearing a military uniform that was festooned with medals and ribbons of all kinds.[353] Alvarez presented himself as a military hero who had been lavishly decorated for his sacrifice to his community.[354] He surely took pleasure in receiving the expressions of admiration that he was able to induce from his duped audience.

Alvarez was therefore an exemplary hyperindividualist. He was perfectly happy to steal the honor that the community had yearned to bestow on its most cherished citizens. The name of the law under which he was punished said it all—the *Stolen* Valor Act.[355] A hyperindividualist charlatan like Alvarez was not best understood as

348. *Id.* at 716 (2012).

349. *Id.*

350. *Stolen Valor—Medal of Honor Phony Goes On Trial*, YOUTUBE (May 4, 2008), *https://www.youtube.com/watch?v=yPguZ0J24Wo* [https://perma.cc/JX9E-HEB3].

351. *Alvarez*, 567 U.S. at 714.

352. *The Medal of Honor*, Congr. Medal of Honor Soc'y, https://www.cmohs.org/medal [https://perma.cc/RN8C-2JEP] [hereinafter *Medal of Honor*].

353. Diane Curtis, *Is It a Crime For a Fake Veteran to Lie About the Medal of Honor?*, CAL. BAR J. (Nov. 2011), https://www.calbarjournal.com/November2011/TopHeadlines/TH1.aspx [https://perma.cc/X84C-NLC2].

354. *Id.*

355. *See Alvarez*, 567 U.S. at 716.

a dissembler; he was a *thief*. This point was underscored by the amicus brief filed by the Veterans of Foreign Wars of the United States.[356] Poignantly, the brief by the Veterans of Foreign Wars began with a declaration made by a severely wounded combat veteran: "*These I earned with blood*."[357] These wrenching words belonged to Lance Corporal Evan Reichenthal.[358] He was referring to the Combat Action Ribbon and the Purple Heart that he was awarded after losing his legs to an improvised explosive device in Afghanistan.[359]

By saying "*[t]hese I earned with blood*," Lance Corporal Reichenthal implied that his medals were a symbol of gratitude by his fellow citizens for his extraordinary sacrifice.[360] While the community could not bring the corporal's legs back, the community could give the corporal the commendations which were owed to a hero. Such recognition by the community amounted to a singularly sacred event. This is why the Veterans of Foreign Wars condemned Xavier Alvarez for "theft, not lying in general."[361] The Veterans of Foreign Wars argued that Alvarez "enjoyed undeserved praise, honors, and other intangible, non-pecuniary benefits by wrongfully taking advantage of the goodwill associated with those awards."[362] Although he had caused considerable anguish to the community and to military heroes like Lance Corporal Reichenthal, Alvarez received an unusually light sentence for violating the Stolen Valor Act.[363] The federal district court required Alvarez to pay a modest fine, serve three years' probation, and perform one year of community service–that is, Alvarez escaped with no jail time, despite the Act's

356. Brief for Veterans of Foreign Wars of the United States et. al. as Amicus Curiae, United States v. Alvarez, 567 U.S. 709 (2012) (No. 11-210), 2011 WL 6179423.

357. *Id.* at *1.

358. *Id.*

359. *Id.*

360. *Cf. id.*

361. *Id.* at *8.

362. *Id.* at *9.

363. *Local Water Director Sentenced to Probation*, SAN BERNADINO SUN (July 21, 2008), https://www.sbsun.com/2008/07/21/local-water-director-sentenced-to-probation/ [https://perma.cc/6CL8-Z6C5].

provision for an enhanced sentence in cases where an individual has made a false claim to the Medal of Honor.[364] In keeping with his unqualified shamelessness, Alvarez was not content with this lenient sentence. He appealed his conviction to the Supreme Court, and argued that the Stolen Valor Act violated his right of speech.[365]

The Supreme Court agreed with Alvarez, however, and overturned the Stolen Valor Act.[366] Justice Scalia had blamed the community in *R.A.V.* for behaving like a corrupt referee in a boxing match,[367] and, in *Alvarez*, Justice Kennedy did something similar. Writing for the Court, Justice Kennedy contended that the problem was not Alvarez. The problem for Justice Kennedy was the community. Justice Kennedy had alleged—without the benefit of discussion—that "[a]s a general matter, the First Amendment means that government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content."[368] Justice Kennedy's statement is not quite accurate, however. As Justice Murphy explained for the Court in *Chaplinsky*, "such utterances [like fighting words] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[369] Justice Murphy explicitly stated that speech *can* be regulated "because of its message, its ideas, its subject matter, or its content."[370]

By saying that the community has "no power" to restrict the content of Alvarez's speech, Justice Kennedy was suggesting that Alvarez, through his deception, enjoyed great freedom to inflict pain on the community and individuals like Lance Corporal Reichenthal. Justice Kennedy was in effect resurrecting the hyperindividualism that had animated Justice Peckham's *Lochner* opinion. Justice

364. *Id.*

365. *United States v. Alvarez*, 567 U.S. 709, 714 (2012).

366. *Id.* at 730.

367. R.A.V. v. St. Paul, 505 U.S. 377, 392 (1992).

368. *Alvarez*, 567 U.S at 716 (quoting Ashcroft v. Am. Civ. Liberties Union, 535 U.S. 564, 573 (2002)) (emphasis added).

369. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see also supra*, note 225.

370. *Alvarez*, 567 U.S. at 716 (quoting *Ashcroft*, 535 U.S. at 573).

Peckham had declared that "[s]tatutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are *mere meddlesome interferences* with the rights of the individual."[371]

In *Alvarez*, Justice Kennedy likewise conceived the right of the individual in hypersensitive terms such that most efforts by the community to regulate the speaker were condemned as meddlesome. Justice Kennedy, remember, had insisted that Alvarez should be permitted to pass himself off as a recipient of the Congressional Medal of Honor because "as a general matter, the First Amendment means that government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content."[372] For the community to punish Alvarez with one year of community service would amount, in Justice Kennedy's view, to the unforgiveable sin of what Justice Peckham derided as "meddlesome" government conduct. Was there nothing that the community in *Alvarez* could offer in its defense? Not according to Justice Kennedy. For him, the Stolen Valor Act was unconstitutional because it "targets falsity and *nothing more*."[373] Justice Kennedy's characterization of the community's law thus elevated hyperindividualism while denigrating the community's aspiration to honor those heroes who were willing to sacrifice their lives for their nation.

Consider how *Alvarez* could have been decided in terms of the communitarian approach. At the heart of the communitarian approach is the premise that the community's members should endeavor to further the common good. Chief Justice Waite's arguments from 1876 in *Munn v. Illinois* are useful on this score. Chief Justice Waite had argued that "[a] body politic . . . is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."[374] In *Alvarez*, the community's effort to recognize the valor of its best citizens, who had sacrificed

371. Lochner v. New York, 198 U.S. 45, 61 (1905) (emphasis added).

372. *Alvarez*, 567 U.S. at 716 (quoting *Ashcroft*, 535 U.S. at 573) (emphasis added).

373. *Id.* at 719 (emphasis added).

374. Munn v. Illinois, 94 U.S. 113, 124 (1876) (quoting MASS. CONST. of 1780, pmbl.).

nearly everything on its behalf, was obviously an effort to further the common good. In addition, Alvarez, as a member of the community, bore an "implied obligation" not to exercise his right of speech in a way that was "injurious to the community.[375] But Alvarez's deception, once revealed, was deeply injurious to the community. Indeed, as someone who admired what military veterans had done, Alvarez knew well that he bore the implied obligation not to dishonor true heroes by passing himself off as one of them. Alvarez should have known better, and the community had every right to punish him for violating the Stolen Valor Act.

There is another aspect of the communitarian approach that warrants mention. Justice Brown in *Holden* had argued in 1898 that "[t]he question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its actions be a *mere excuse* for an unjust discrimination, or the *oppression or spoliation* of a particular class."[376] But there was no evidence whatsoever to suggest that the Stolen Valor Act was passed to punish a person who was wearing a soldier's uniform as a Halloween costume or a Broadway actor who was portraying a war hero. The Stolen Valor Act was aimed solely at hyperindividualist charlatans like Alvarez.

V. LIMITS TO THE COMMUNITARIAN APPROACH

The Article has illustrated how the Court has unjustifiably adhered to a hyperindividualism that is antithetical to the community. But there are examples in which the Court has made sound decisions in favor of the individual speaker and against the community which seeks to regulate the speaker. To develop an account of which decisions are acceptable and which are not in terms of the communitarian approach, it is important to start by understanding the paradoxical nature of the logic of self-government as articulated in the Constitution.

The Constitution gives to the community enormous powers of

375. Mugler v. Kansas, 123 U.S. 623, 665 (1887).

376. Holden v. Hardy, 169 U.S. 366, 398 (1898) (emphases added).

self-government to regulate its individual members. There is evidence for this conclusion, this Article has suggested, in the Preamble to the Constitution, along with the state constitutions that preceded it.[377] Such powers of self-government enable the community to forbid instances of hyperindividualist speech that are harmful to the community.

But the powers of self-government, seen in relation to the right of speech, are not simple. The chief reason why scholars and jurists have defended the right of speech has been to protect the right of the community to have access to a radical diversity of viewpoints and ideas.[378] The position derives naturally from the premise that the Constitution is founded on the sovereignty of the people, not their leaders or a chosen elite.[379] In order for a sovereign people to exercise their powers of self-government, such people need a diversity of views and ideas from which they can draw to make meaningful decisions about how they should order their government.[380] However, in order to create conditions that will produce this diversity of viewpoints and ideas, the Constitution must limit the right of the community to exercise its powers of self-government to limit the right of speech by a variety of individuals.[381] Put in institutional terms, the Constitution requires judges, in some instances, to protect an individual's right of speech, even if that individual's speech offends the community, so that the community may deliberate the substance of the speaker's message.

Therein lies the paradox: in order for the community to exercise its constitutional powers of self-government in an informed manner, the Constitution must place restraints on what that community may do in terms of restricting an individual's right of speech. In other words, the collection of beings who form "We the People" in

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377. *See supra* Part III.

378. *See supra* note 2 and accompanying text.

379. *See* N.Y. Times Co v. Sullivan, 376 U.S. 254, 269–72 (1964); *see also* MEIKLEJOHN, FREE SPEECH GOVERNMENT, *supra* note 3, at 6, 7, 16–17, 22–34, 66.

380. *See id.*

381. No one has explained this dynamic with more clarity than Alexander Meiklejohn. *See* MEIKLEJOHN, FREE SPEECH GOVERNMENT, *supra* note 3, at 22–34, 66.

the Constitution's Preamble occupy two different states of existence.[382] These beings are members of a community, a form of social organization that is defined by widely shared ideas about morality, especially the principle of civility by which all of its members are presumptively entitled to mutual respect.[383] The members of this community are, however, also citizens in a democracy, a form of political organization in which ideas about mutual respect and morality are momentarily suspended for purposes of promoting a robust diversity of speech, including offensive and potentially harmful speech.[384]

It is up to the Supreme Court to determine when the community may forbid some speech as hyperindividualist and harmful to the community, and when the speaker must be protected in the interests of furthering democracy. Plenty of examples of the former have been furnished by this Article. Examples of the latter will now be provided.

In providing examples of where the Court may justifiably limit the reach of the community with respect to the right of the individual speaker, there is the risk that the Court will revert to the judicial activism which has come to scaffold the claims of hyperindividualist speakers. As can be imagined, however, it is not possible to offer brightline rules about which examples fall into which category. That said, the examples that will be furnished will dwell, in large part, on how closely the speech at issue resembles what the Court has called core political speech.[385] For, by its definition, core political speech is speech that is most essential for the people to receive

382. *See* POST, *supra* note 5, at 3–10.

383. *See id.* at 55–59, 127–29, 132–34, 181–84, 300–301.

384. *See id.* at 113–14, 124–25, 152, 164, 201, 301, 392–93.

385. *See, e.g.*, Landmark Commc'n, Inc. v. Virginia, 435 U.S. 829 (1978) (arguing that political speech lies near the core of the First Amendment); *see also* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 102 (1979); Butterworth v. Smith, 494 U.S. 624, 631 (1990). Prominent scholars have made similar claims. Professor 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). The Court stated in *Federal Election Commission v. National Conservative Political Action Committee*, "[t]here can be no doubt

in order to assess matters related to self-government.[386] Speech which is far removed from core political speech—obscenity, fighting words, defamation—is afforded much less protection by the Court in part because such speech does not aid the public's deliberation of issues related to self-government.[387] This is why the community can exercise greater control in forbidding speech that amounts to obscenity, fighting words, and defamation.[388] There are other factors, too, that are relevant to whether the community can exercise control over the speaker. For example, the time, place, and manner in which the individual speaks clearly matters. The highly offensive speakers in *Cohen*, *Gooding*, and *R.A.V.* chose to express their respective message in a way that was unusually violative of the community's norms even though other reasonable options were available.

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that the expenditures at issue in this case produce speech at the core of the First Amendment." 470 U.S. 480, 493 (1985). Professor Cass Sunstein stresses that "political speech belongs in the top tier . . . ." SUNSTEIN, *supra* note 161, at 132. Professor 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, 80 (2010). Professors 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. Judge 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 (1971).

386. This is not to suggest that other factors cannot be important, but the proximity of the speech to core political speech is the most important factor. The right to refuse to comply with laws that compel a philosophical view which I find abhorrent could also be a basis to distinguish instances in which communitarianism is appropriate. *See* W. Va. St. Bd. Of Ed. v. Barnette, 319 U.S. 624 (1943).

387. *See* Miller v. California, 413 U.S. 15, 24 (1973) (arguing that obscenity should not be protected in part because it lacks serious political value); Chaplinsky v. New Hampshire, 351 U.S. 568, 572 (1942) (arguing that fighting words are not entitled to constitutional protection because they are not essential for the exposition of ideas and are of such slight social value to the discovery of truth); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (holding that there is no constitutional protection for defamation unless the defamation regards issues of public concern and public figures or public officials).

388. The Supreme Court has denied First Amendment protection for obscenity because its lack of worth, as assessed by "the average person, applying contemporary community standards. . . ." *Miller*, 413 U.S. at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

A. Speech Critical of the Government

The clearest examples of laws which should not be justified by the communitarian approach are those that prohibit criticism of government. These laws are not properly characterized as attempts solely to regulate an antisocial hyperindividualism, but more so as attempts to limit the diversity of speech plainly related to matters of public concern. In fact, the origins of modern First Amendment jurisprudence hail from efforts by jurists to protect speech that is critical of the government. These efforts are examined below.

1. *Abrams v. United States*

Start with *Abrams v. United States* from 1919.[389] *Abrams* is not merely one more case involving speech that is critical of the government. It is one of the most crucial cases in the Supreme Court's First Amendment jurisprudence. For the majority opinion in *Abrams* represents an egregious instance in which the Court uncritically upheld a law passed by the community, while the dissenting opinion by Justice Oliver Wendell Holmes would, decades later, come to inform the modern Supreme Court's approach to the right of speech.[390] Justice Holmes's dissent was valuable, not only for providing an alternative means to interpret the First Amendment, but for delineating the limits of what the community may do in terms of regulating the right of speech.

With this in mind, turn to the facts of *Abrams*. The historical backdrop of *Abrams* was World War I.[391] World War I pitted the United States and Russia against Germany, but a group of communists and anarchists in New York City feared that the American government was covertly transporting troops to stage a coup against the newly

389. 250 U.S. 616 (1919).

390. Mary-Rose Papandrea, *The Missing Marketplace of Ideas Theory*, 94 NOTRE DAME L. REV. 1725, 1728 (2019) ("[T]he influence of Holmes's famous *Abrams* dissent is evident throughout its one hundred years of First Amendment decisions.").

391. SPENCER TUCKER & PRISCILLA MARY ROBERTS, THE ENCYCLOPEDIA OF WORLD WAR I 471 (2005).

established communist government in Russia.[392] In order to call attention to this perceived plot by the American government, Jacob Abrams, a communist, distributed leaflets. One leaflet read, "[t]he President was afraid to announce to the American people the intervention in Russia."[393] The leaflet suggested that America was actually conspiring with Germany to overthrow Communist Russia. "[President Woodrow Wilson] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.'"[394] "Instead," the leaflet continued, "he uttered beautiful phrases about Russia, which, as you see, he did not mean, and secretly, cowardly, sent troops to crush the Russian Revolution. Do you see now how German militarism combined with allied capitalism to crush the [R]ussian [R]evolution?"[395] Eventually, the leaflet resorted to seemingly violent rhetoric: "THE RUSSIAN REVOLUTION CALLS TO THE WORKERS OF THE WORLD FOR HELP. The Russian Revolution cries: 'WORKERS OF THE WORLD! AWAKE! RISE! PUT DOWN YOUR ENEMY AND MINE!'"[396]

Abrams's rhetoric was prosecuted as an attempt to unlawfully obstruct military recruitment.[397] After being convicted, Abrams unsuccessfully appealed his case to the Supreme Court.[398] In upholding the convictions against Abrams and his confederates, Justice Clarke penned an opinion on behalf of the Court that did not speak to the concerns of the community, but that spoke more to an abiding indifference to the right of speech.[399] In a decision that would form one of the canonical cases in First Amendment jurisprudence, there was in Justice Clarke's opinion no sustained discussion of the First Amendment. Justice Clarke limited himself to explaining why

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392. RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 52 (Cornell University Press 1999) (1987).

393. *Id.* at 50.

394. *Id.*

395. *Id.*

396. *Id.*

397. *Abrams*, 250 U.S. 616, 622 (1919).

398. *Id.* at 624.

399. *Id.* at 619.

Abrams's conviction was justified under the relevant statute.[400] Justice Clarke, however, did not preoccupy himself with the details of statutory interpretation.[401] Instead, he focused on the "contempt and disrepute" that Abrams expressed toward the President and Congress.[402] Based on this outward disrespect, Justice Clarke defended Abrams's conviction.[403]

By focusing mostly on the disrespectful tone of Abrams's leaflet, Justice Clarke failed to appreciate the fact that core political speech was at issue. Abrams's leaflet passionately derided President Wilson. The leaflet warned that America and Germany were conspiring to topple the fledgling communist regime in Russia. And the leaflet called upon the workers of the world to wage revolution against capitalist nations like the United States.

Such speech is fundamentally different from the speech in the cases that implicated hyperindividualism. For example, *Cohen v. California* involved political speech, but it was political speech that was adulterated with profanity and imposed itself on a captive audience in a place where such profanity did not belong.[404] Further, what the community tried to do in *Cohen* as opposed to what it tried to do in *Abrams* was also quite different. In *Cohen*, the community, as the prosecution clarified in its brief, did not try to forbid Cohen from publicly indulging his profanity.[405] Rather, the community merely sought to prevent him from doing so in a courthouse where children were part of a captive audience.[406] On the other hand, in *Abrams*, the community, in consort with the Court, had punished Abrams for speech which, while offensive to many, did not contain profanity, and was not forced upon a captive audience.

More importantly, Cohen's speech, while containing political content, was mostly intent on using profanity to shock its audience,

400. *Id.* at 622, 624.
401. *Id.* at 624.
402. *Id.*
403. *Id.*
404. *See supra* notes 67–69 and accompanying text.
405. *See supra* notes 71–72 and accompanying text.
406. *See id.*

but Abrams's speech sought to change the reader's mind. Admittedly, Abrams's leaflet lacked evidence and sustained argument, but it was nevertheless far more substantive than Cohen's profane epigram. Abrams's speech presented an alternative account of America's involvement in World War I, and his speech cast the President as a coward who was trying to hide his actual motives for supporting the war. Whether these views were sound was up to the public, but the public should have been made aware of them, as long as they did not pose a clear and present danger. For Abrams's speech was the sort of speech that citizens in a democracy should read for purposes of deliberating what they should do as politically sovereign actors.

So too Abrams's speech is not an instance of hyperindividualism as was that of Johnny C. Wilson in *Gooding*.[407] Wilson had hurled racist, violent threats at police officers who were merely doing their job and were not threatening him.[408] The Black Wilson had yelled at a white police officer within very close physical proximity: "White son of a bitch, I'll kill you" and "[y]ou son of a bitch, I'll choke you to death."[409] Wilson's words were tantamount to fighting words, even though a Supreme Court gripped by the charms of hyperindividualism refused to characterize them as such. On the other hand, Abrams's words, which were printed on pamphlets, rather than spoken, made abstract claims about political authority. Unlike the menacing and personal threats issued by Johnny C. Wilson, the pamphlets published by Jacob Abrams merited constitutional protection, as Holmes had argued, so that the community could weigh their meaning in the interests of self-government.[410] This is why the *Abrams* Court in 1919 went too far in upholding the punishment against Abrams.

While Justice Clarke failed to appreciate these aspects of *Abrams*, Justice Holmes, in dissent, did. What Justice Holmes wrote can be useful in delineating when the community may regulate speech

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407. *See supra* notes 90–104 and accompanying text.
408. *See supra* note 89 and accompanying text.
409. *See supra* note 88 and accompanying text.
410. *Abrams*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

and when it may not. Justice Holmes argued that Abrams's conviction should be overturned because of what Abrams contributed to public discourse. What Justice Holmes wrote helps to clarify how Abrams's speech was less an instance of hyperindividualism and more an example of speech which was directly relevant to matters of public concern. Justice Holmes observed that the Constitution "is an experiment, as all life is an experiment."[411] "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge," Justice Holmes continued.[412] Justice Holmes was suggesting that human beings were incapable of arriving at truths that were invulnerable to criticism. Accordingly, for Justice Holmes, no one had a monopoly on political truth. What the constitutional right of self-government guaranteed to people was not the truth, but the right to get access to a diversity of views and ideas that could lead to some provisional truth, which was itself subject to revision and replacement. Justice Holmes made this thesis explicit when he warned about suppressing speech which was offensive or seemingly dangerous to the community. Because "all life is an experiment," he reflected, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with lawful and pressing purposes of the law that an immediate check is required to save the country."[413] For Justice Holmes, a diversity of speech, including "opinions that we loathe and believe to be fraught with death," was vital for citizens in a democracy to consider.[414] To do otherwise would be to abandon the notion that life was an experiment in which no one enjoyed a monopoly on political truth and one in which a diversity of viewpoints and ideas should compete for acceptance by the public.

411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.*

2. *Gitlow v. New York*

In 1925, the Supreme Court took up another iconic case dealing with the right to criticize the government: *Gitlow v. New York*.[415] Benjamin Gitlow, like Jacob Abrams, belonged to a political organization that opposed the United States.[416] In Gitlow's case, he belonged to the Socialist Party's radical "Left Wing Section," a faction that was prepared to use violence to accomplish its ends to achieve proletarian revolution.[417] Also like Abrams, Gitlow created leaflets to distribute.[418] The leaflet contained language that was jarring and foreboded violence. Depicting the government of the United States as an organ of capitalist exploitation, Gitlow's leaflet urged that "[t]he revolutionary proletariat must, accordingly, destroy this state. . . . It is therefore necessary that the proletariat organize its own state for the coercion and suppression of the bourgeoisie. . . . The old machinery of the state cannot be used by the revolutionary proletariat. *It must be destroyed*."[419]

New York convicted Gitlow of "criminal anarchy."[420] Criminal anarchy was "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means."[421] The Supreme Court upheld Gitlow's conviction.[422] Authoring the Court's opinion, Justice Sanford confessed that "[t]here was no evidence of any effect resulting from the publication and circulation of the Manifesto."[423] However, Justice Sanford argued that Gitlow's words, "by their very nature, involve danger to the public peace and to the security of the State" and the "immediate danger is none the less real and substantial, because

415. 268 U.S. 652 (1925).
416. *Id.* at 655.
417. *Id.* at 655, 659.
418. *Id.* at 655–56.
419. *Id.* at 659 (emphasis added).
420. *Id.* at 654.
421. *Id.*
422. *Id.* at 672.
423. *Id.* at 656.

the effect of a given utterance cannot be accurately foreseen."[424] Justice Sanford gave voice to what he thought were the fears of the community: "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration."[425] In Justice Sanford's view, New York rightfully "seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."[426] Justice Sanford's arguments, while formally concerned about the welfare of the community, were not suppressing hyperindividualism, but were suppressing speech that could prove valuable to the public in terms of making decisions about matters of public concern, the sort of decisions that were consistent with the people's powers of self-government. Justice Sanford's sentiments were better described as the confessions of an anxious mind that felt uneasy in a constitutional democracy where certainty was held in abeyance and the possibility for political experimentation was the norm.

The speech by Gitlow, like that by Abrams, was core political speech. This proposition found support in a classic dissent, once again penned by Justice Holmes.[427] Justice Holmes addressed Justice Sanford's claim that Gitlow's leaflet posed a threat to the community. "It is said," Justice Holmes wrote, "that this manifesto was more than a theory, that it was an incitement."[428] But for Justice Holmes, "[e]very idea is an incitement."[429] Indeed, Justice Holmes argued that "[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."[430] Indeed, "[e]loquence may set fire to reason."[431] Justice Holmes tacitly acknowledged that political speech could be dangerous to the community, but he also sug-

424. *Id.* at 669.
425. *Id*.
426. *Id*.
427. *See id.* at 672–73 (Holmes, J., dissenting).
428. *Id*. at 673.
429. *Id*.
430. *Id*.
431. *Id*.

gested that the Constitution's logic of self-government did not necessarily ensure prudent results.[432] Justice Holmes sought to protect Gitlow's speech because it was core political speech that the people should reflect upon as self-governing beings in a democracy where no one holds a monopoly on truth. Justice Holmes famously summed up: "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."[433]

It must be noted in this regard that the pamphlet printed by Gitlow was far removed from the hyperindividualist speech in, say, *R.A.V.*[434] There, the white supremacist Robert Viktora, as a perverse coup de grace to his campaign of intimidation against the lone Black family in his St. Paul neighborhood, burned a cross in front of their lawn in the early morning.[435] Unlike Gitlow, the adolescent Viktora had no desire to contribute to the public discourse of the community. His only aim was to fill the Black family's psyche with rage and terror. That is why Viktora's actions were an exemplar of hyperindividualism, whereas Gitlow's pamphlets, while a distant cousin of scholarly treatises about Marxism, were nonetheless a public appeal to consider the merits of the Russian Revolution and its supposed victory for the rights of workers all over the world.

B. Content Discrimination

Over the years, the Supreme Court has fashioned a series of doctrines that are meant to protect the right of speech.[436] One of these

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432. *See id.*

433. *Id.*

434. *See supra* notes 106–112 and accompanying text.

435. *See supra* notes 106–12 and accompanying text.

436. These include the doctrines of substantial overbreadth and undue vagueness. According to the substantial overbreadth doctrine, a law will be struck down on its face as violative of the First Amendment if the law forbids substantially more speech than what the First Amendment allows. *See, e.g.*, Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 573–74 (1987). According to the doctrine of undue vagueness, a law will be struck down if the law is so vague that a reasonable person cannot discern what it forbids. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 613–14 (1971) (creating the undue vagueness doctrine).

doctrines is content discrimination.[437]

The Supreme Court's development of the content discrimination doctrine affords another opportunity to distinguish between hyperindividualism and the constitutionally valid rights of the speaker. According to the content discrimination doctrine, a law will be subject to strict scrutiny if it punishes speech based on the content of the speech.[438] *R.A.V.* was a case in which the Court, animated by the ethos of hyperindividualism, overturned St. Paul's ordinance forbidding hate speech as an instance of content discrimination.[439] This Article has already explained how the *R.A.V.* Court failed to appreciate the communitarian claims that were made in that case. There are, however, examples in which the Court has rightfully invalidated laws which suffer from content discrimination.

A classic example of where the community went awry is *Police Department of Chicago v. Mosely*.[440] *Mosely* was, in fact, the case that created the content discrimination doctrine.[441] Mosely, a Black postal worker, believed that a public trade school in Chicago had capped the number of Black students that could attend.[442] Therefore, he picketed the school with a sign that read, "Jones High School practices black discrimination. Jones High School has a black quota."[443] As the *Mosely* Court observed, "[Mosley's] lonely crusade was always peaceful, orderly, and quiet, and was conceded to be so by the city of Chicago."[444] Notwithstanding Mosely's calm demeanor, he was arrested for violating Chicago's ordinance which prohibited all picketing within 150 feet of a school, except picketing

437. *See* Police Dept. of City of Chi. v. Mosley, 408 U.S. 92, 94 (1972) (creating the content discrimination doctrine).

438. *See id.*

439. *See supra* notes 106–12 and accompanying text.

440. 408 U.S. 92 (1972).

441. *Id.* at 94.

442. *Id.* at 93.

443. *Id.*

444. *Id.* at 93.

of any school involved in a labor dispute.[445] Justice Marshall authored the Court's opinion and he remarked that "[t]he central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter."[446] Justice Marshall declared, "[p]eaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited."[447] According to Justice Marshall, "[t]he operative distinction is the message on a picket sign."[448] But such distinction violated the First Amendment, since "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[449] Thus was born the doctrine of content discrimination in 1972.

Justice Marshall explained why content discrimination by the government was objectionable. "To permit the continued building of our politics and culture . . . our people are guaranteed the right to express any thought, free from government censorship," he wrote.[450] "The essence of this forbidden censorship," Justice Marshall added, "is content control."[451] Justice Marshall's justification for the prohibition against content discrimination was rooted in the communitarian approach toward the right of speech even as the prohibition against content discrimination protected the individual speaker against the wishes of the community. This was because the prohibition against content discrimination was meant to help a diversity of content to flourish, and such diversity was expected to stir the community to think more deeply about how to "buil[d] our politics and culture." [452]

To return to the facts of *Mosley*, even though the community may object to nearly all picketing near high schools in Chicago, such picketing, like Mosely's, could prompt the residents of Chicago to

445. *Id.* at 92-93.
446. *Id.* at 95.
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.* at 95–96.
451. *Id.* at 96.
452. *Id.* at 95–96.

think more carefully about whether its trade schools in the 1970s did have the effect of discriminating against Black children. In a sense, Justice Marshall and the Court were taking some liberty in *Mosely* to overturn the present wishes of the community so that the community could have access to speech which would facilitate its efforts to make more informed decisions. Justice Marshall made this connection explicit by quoting from *New York Times v. Sullivan*: "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[453]

That said, not everything that the *Mosely* Court did was sensible. Justice Marshall, for the Court, cited *Cohen v. California* for the proposition that the government could not restrict expression because of its content.[454] As the reader will recall, the Court's decision in *Cohen* was animated by hyperindividualism. The *Cohen* Court contrived the position that California had punished the nineteen-year-old Paul Robert Cohen for displaying profanity on his jacket inside a courthouse. There is no indication, however, that the students were made needlessly upset by Mosley's picketing or were distracted from their studies. Also, Mosley was not inside the school, but on the sidewalk near it. And, while provocative, Mosley's picket made a statement about political unfairness and was wholly lacking profanity. Mosley wanted onlookers to think about whether the public trade schools in Chicago were discriminating against Black students. Cohen, by contrast, entered the courthouse and exposed his profane jacket to a captive audience that included children. Mosley picketed near a public school that contained children because he wanted to picket the school's policies, but there was no logical reason why Cohen wanted to protest the military draft inside a Los Angeles County courthouse. Moreover, unlike Mosley, Cohen, with his use of the F-word, sought to shock his captive audience in the courthouse. There were children near the school

453. *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
454. *Id.* at 95.

where Mosley protested. There was no indication that the children, who were inside the school, saw his sign, which was displayed on the sidewalk. And even had they done so, there is little likelihood that the children would have been shocked. In sum, Mosley sought to alert the community to investigate what he believed was a racist admissions policy in a public high school. Cohen, with so many alternative means for expressing his displeasure with the military draft, chose the most shocking and the least intelligent means, emblematic of a certain variety of hyperindividualism.

Another example is *Reed v. Town of Gilbert*.[455] The Town of Gilbert, Arizona, enacted a law that subjected different categories of signs to different rules.[456] In particular, "Temporary Directional Signs Relating to a Qualifying Event" were subject to the most stringent restrictions in terms of size of the signs and how long they could remain on the property in question.[457] For example, "political signs" and "ideological signs" could be larger and could remain standing longer.[458]

Such difference in treatment drastically limited Pastor Clyde Reed's ability to publicize his church.[459] Reed was the head of the Good News Community Church, a "cash-strapped entity that own[ed] no building" and thus "[held] its services at elementary schools or other locations in or near" the Town of Gilbert.[460] Reed placed 15 to 20 temporary signs around Gilbert.[461] The signs displayed the Church's name, along with the time and location of the upcoming service.[462] "Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday."[463] According to the Court, "[t]he display of these signs require[d] little money and manpower, and thus . . . proved to be an

455. 576 U.S. 155 (2015).
456. *Id.* at 159.
457. *Id.* at 160–61.
458. *Id.* at 159–61.
459. *Id.*
460. *Id.* at 161.
461. *Id.*
462. *Id.*
463. *Id.*

economical and effective way for the Church to let the community know where its services are being held each week."[464] Unfortunately for Reed, his signs were deemed to be in violation of Gilbert's laws, once for displaying the signs beyond their time limits, and another time for failing to include the date of the event on the signs.[465] "Political" and "ideological" signs were subject to far more generous rules than the rules which Reed had violated.[466]

The Court concluded that the Town of Gilbert's law was "content based on its face."[467] Writing for the Court, Justice Thomas applied strict scrutiny.[468] Justice Thomas asserted that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[469] Like Justice Marshall in *Mosely*, Justice Thomas harped on the concern that content discrimination ran the risk of depriving people of information that would be useful for making decisions about matters of public concern.[470] Justice Thomas warned that "innocent motives" by the government "do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech."[471] The purpose of the content discrimination doctrine, Justice Thomas suggested, was not chiefly to root out bad motives by the legislature.[472] The purpose was to ensure that the community was able to receive information in a neutral manner, without meddling by government officials, so that they could make up their own minds about how they wished to fashion their government.[473] "That is why the First Amendment," Justice Thomas

464. *Id.*
465. *Id.*
466. *Id.* at 159–60.
467. *Id.* at 164.
468. *Id.* at 165.
469. *Id.* (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).
470. *Id.* at 168–69.
471. *Id.* at 167.
472. *See id.*
473. *See id.* at 167–68.

continued, "expressly targets the operation of the laws—*i.e.*, the 'abridg[ement] of speech'—rather than merely the motives of those who enacted them."[474] In *Town of Gilbert*, "one could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services."[475] It is unclear whether Reed addressed themes in his sermons relating to matters of public concern, but one would also expect that, given the nature of religion, he would address issues of morality and the purpose of a virtuous life. As such, Reed was likely to address issues related to public concern that could affect how people think about their government and its laws.[476] Compare this context to the hyperindividualist Chaplinsky.[477] Like Reed, Chaplinsky sought to spread his religious views in public, but unlike Reed, Chaplinsky used vulgarity and personal insults against a police officer who was arresting him under lawful circumstances.[478] Reed was punished for trying to peaceably proselytize the community with what he believed was the religious truth while Chaplinsky was punished for his aggressive verbal confrontation.

C. Commercial Speech

This Article has already discussed how the Supreme Court has been enamored with hyperindividualism in the context of commercial speech. In *Rubin v. Coors Brewing*, the Court empowered a wealthy brewery to advertise its high alcohol content malt liquors,

474. *Id.* at 167 (quoting U.S. CONST. amend. I).

475. *Id.* at 167–68.

476. For examples of famous Supreme Court cases in which religion informed political beliefs, *see* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308 (2023) (discussing a Christian web designer's refusal to express the state's views about the acceptability of gay marriage); McCullen v. Coakley, 573 U.S. 464, 472–73 (2014) (discussing the desire of some Christian activists who seek to dissuade women from seeking an abortion); W. Va. St. Bd. of Ed. v. Barnette, 319 U.S. 624, 629 (1943) (discussing how the Jehovah's Witness faith forbids pledging allegiance to the American flag).

477. *See supra* notes 225–34 and accompanying text.

478. Chaplinsky had said to Marshal Bowering: "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).

liquors whose cheaper prices were targeted at poor communities of color.[479] But there are also two especially noteworthy examples where the community went too far. These cases are *Bigelow v. Virginia*[480] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[481] These two cases not only illustrate the harms of an excessive communitarianism, but they also constitute the first two cases in which the Supreme Court articulated a theory for why commercial speech should be protected by the First Amendment.

In *Virginia Pharmacy*, Virginia's State Board of Pharmacy passed a law stating that a pharmacist was guilty of "unprofessional conduct" if he "publishe[d], advertise[d] or promote[d] . . . any amount . . . for any drugs which may be dispensed only by prescription."[482] The State Board argued that such a law was necessary to preserve the integrity of the pharmaceutical profession.[483] 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 percent in Virginia, depending on the pharmacy.[484] The Court struck down Virginia's law as a violation of the First Amendment.[485] To do so, the Court had to break with precedent and declare that commercial speech deserved protection.[486]

The justification employed by the Court stressed that commercial speech was valuable,[487] 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.[488] "As to the particular consumer's interest in the free flow of

479. *See supra* notes 296–316 and accompanying text.

480. 421 U.S. 809 (1975).

481. 425 U.S. 748 (1976).

482. *Id.* at 749–50 (quoting VA. CODE ANN. § 54–542.35 (1974)).

483. *Id.* at 768 ("Price advertising, it is said, will reduce the pharmacist's status to that of a mere retailer.").

484. *Id.* at 754.

485. *Id.* at 770.

486. *See id.* at 758.

487. *See id.* at 780–81.

488. *Id.* at 764 ("Even an individual advertisement, though entirely 'commercial,' may be of general public interest.").

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."[489] 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."[490] 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.[491]

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

There was in Justice Blackmun's remarks the implication that some commercial speech could merit higher protection because it contained information regarding matters of public concern. How this could be so can be illustrated with a hypothetical. Consider the case of Susan, an 80-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, Susan 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 Susan, then, the advertisement from Virginia can be interpreted as speech that is related to a matter of public concern. This is because the advertisement could be read as an unintended commentary about the failure of Alabama's 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 indict-

489. *Id.* at 763.
490. *Id.*
491. *Id.* at 763–64.

ment—probably far more effective than a standard political editorial—for how Alabama's politicians have not protected the state's residents from price gouging. Worth emphasizing in this regard is Justice Blackmun's statement from *Virginia Pharmacy* that information relating to drug prices "hits the hardest . . . the poor, the sick, and particularly the aged."[492] From the perspectives of such people, advertisements 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. In *Virginia Pharmacy*, Justice Blackmun seemed to be alluding to this potential for commercial speech to engage people in matters of public concern: "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."[493]

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."[494] One example that comes to mind is the labeling for alcohol volume in *Coors Brewing*.[495] Unlike the advertisement in *Virginia Pharmacy*, the advertisement in *Coors Brewing* did not amount to a matter of public concern. The former involved essential drugs which poor people needed to survive whereas the latter involved a product that promised to deliver the strongest level of intoxication.[496] *Virginia Pharmacy* involved advertisements that could shame state legislators who did nothing to lower drug prices, whereas *Coors Brewing* involved advertisements for products that could contribute to the nationwide problem of alcoholism.[497] One sort of advertisement could have served as a tacit call to regulate drugs in a manner fair to the consumer, while the other could simply be an invitation for intense inebriation.

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492. *Id.* at 763.
493. *Id.*
494. *Id.* at 764.
495. *See supra* notes 289–310 and accompanying text.
496. *Id.*
497. *Id.*

Accordingly, the decision by the *Virginia Pharmacy* Court to overturn the law forbidding the advertisement of drug prices should not be justified in terms of the communitarian approach, since the advertisement clearly related to matters of public concern and was vital for some members of the public to receive. On the other hand, the *Coors Brewing* Court was animated by hyperindividualism that prioritized the wealthy brewery over the concerns of the community.[498] This distinction becomes apparent in light of how the Court justified its decision in each case. *Coors Brewing* required the community to meet the implausible standard that its prohibition against advertising of alcohol volume "will *in fact* alleviate [alcohol abuse] to a *material* degree."[499] Such a high standard was particularly troubling considering that even a modest effort by the community to combat the serious and widespread problem of alcoholism was regarded as suspect. By contrast, in *Virginia Pharmacy*, the community, in the form of the legislature, provided an odd argument in support of its regulation. Virginia argued that its prohibition against pharmacists disclosing the prices of prescription drugs was motivated by the desire to maintain "the integrity of, and public confidence in, the profession and improving the delivery of quality pharmaceutical services to the citizens of Virginia."[500] While such ends are valid, it was unclear how suppressing the prices for lifesaving prescription drugs would enhance "public confidence" in pharmacists or the perception that pharmacists were imbued with "integrity."[501] The law in *Coors Brewing* was not guaranteed to provide "material" results, but the law's means resonated with common sense. On the other hand, the law in *Virginia Pharmacy* would seem to be inconsistent with common sense. Indeed, the law in *Virginia Pharmacy* would not necessarily seem to be something

498. *See supra* notes 298–310 and accompanying text.

499. Rubin v. Coors Brewing, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)) (emphases added).

500. Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 751 (1976) (quoting VA. CODE ANN. § 54–524.16(d) (1974)).

501. *Id.*

that the community in general would want, even though the legislature fought to defend it in court.

VI. CONCLUSION

Since 1971, the Supreme Court has lit upon a jurisprudence that has drawn recklessly from hyperindividualism. As a result, an assortment of speakers have been empowered to express shameful and dangerous speech of various kinds. This Article has argued that hyperindividualism lacks support from the Constitution. Rather than relying on one set of evidence, this Article has enlisted various kinds. This Article has looked to evidence from the Constitution's text, along with the views of the Framers and the Founding generation. This Article also sought support from the Supreme Court's precedent. All of these sundry sources, this Article has suggested, lend support for the thesis that the Constitution is founded upon a communitarian approach to the right of speech. This Article, however, concluded by outlining the limits of the communitarian approach.