Political Recoding of the Contemporary Celebrity and the First Amendment

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ABSTRACT

If the celebrity semiotic sign is recognized to represent the values of a majoritarian public, then the debate and opposition to these encoded ideals may be expressed by using the same signs in a "recoded" manner, and such counterpublic uses can therefore be categorized as "political speech." Through an analysis of right of publicity claims, this Article suggests that in order for political speech to be given adequate breathing space, it would be beneficial to understand how the writings of Roland Barthes, Stuart Hall, Richard Dyer, and other cultural scholars can contribute to the articulation of a robust First Amendment defense regarding the uses of celebrity iconography.

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I. INTRODUCTION

The American flag is infused with symbolic values of nationhood.[1] A burning cross connotes racial hostility emblematic of Ku Klux Klan ideology.[2] The use of an image of a celebrity—like Oprah Winfrey or Tiger Woods—on a t-shirt may also possess sufficient communicative elements to convey "a particularized message . . . [clearly] understood by those who viewed it."[3] This Article argues that an expressive use of the celebrity persona, depending on its content, form, and context, may be categorized as "political speech" protected by the First Amendment. While links between the contemporary celebrity and political speech have been raised in existing scholarship that draws on cultural studies, this Article presents an original interdisciplinary contribution to First Amendment jurisprudence by utilizing cultural studies differently from most postmodern scholars who argue against the legal recognition of a right of publicity.

Interdisciplinarity has become an influential force in legal studies, and its advantages have been well canvassed.[4] However, some critiques can operate at a level of abstraction that does not allow any meaningful contribution to First Amendment doctrine, while others can commit to one to a reductionism that ignores key aspects of the First Amendment ethos.[5] Rather than resort to interdisciplinarity to argue for greater limits on free speech rights,[6] this Article proposes that free speech interests may be

[1] *E.g.*, Texas v. Johnson, 491 U.S. 397, 404–05 (1989); United States v. Eichman, 496 U.S. 310, 316–18 (1990).

[2] *E.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 432 (1992); Virginia v. Black, 538 U.S. 343, 356–57, 363, 389–91 (2003).

[3] Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[4] *E.g.*, MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY i, xii–xiii (2001).

[5] *Id.* at 184.

[6] Legal scholar Kathleen Sullivan had dubbed these interdisciplinary challenges "free

augmented by a pragmatic understanding of semiotics that seeks to attain a "wide reflective equilibrium [that is] firmly grounded in constitutional reality."[7]

The right of publicity, broadly defined as the "inherent right of every human being to control the commercial use of his or her identity,"[8] has been well-established in the United States for over fifty years.[9] It protects the burgeoning "associative value" that celebrities bring to products and services.[10] If a plaintiff succeeds in proving that he or she has been identified by the defendant's use and that the defendant has appropriated the associative value of his or her identity, the plaintiff still may have to face the formidable argument by the defendant that the unauthorized commercial use is nevertheless protected by the First Amendment. In the absence of clear U.S. Supreme Court precedent, circuit and state courts have been struggling to articulate a comprehensive standard to resolve the clash between the right of publicity—widely recognized as a private property right—and free speech values as enshrined in the First Amendment. This has led commentators to propose a number of possible tests to resolve these competing claims,[11] with significant lamentation that the current state of the

speech wars." *See* Kathleen Sullivan, *Free Speech Wars*, 48 S.M.U. L. REV. 203 (1994).

[7] BUNKER, *supra* note 4, at 188.

[8] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 3:1 (2d ed. 2000). The right of publicity is articulated in the *Restatement (Third) of Unfair Competition* as follows: "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). The right of publicity action is available to all claimants, celebrities and non-celebrities. However, due to the highly lucrative commercial value associated with the celebrity identity, most claims are brought by celebrities like Tiger Woods, Dustin Hoffman, Johnny Carson, Bette Midler, and professional sports league athletes for unauthorized uses of their identities. *E.g.*, ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983); Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003); Wendt v. Host Int'l, Inc., 125 F.3d 806 (9th Cir. 1997); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996).

[9] It was first recognized by the Second Circuit in 1953 that baseball players had a "right of publicity" in their images. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953). In the only right of publicity case ever to reach the U.S. Supreme Court, the court affirmed the recognition of such an actionable right. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

[10] Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 856, 859-60 (1995).

[11] *E.g.*, Gloria Franke, *The Right of Publicity vs the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CALIF. L. REV. 945 (2006); David M. Schlachter, *Adjudicating the Right of Publicity in Three Easy Steps*, 14 J.L. & POL'Y 471 (2006); Jason

First Amendment defense is "a confusing morass of inconsistent, incomplete, or mutually exclusive approaches, tests, and standards."[12] It is important to recognize that this Article does not purport to resolve all the issues regarding the interaction of the right of publicity with the First Amendment. Its original contribution to First Amendment jurisprudence is to assess how cultural studies can contribute to legal analysis when a celebrity's persona is appropriated for expressive uses in identity politics. This Article maintains that one can find significant support in cultural studies for an argument that such expressive uses qualify for the highest level of First Amendment protection as political speech.

According to Richard Dyer and many other cultural studies scholars, the celebrity is a semiotic sign that embodies particular meanings for the majoritarian public. Richard Dyer's extensive work on the movie star has been consistently hailed as being highly influential in the contemporary study of the meaning of celebrities in society. Celebrities can "represent typical ways of behaving, feeling and thinking in contemporary society, ways that have been socially, culturally, historically constructed."[13] In building on Dyer's arguments in examining the celebrity as a form of cultural power and its significance in identity formation, David Marshall observes that celebrities function as stable configurations of collective identity formations and act as "icons of democracy and democratic will."[14] The courts have also noted that celebrities have become "common points of reference for millions of individuals who may never interact with one

K. Levine, *Can the Right of Publicity Afford Free Speech? A New Right of Publicity Test for First Amendment Cases*, 27 HASTINGS COMM. & ENT. L.J. 171 (2004); W. Mack Webner & Leigh Ann Lindquist, *Transformation: The Bright Line between Commercial Publicity Rights and the First Amendment*, 37 AKRON L. REV. 171 (2004); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003); Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 LOY. L.A. ENT. L. REV. 471 (2003); Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47 (1994).

[12] Franke, *id.* at 946. *See also* Gil Peles, *The Right of Publicity Gone Wild*, 11 UCLA ENT. L. REV. 301, 302 (2004).

[13] RICHARD DYER, HEAVENLY BODIES: FILM STARS AND SOCIETY 15-16 (2d ed. 2004) [hereinafter HEAVENLY BODIES]. *See also* RICHARD DYER, STARS 3 (1979) [hereinafter STARS] (discussing how Hollywood, through its representation of movie stars, can reproduce the "dominant ideology of Western society").

[14] P. DAVID MARSHALL, CELEBRITY AND POWER: FAME IN CONTEMPORARY CULTURE 246 (1997). *See also* Christine Geraghty, *Re-examining Stardom: Questions of Texts, Bodies and Performance*, *in* STARDOM AND CELEBRITY: A READER 98, 105 (Sean Redmond & Su Holmes eds., 2007).

another, but who share, by virtue of their participation in a mediated culture [as the audience], a common experience and a collective memory."[15]

As illustrated in Roland Barthes's work, *Mythologies*,[16] a particularly well-known individual, like Oprah Winfrey (the signifier), may be viewed as a sign that denotes "celebrity" (the signified). The widespread media narratives and other forms of commercial and noncommercial circulation of the celebrity sign also result in a particular celebrity sign garnering certain connotations which make it distinctive vis-à-vis other signs.[17] Thus a celebrity sign like Oprah Winfrey is able to differentiate itself from other celebrity signs with an ascribed set of connotations and "develops into a *metalanguage* and becomes a significant resource for cultural expression and critique."[18]

Referring to Barthes's seminal work,[19] Stuart Hall discusses the politics of signification[20] and how ideological discourses of a particular society are classified and framed through semiotic signs within a "pragmatic circle of knowledge."[21] In Barthesian terms, the celebrity image is seen as a "cultural narrative" or signifier that is synonymous with the dominant culture.[22] Due to the meticulously constructed public personae of many celebrities—particularly the movie stars and sports icons—the semiotic signs of these well-known individuals are usually "decoded" by the audience to represent a defined cluster of meanings. While movie stars are often represented as objects of aspiration, glamour, and desire, the celebrity athlete signifies heroism, human transcendence, and a love for the pure authentic game.

The celebrity, as a widely recognized cultural sign, can impel the public who identify with such attributed ideological values to consume the celebrity itself as a commodity (e.g. by watching the movies of a particular actor) or products associated with the celebrity (e.g. by purchasing celebrity-endorsed products). On the other hand, the celebrity semiotic sign,

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[15] JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION 163 (1990). *See also* citations of Thompson in ETW Corp., Inc., 332 F.3d at 933; Cardtoons, 95 F.3d at 972.

[16] ROLAND BARTHES, MYTHOLOGIES 110–11 (Annette Lavers trans., 1972). *See also* Jason Bosland, *The Culture of Trade Marks: An Alternative Cultural Theory Perspective*, 10 MEDIA & ARTS L. REV. 99, 106 (2005).

[17] For a similar argument in relation to trademark, *see* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004).

[18] Bosland, *supra* note 16, at 107.

[19] BARTHES, *supra* note 16.

[20] Stuart Hall, *The Rediscovery of "Ideology": Return of the Repressed in Media Studies*, *in* CULTURE, SOCIETY AND THE MEDIA 56, 70–74 (Michael Gurevitch et al. eds., 1982).

[21] *Id.* at 74.

[22] PATRICK FUERY & KELLI FUERY, VISUAL CULTURES AND CRITICAL THEORY 93, 101 (2003).

as a result of its publicly identifiable encodings, also presents rich opportunities for alternative codings to challenge these "typical ways of behaving, feeling and thinking in contemporary society"[23] representative of majoritarian ideals. Celebrities can have an ideological function of not only reiterating dominant values, but also concealing prevalent contradictions or social problems. More generally, cultural scholars have argued that "identities can function as point of identification and attachment only *because* of their capacity to exclude, to leave out, to render 'outside' abjected."[24] This theme of popular subcultural resistance permeates the bulk of contemporary cultural studies.[25] What significance do all these observations have for the First Amendment and the right of publicity?

Generally perceived to be a property right akin to an intellectual property right,[26] the right of publicity has been invoked mainly by celebrities to prevent unauthorized commercial uses of various aspects of their personae. The relevance of cultural studies here to the right of publicity doctrine is the observation that different groups in society can use particular celebrity images in a variety of ways to represent their cultural identities and convey their political ideologies.[27] Hence the structural domination of a white Anglo-Saxon heterosexual male social identity that occupies a privileged public identity suggests that other identities organized around being non-white, homosexual, or female will have socially subordinate positions. Other exemplars based on different combinations of race, class, gender, athleticism, and sexual desirability also create multiple privileged social identities each valuing a particular ideological position over another. Thus a particular celebrity who is symbolic of a privileged public identity can be seen to represent a majoritarian ideological position—a form of "frozen speech"[28]—and is therefore open to a recoding

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[23] DYER, HEAVENLY BODIES, *supra* note 13, at 15–16.

[24] Stuart Hall, *Introduction: Who Needs "Identity?", in* QUESTIONS OF CULTURAL IDENTITY 1, 5 (Stuart Hall & Paul Du Gay eds., 1996) (emphasis in original). *See also* Stuart Hall, *The Local and the Global: Globalization and Ethnicity*, *in* CULTURE, GLOBALIZATION AND THE WORLD SYSTEM: CONTEMPORARY CONDITIONS FOR THE REPRESENTATION OF IDENTITY 19 (Anthony D. King ed., 1997); ERNESTO LACLAU, NEW REFLECTIONS ON THE REVOLUTION OF OUR TIME (1990); JUDITH P. BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX (1993).

[25] *E.g.*, MARSHALL, *supra* note 14, at 46; Stuart Hall, *Notes on Deconstructing the "Popular," in* PEOPLE'S HISTORY AND SOCIALIST THEORY 227, 239 (Raphael Samuel ed., 1981).

[26] *E.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804–05 (Cal. 2001).

[27] I have explored this theme in an earlier work. *See* David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913 (2008). *See also* David Tan, *The Fame Monster Reloaded: The Contemporary Celebrity, Cultural Studies and Passing Off*, 32 SYD. L. REV. 291 (2010).

[28] BARTHES, *supra* note 19, at 112.

challenge by minority groups to represent their cultural identities and convey their political ideologies.[29]

This Article adopts the premise that the underlying rationale of the First Amendment is the advancement of a democracy where the public can freely participate in deliberating issues important to decision-making in a democracy ("participatory democracy"). This is a plausible and well-supported view of the First Amendment. It further contends that the augmentation of this participatory theory of the First Amendment with cultural studies insights is likely to lead to better outcomes in cases because more speech of "greater" constitutional value is protected—i.e. speech that contributes to an increased awareness and debate of public issues—while speech of "lesser" value need not be accorded the same level of protection.

Part II will show that First Amendment jurisprudence, especially Supreme Court decisions, supports an overarching approach to the First Amendment in terms of a participatory theory that places the highest constitutional value on political speech.

Part III argues that the various tests formulated to give effect to First Amendment goals in right of publicity claims do not accord sufficient protection to political speech because they do not adequately address how uses of the celebrity identity may contribute to the advancement of democratic deliberation and debate. This is demonstrated through an analysis of the three main judicial tests presently used to articulate a First Amendment defense in right of publicity claims.

Part IV contends that cultural studies writings on the political significance of the celebrity semiotic sign can assist the development of First Amendment jurisprudence and judicial tests in this area. It advances the analysis by recommending ways in which the three tests may incorporate relevant insights on the recoding potential of the celebrity sign especially as used by subaltern groups or counterpublics as an integral part of political and social identity formation.

Part V concludes that this use of cultural studies allows current First Amendment jurisprudence to be refined to protect political speech in a manner that more effectively negotiates the competing right of the celebrity individual to exploit the commercial value of his or her identity and the

[29] More recently, recoding—in a copyright context—has been defined to be "the appropriation of a copyrighted cultural object for new expression in a way that ascribes a different meaning to it than intended by its creator." Notes, *"Recoding" and the Derivative Works Entitlement: Addressing the First Amendment Challenge*, 119 HARV. L. REV. 1488, 1488 (2006). *See also* Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597, 600–25 (2007).

right of the public to use the celebrity sign as an expressive communicative resource in a participatory democracy.

II. OVERVIEW OF THE FIRST AMENDMENT

It has been noted by free speech scholar Rodney Smolla that "[c]ontemporary free speech doctrines are extraordinarily detailed and often confusing" and that "[m]odern First Amendment law abounds in three-part and four-part tests of various kinds."[30] Similarly, Lillian BeVier and Thomas McCarthy have expressed despair at how "First Amendment theories have multiplied, the case law has become ever more chaotic, and consensus on fundamental issues has remained elusive both on and off the Court,"[31] and how the rules are "often maddeningly vague and unpredictable."[32] While it is not the purpose of this article to propose a systematic reconciliation or reconstruction of the contentious doctrines and rules of the First Amendment, this Part argues that participatory understandings of democracy can provide a strong foundation for articulating an appropriate standard of protection for political speech under right of publicity laws.

This Part will first review goals and theories of the First Amendment and then analyze how these are advanced by the present judicial approaches in classifying and protecting speech within a First Amendment hierarchy. It will show that while most First Amendment jurisprudence on the impact of governmental regulation on freedom of speech offers limited assistance to the formulation of a test to resolve the conflict between the private proprietary right of publicity and free speech values, the adoption of a participatory theory nonetheless can reinterpret and refashion the First Amendment defense in publicity claims to protect political speech that is widely recognized to have the highest constitutional value in a democracy.

A.Goals and Theories of the First Amendment

Courts generally are concerned that the enforcement of publicity rights does not have a "chilling effect"[33] on free speech. There are various theories

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[30] RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2:13 (3d ed. 2008). *See also* Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000).

[31] Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1280 (2005).

[32] MCCARTHY, *supra* note 8, § 8:9.

[33] Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). *See also* ERIC BARENDT, FREEDOM OF SPEECH 38 (2d ed. 2005); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL

of the First Amendment, but this Article adopts a participatory theory of democracy involving deliberation and debate for two key reasons. First, in addition to the centrality of such an understanding in justifying free speech in any representative democracy, it is also an integral feature of many other prominent theories.[34] Second, the case law has consistently demonstrated the "preferred position" of political speech at the apex of a speech hierarchy, and this in turn indicates the preeminence of participatory understandings of democracy.[35] However, it should be noted that courts may also consider other justifications that cover non-political expressions, as there is no single overarching theory that can account for the protection given to different types of speech.

Mutually supportive theories for the First Amendment have been said to rest on the tripartite goals of the Framers of the U.S. Constitution that comprise sponsoring enlightenment or the discovery of truth, self-fulfillment, and citizen participation in a deliberative democracy.[36] There are numerous writings by political philosophers and jurists advocating the protection of free speech principles, but this article will not be revisiting the arguments by theorists such as John Stuart Mill, Alexander Meiklejohn, Thomas Emerson, and Ronald Dworkin.[37] Instead this section will focus

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ENQUIRY 80–85 (1982). The term "free speech" shall be taken to mean the freedom of speech and of the press as protected by the First Amendment. It is well-accepted that "in modern First Amendment jurisprudence the Press Clause has largely been subsumed into the Speech Clause." SMOLLA & NIMMER, *supra* note 30, §§ 22:6, 22:10, 22:18.

[34] Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 577–78 (1999) ("All else being equal, one theory should therefore be preferred to another if it is more consonant with widely-shared values or has better prospects of attaining broad acceptance.").

[35] BARENDT, *supra* note 33, at 20–21. It has also been called the "most important theoretical approach to freedom of speech in the twentieth century." Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 28 (2004).

[36] Rodney Smolla argues that all three theories should be understood "not as *mutually exclusive* defenses of freedom of speech, but rather as *mutually supportive* rationales." SMOLLA & NIMMER, *supra* note 30, § 2:7. *See also* MCCARTHY, *supra* note 8, §§ 8:2–8:8; RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 14–17 (1992); BARENDT, *supra* note 33, at 7–21. There have been different variations of the goals advanced by the First Amendment, but they cover essentially the same themes. *E.g.*, Whitney v. California, 274 U.S. 357, 375 (Brandeis, J., concurring) (1927); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6, 879–881 (1970); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47 (1989); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

[37] For an excellent review of such works, *see, e.g.*, BARENDT, *supra* note 33, at 1–36; SCHAUER, *supra* note 33, at 35–46. *See also* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 73, 73–85, 139–55 (John Gray ed., 1998); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); THOMAS I. EMERSON, TOWARD A

only on how the First Amendment is traditionally viewed as essential for the protection of speech from governmental regulation, and how the courts have determined a hierarchy of different types of speech with the highest protection accorded to political speech and a lower level of protection for commercial speech.

In its earlier conceptions, the First Amendment goal of enlightenment or the discovery of truth is represented most prominently by Oliver Wendell Holmes's theory of a "marketplace of ideas" in which "the ultimate good desired is . . . reached by free trade in ideas,"[38] and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[39] The marketplace theory is perhaps "the most famous and rhetorically resonant of all free speech theories,"[40] but it also exhibits a strong underlying democratic theory, evident in the oft-quoted phrase from *New York Times v. Sullivan* that there is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open."[41]

In contrast, the self-fulfillment function shifts the attention from the ideas marketplace to individual dignity.[42] While the Supreme Court has acknowledged that "the human spirit . . . demands self-expression,"[43] there have been relatively few decisions discussing this as a central goal of the First Amendment.[44] Nevertheless, it has been argued that although this theory might regard a right to express personal beliefs and political attitudes as a reflection of what it means to be human, the exercise of free speech might also be seen to be of value to democracy in "leading to the

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GENERAL THEORY OF THE FIRST AMENDMENT (1966); RONALD M. DWORKIN, FREEDOM'S LAW (1996).

38 Abrams v. U.S., 250 U.S. 616, 630 (1919). *See also* Whitney, 274 U.S. at 375.

39 Abrams, 250 U.S. at 630.

40 SMOLLA & NIMMER, *supra* note 30, § 2:4.

41 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), *quoted in* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Boos v. Barry, 485 U.S. 312, 318 (1988). The democratic variant of the marketplace of ideas theory was first discussed in *Thornhill v. Alabama*, 310 U.S. 88, 96, 101–06 (1940).

42 *E.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990–91 (1978); Genevieve Blake, *Expressive Merchandise and the First Amendment in Public Fora*, 34 FORDHAM URB. L.J. 1049, 1081–83 (2007).

43 Procunier v. Martinez, 416 U.S. 396, 427 (1974).

44 *E.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969); Cohen v. California, 403 U.S. 15, 26 (1971). For a useful discussion of this theory of the First Amendment, *see* Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARVARD C.R.-C.L. L. REV. 443 (1998). There has also been much criticism that individual self-actualization or autonomy cannot provide a sound basis for the First Amendment. *E.g.*, Garry, *infra* note 54, at 514; *e.g.*, Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 19 (1990).

development of more reflective and mature individuals and so benefiting society as a whole."[45]

However, the Supreme Court has more recently embraced a "participatory theory of democracy"[46] that is concerned with the enlightenment of public decision-making in a democracy through enabling public access to information and promoting public discourse.[47] This theory has been viewed as drawing on elements of the other two theories: (1) that the minorities in a representative democracy have the right to contribute to political debate as they may have better ideas than the majority, and (2) that the right of individuals to dignity and self-fulfillment may be expressed through their engagement in public discourse. Often known as the Madisonian ideal of deliberative democracy, different but related versions of this theory have been prominently championed by constitutional scholars like Robert Post,[48] Cass Sunstein,[49] and Jack Balkin.[50] The participatory theory is also supported by the more philosophical writings of Meiklejohn,[51] Dworkin,[52] and Owen Fiss.[53] Although the Supreme Court has never ruled

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[45] Tom Campbell, *Rationales for Freedom of Communication*, *in* FREEDOM OF COMMUNICATION 17, 33–34 (Tom Campbell & Wojciech Sadurski eds., 1994); BARENDT, *supra* note 33, at 13.

[46] *E.g.*, Post, *supra* note 30, at 2371. *See also* BARENDT, *supra* note 33, at 18–21; DWORKIN, *supra* note 37, at 15–26. Smolla refers to this as the "democratic self-governance" rationale. SMOLLA & NIMMER, *supra* note 30, § 2:28.

[47] *E.g.*, Virginia v. Black, 538 U.S. 343, 365 (2003); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 (1997); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976). At the Circuit level, *see also* King v. Fed. Bureau of Prisons, 415 F.3d 634, 637 (7th Cir. 2005); Prometheus Radio Project v. FCC, 373 F.3d 372, 435 (3d Cir. 2004); United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990).

[48] *E.g.*, Post, *supra* note 30; Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990) [hereinafter THE CONSTITUTIONAL CONCEPT OF PUBLIC DISCOURSE].

[49] *E.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 17–23, 241–52 (1993); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 6–9, 96–101, 239–43 (2001).

[50] Balkin argues that the purpose of free speech is to promote a "democratic culture" that is even broader than deliberation about public issues such that each individual has "a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong." Balkin, *supra* note 35, at 4. *See also* Jack M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1948–49 (1995).

[51] *E.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 19–28 (1965).

[52] *E.g.*, DWORKIN, *supra* note 37, at 15–26.

[53] *E.g.*, Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–

that to qualify for the highest levels of constitutional protection speech must relate to self-government,[54] Justice Stephen Breyer, speaking in an extrajudicial capacity, has advocated an approach to constitutional adjudication centered on "active liberty" similar to Post's participatory theory.[55] An acceptance of the participatory theory has important implications for the continuing development of judicial approaches in resolving the tension between free speech values and property rights in a right of publicity claim, as it focuses on not an abstract notion of the quest for truth but how the nature and content of communication can "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government"[56] where "national identity [is understood] to be endlessly controversial."[57]

The Supreme Court has never made an "official choice" among competing theories.[58] But "where the doctrinal implications of different prominent theories . . . collide, courts will tend to give priority to the participatory theory of democracy."[59] As the next section will demonstrate, the Supreme Court's articulation of a hierarchy of protectable speech, with political speech at its apex, is compatible with this understanding.

B.Scope of Freedom of Speech

The protection of speech—which generally includes symbolic or expressive conduct[60]—by the First Amendment depends on its position in

10 (1986).

54 Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model that Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 519 (2007). *See also* SMOLLA & NIMMER, *supra* note 30, § 2:46.

55 Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 246 (2002). The participatory theory also appears to have the support of Brian Murchison who, through an analysis of judgments of the Supreme Court, contends that the "self-governance value" underpins the First Amendment. Brian C. Murchison, *Speech and the Self-Governance Value*, 14 WM. & MARY BILL RTS. J. 1251, 1291–1306 (2006).

56 Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty., 457 U.S. 596, 604 (1982).

57 Post, *supra* note 30, at 2369.

58 Cass R. Sunstein, *The Supreme Court 1995 Term - Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 13 (1996).

59 Post, *supra* note 30, at 2371. According to Schauer, the "narrowness of the argument from democracy is also its greatest strength . . . it does furnish several strong reasons for giving special attention and protection to political speech." SCHAUER, *supra* note 33, at 44. It is noted that the opposition to the participatory theory comes most strongly from those who argue from a position of individual autonomy. *E.g.*, C. Edwin Baker, *Harm, Liberty and Free Speech*, 70 S. CAL. L. REV. 979, 981 (1997); David Strauss, *Persuasion, Autonomy and Freedom of Expression*, 91 COLUM. L. REV. 334, 354–55 (1991).

60 *E.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992) (cross-burning);

the hierarchy of protectable speech, the applicable level of scrutiny of the governmental action, and the nature of the other rights with which it is in conflict.[61] However, the U.S. Supreme Court has not established "a clear theory to explain why and when speech qualifies for the top tier,"[62] with the plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* conceding that the inquiry "must be determined by [the expression's] content, form and context."[63]

The Supreme Court has highlighted that while freedom of speech has been recognized "as indispensable to a free society and its government . . . [it] has not meant that the public interest in free speech . . . always has prevailed over competing interests of the public."[64] Most existing First Amendment jurisprudence is concerned with governmental action that abridges speech,[65] with less attention given to discussing how private action can also significantly restrict speech.[66] Yet right of publicity laws are not seen as content-based or viewpoint-based governmental regulation of speech, thus resulting in the bulk of case law on governmental action being unhelpful to an analysis of First Amendment issues in a publicity claim. Nonetheless, the general recognition of the right of publicity as a private

Texas v. Johnson, 491 U.S. 397, 405-06 (1989) (flag-burning); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) (wearing black armbands); Ayres v. City of Chicago, 125 F.3d 1010 (7th Cir. 1997) (wearing t-shirts).

61 BARENDT, *supra* note 33, at 75. *See also* SCHAUER, *supra* note 33, at 89–92.

62 SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, *supra* note 49, at 11.

63 472 U.S. 749, 761 (1985).

64 Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 106 (1979) (Rehnquist, J., concurring). Regarding the protection of private property as a competing interest, *see* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82–88 (1980); Lloyd Corp. v. Tanner, 407 U.S. 551, 569–70 (1972).

65 The Supreme Court has employed a "heightened scrutiny methodology" drawn from the Fourteenth Amendment jurisprudence where governmental regulation has to satisfy the relevant strict, intermediate, or rational scrutiny standards, depending on whether it was content-neutral or content-based. Content-neutral time, place and manner restrictions are usually permitted if they serve a substantial governmental interest, but content-based restriction of protectable speech will be subject to strict scrutiny, which is usually fatal to the challenged regulation. *E.g.*, SMOLLA & NIMMER, *supra* note 30, §§ 2:12, 3:1–3:2; United States v. Playboy Entm't Group, 529 U.S. 803, 817 (2000); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874–79 (1997); R.A.V., 505 U.S. at 382–83; City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–47 (1986); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

66 On the impact of the enforcement of private intellectual property rights on the public domain, *see, e.g.*, Keith Aoki, *Authors, Inventors and Trademark owners: Private Intellectual Property and the Public Domain Part II*, 18 COLUM.-VLA J.L. & ARTS 191 (1994); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (1993).

property right creates a head-on collision with the defendant's free speech interests, as well as the audience's interest in receiving the communication, thus requiring courts to formulate appropriate tests to resolve this conflict.

This Part contends that such judicial formulations should adopt as a starting point a consideration of the constitutional value of the different types of protectable speech. The participatory theory clearly elevates political discourse to a special status at the top of the speech hierarchy, and this is reinforced by Supreme Court decisions that consistently accord to political speech the highest constitutional value in the system of American democracy.[67] Although the Court has categorized art and entertainment together with political speech as belonging to the "core" of the First Amendment, such expressions do not appear to enjoy same level of constitutional protection in the absence of disseminating news;[68] commercial speech has received a lower level of protection,[69] with fighting words, obscenity, and child pornography receiving none at all.[70]

It seems that the Supreme Court has implicitly accepted the participatory theory with frequent pronouncements, such as that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[71] Furthermore, the Court thought that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."[72] Generally, political speech covers all discussion on public issues, especially if intended by the speaker

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[67] Dun & Bradstreet, Inc., 472 U.S. at 758–59 (1985). *See also* Morse v. Frederick, 551 U.S. 393, 403 (2007); Black, 538 U.S. at 365 (2003); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); SMOLLA & NIMMER, *supra* note 30, §§ 16:1–16:2.

[68] MCCARTHY, *supra* note 8, § 8:15 ("to the extent that 'entertainment' is not the equivalent of hard 'news,' it enjoys some slightly lesser level of constitutional protection"). *C.f.* Playboy, 529 U.S. at 818; Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981); Winters v. New York, 333 U.S. 507, 510 (1948). Art is protected because it "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952); *cf.* Mastrovincenzo v. City of New York, 435 F.3d 78, 94–96 (2d Cir. 2006); Am. Civil Liberties Union of Nev. v. City of Las Vegas, 333 F.3d 1092, 1107 (9th Cir. 2003).

[69] *E.g.*, Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763–65 (1976).

[70] *E.g.*, United States v. Williams, 553 U.S. 285, 293 (2008); Black, 538 U.S. at 358–60; R.A.V., 505 U.S. at 422 (1992); Miller v. California, 413 U.S. 15, 23–24 (1973); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[71] Connick v. Myers, 461 U.S. 138, 145 (1983); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); Roth v. United States, 354 U.S. 476, 484 (1957).

[72] Claiborne Hardware Co., 458 U.S. at 907.

to influence governmental action.[73] Political speech has been defined by commentators as speech that has "a reasoned, cognitive connection to some identifiable political issue that has the potential of entering the legislative arena";[74] or "which bears, directly or indirectly, upon issues with which voters have to deal";[75] or "when it is both intended and received as a contribution to public deliberation about some issue."[76]

Although art and entertainment are protected by the First Amendment as having intrinsic value, courts often examine their "political value." A number of decisions assess their contribution to public debate through the articulation of a particular viewpoint or through critical commentary or parody.[77] The Supreme Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* commented, but without further explanation, that a "narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."[78] But the Court has not declared that all entertainment and artistic expression is protected by the First Amendment, and the decisions of the circuit courts are anything but consistent. For example, in evaluating governmental action, the Ninth Circuit has developed a test which protects merchandise that conveys "a religious, political, philosophical or ideological message,"[79] while the Second Circuit uses a weighing methodology to determine whether the defendant's work was "predominantly expressive" in order to separate expressive art from commercial merchandise.[80] Generally, courts have difficulty drawing "[t]he line between the informing and the entertaining"[81] and will continue to face

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[73] *Id.* at 913–14; Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); Sullivan, 376 U.S. at 270 (1964).

[74] Garry, *supra* note 54, at 516.

[75] MEIKLEJOHN, *supra* note 37, at 79.

[76] SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, *supra* note 49, at 130.

[77] In a right of publicity context, *see, e.g.*, Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J., 1981); ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003).

[78] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995). This view that art may be protected for its intrinsic aesthetic value, even if it communicates no articulable message, has been widely debated. *E.g.*, David Greene, *Why Protect Political Art as "Political Speech"?*, 27 HASTINGS COMM. & ENT. L.J. 359, 364–69 (2005); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 105–12 (1996).

[79] Am. Civil Liberties Union of Nev. v. City of Las Vegas, 333 F.3d 1092, 1107 (9th Cir. 2003).

[80] Mastrovincenzo v. City of New York, 435 F.3d 78, 96 (2d Cir. 2006). *See also* Bery v. City of New York, 97 F.3d 689, 696–97 (2d Cir. 1996).

[81] Winters v. New York, 333 U.S. 507, 510 (1948).

problems in publicity claims when deciding whether uses of a celebrity image contribute to public debate (thereby securing the highest protection as political speech) or provide entertainment (hence getting a lesser degree of protection). The subsequent decisions of some courts have read down the *Hurley* dicta regarding the protection of apolitical artworks.[82] It appears unavoidable that judges will have to grapple with ascertaining the constitutional value of the defendant's use of the celebrity personality in artistic or entertainment contexts.

A significant number of right of publicity claims involve unauthorized uses in advertising.[83] Advertising is the quintessence of commercial speech,[84] receiving some constitutional protection against governmental regulation under the *Central Hudson* standard[85] as it "carr[ies] information of import to significant issues of the day"[86] and the information it provides is needed for "private economic decisions."[87] However, the unauthorized use of a celebrity identity to propose a commercial transaction is unlikely to receive First Amendment protection. The courts have not held that the constitutional protection of commercial speech can immunize one from liability in a publicity claim,[88] and this is evident in the various judicial tests used to delineate between protectable expressive uses and non-protectable commercial uses.

In summary, political speech is the most "valuable" type of speech under the participatory theory and is also an important feature of other First Amendment theories. Recent cases have become more focused on the constitutional value of a communication to public political discourse.

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82 *E.g.*, Mastrovincenzo, 435 F.3d at 94–95.

83 *E.g.*, White v. Samsung Electronics Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (White I); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Allen v. Nat'l Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985); Onassis v. Christian Dior-N.Y., Inc., 472 N.Y.S.2d 254 (Sup. Ct. 1984).

84 Commercial speech is one that "proposes a commercial transaction." *E.g.*, Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 761 (1976).

85 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980). Despite numerous criticisms from individual judges and legal scholars, the four-part analysis is still the test applied by the courts. *E.g.*, Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 183 (1999); 44 Liquormart Inc v. Rhode Island, 517 U.S. 484, 495–502, 522–23 (1996); Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 34–43 (2000); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 (1988).

86 44 Liquormart, 517 U.S. at 512.

87 Virginia Pharmacy, 425 U.S. at 765.

88 MCCARTHY, *supra* note 8, §§ 3:46, 7:1; Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 802 (Cal. 2001).

Indeed the courts have eschewed a case-by-case balancing approach to *governmental* regulation of protectable speech,[89] employing a heightened scrutiny methodology that investigates whether there was viewpoint discrimination. However, in disputes involving *nongovernmental* parties, where free speech rights protected by the First Amendment clash with other rights guaranteed by the Constitution—e.g. protection of private property under the Fifth[90] and Fourteenth[91] Amendments—courts appear willing to consider the relative burdens placed on the exercise of the respective rights.[92] As the right of publicity is considered by courts to be a "property right"[93] and in some instances a form of intellectual property right,[94] there ought to be a coherent framework that allows it to be balanced against First Amendment values, drawing on appropriate analogies with either real property or intellectual property, where the courts weigh the harm to the holder of a private property right against the impact of the burden on the freedom of speech on the speaker and the audience.

III. THE FIRST AMENDMENT DEFENSE IN A RIGHT OF PUBLICITY CLAIM

Insofar as statutory publicity rights are concerned, McCarthy observes that it is "difficult to group the statutes into any sort of coherent 'types' or subspecies," and they present "a crazy quilt of different responses at

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89 SMOLLA & NIMMER, *supra* note 30, §§ 2:56–2:60.

90 "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

91 "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

92 MCCARTHY, *supra* note 8, §§ 8:31–8:32. In the shopping center cases, courts are also concerned with the availability of alternative channels of communication, the presence of state action, and whether the property has become a public forum. *E.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83–84 (1980); Lloyd Corp. v. Tanner, 407 U.S. 551, 567–70 (1972); Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229 (1999).

93 Although the court in *Haelan Laboratories* was not explicit about the meaning of the label "property," the Second Circuit clarified in a later decision that the right of publicity was indeed a "property right." Topps Chewing Gum, Inc. v. Fleer Corp., 799 F.2d 851, 852 (2d Cir. 1986). For a list of states which have explicitly recognized this in either case law or statute, *see* MCCARTHY, *supra* note 8, §§ 8:29–8:33, 10:6–10:9. *See also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (1995); RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977).

94 *E.g.*, Acme Circus Operating Co., Inc. v. Kuperstock, 711 F.2d 1538, 1541 (11th Cir. 1983).

different times to different demands on the legislatures."[95] Nonetheless, the relevant legislation will usually enumerate exclusion or exemption categories of use that incorporate by reference the "core" speech protections of the First Amendment. These statutes do not make a distinction between the constitutional values of the different types of speech: once the defendant's use has been found to be within the statutory description of what constitutes permissible use in news; public affairs; political campaigns; sports broadcasts; original works of fine art; literary, dramatic, musical, or artistic works,[96] or by particular types of media,[97] the plaintiff is barred from making a statutory claim. Under this categorical approach, the unauthorized use of a celebrity's identity in a work of fine art is treated the same as its use in a political rally; both will be permitted regardless of the value of their contribution to the debate of public issues.[98]

As Part II has shown, a preponderance of Supreme Court decisions and scholarly writings support the view that the central goal of the First Amendment is to advance democratic deliberation. Therefore, it follows that the defendant's use of the celebrity identity may be classified as political speech with the highest constitutional value if it contributes to democratic processes, and such uses should be accorded greater value than artistic speech or entertainment. Unlike the privileged status that political speech occupies in cases involving judicial scrutiny of legislation for viewpoint or content discrimination, political speech does not occupy a paramount position in the current judicial tests which have been formulated to resolve the conflict between the plaintiff's proprietary right in identity and the First Amendment.

Section A will examine why most "classic" First Amendment jurisprudence concerned with governmental action offers limited guidance to the formulation of the First Amendment defense in publicity claims. Section B will investigate how, in the absence of a clear direction from the Supreme Court, lower courts have developed a mélange of tests that are not based on a particular theory of the First Amendment. Through a critical

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95 MCCARTHY, *supra* note 8, § 6:6.

96 *E.g.*, CAL. CIV. CODE §§ 3344(d), 3344.1(a)(2) (2010); FLA. STAT. § 540.08(3)(a) (2010); 765 ILL. COMP. STAT. ANN. 1075/35(b) (2010); IND. CODE § 32-36-1-1(c)(1) (2010); OHIO REV. CODE ANN. §§ 2741.02(D), 2741.09(A) (2010).

97 *E.g.*, CAL. CIV. CODE § 3344(f) (2010); 765 ILL. COMP. STAT. ANN. 1075/35(b) (2010); IND. CODE § 32-36-1-1(c)(1)(D) (2010); OHIO REV. CODE ANN. § 2741.02(E) (2010); TENN. CODE ANN. § 47-25-1107(c) (2010).

98 As the myriad statutory frameworks generally do not underprotect political speech, this Article will not be discussing their shortcomings. *But see* Richard S. Robinson, *Preemption, the Right of Publicity and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183 (1998); Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?*, 10 CARDOZO ARTS & ENT. L.J. 1(1991); MCCARTHY, *supra* note 8, §§ 6:3–6:8.

analysis of three main judicial approaches, it will demonstrate that these tests do not adequately promote public discourse and debate, and that reference to cultural studies perspectives may help to articulate the "operationalization" of the participatory theory in right of publicity claims.

A.Limited Guidance from the U.S. Supreme Court

As a general rule, a private person may exclude a speaker from his or her property without violating the First Amendment.[99] Under the *O'Brien* principles, the enforcement of the right of publicity by the states may be viewed as content-neutral protection of personal property—an "important or substantial governmental interest"—that is subject to intermediate scrutiny and consequently upheld even though there may be incidental and indirect interference with speech.[100] Thus the First Amendment cases on governmental regulation of speech, including time-place-manner restrictions, do not offer much assistance to the formulation of a First Amendment defense in publicity claims and have not been the subject of much consideration by circuit and state courts.

The Supreme Court, in its only decision to have ever considered a clash between the right of publicity and the First Amendment, eschewed the heightened scrutiny doctrine used in the governmental regulation of speech cases.[101] *Zacchini v. Scripps-Howard Broadcasting Co.* was unusual in its facts because what was appropriated was the plaintiff's entire fifteen-second human cannonball act. Indeed the *Zacchini* decision may be distinguished from most right of publicity claims, which involve an unauthorized use of name, likeness, or other evocative aspects of identity rather than the performance value of identity.[102] Thus many commentators and courts have construed *Zacchini* to be of limited precedential value, relevant only in the rare situation where the plaintiff's "entire act" has been appropriated.[103] As

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[99] *E.g.*, Hudgens v. NLRB, 424 U.S. 507, 518–19 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972). *See also* Mark C. Alexander, *Attention, Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1 (1999).

[100] United States v. O'Brien, 391 U.S. 367, 377 (1968). *See also* Lloyd Corp., 407 U.S. at 570 (upholding the use of trespass laws to exclude speakers from private shopping centers).

[101] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

[102] J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 133 (1995); Richard C. Ausness, *The Right of Publicity: A "Haystack in a Hurricane,"* 55 TEMP. L.Q. 977, 989–90 (1982).

[103] *E.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 806 (Cal. 2001); MCCARTHY, *supra* note 8, § 8:27; Russell S. Jones, Jr., *The Flip Side of Privacy: The Right of Publicity, The First Amendment, and Constitutional Line Drawing—A Presumptive Approach*, 39 CREIGHTON L. REV. 939, 946 (2006). *See also* Pamela Samuelson, *Reviving* Zacchini*: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983).

a result, as Part B will show, lower courts have independently formulated their own tests to resolve the property-speech conflict. However, *Zacchini* is important here on two key points.

First, it is significant that the Supreme Court considered the line of authorities that included *New York Times Co. v. Sullivan*,[104] *Time, Inc. v. Hill*,[105] *Gertz v. Robert Welch, Inc.*,[106] and *Time, Inc. v. Firestone*,[107] which dealt with defamation and invasion of privacy claims by public figures, and declined to extend the actual malice standard to media defendants for right of publicity claims.[108] This suggests that the Supreme Court does not embrace an overarching constitutional actual malice standard that applies to all communications by media defendants, and appears to make a distinction between cases where there was damage to the dignitary or reputational interests of the plaintiff (e.g., invasion of privacy, defamation) and where there was damage to commercial exploitation opportunities (e.g., infringement of right of publicity). Hence it presents ample possibilities for the judicial development of an appropriate First Amendment test to determine the liability of media defendants in publicity claims by public figures, which include politicians and celebrities.[109]

Second, despite the frequent rejection of case-by-case balancing in First Amendment cases involving state action,[110] the *Zacchini* majority

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[104] 376 U.S. 254 (1964).

[105] 385 U.S. 374 (1967).

[106] 418 U.S. 323 (1974).

[107] 424 U.S. 448 (1976).

[108] Zacchini v. Scripps Howard Broad. Co., 433 U.S. 562, 571–75 (1977). The actual malice standard requires a public figure to prove that the publication by the media defendant was made "with knowledge that it was false or with reckless disregard of whether it was false or not." N.Y. Times, 376 U.S. at 280. Despite *Zacchini*, some courts have adopted the actual malice standard. *E.g.*, Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186–8 (9th Cir. 2001); Eastwood v. National Enquirer, Inc., 123 F.3d 1249, 1255 (9th Cir. 1997). *See also* Casondra Kevorkian, *Reinterpreting Jurisprudence: The Right of Publicity*; Hoffman v. Capital Cities/ABC, Inc., 37 LOY. L.A. L. REV. 85, 93–103 (2003).

[109] Under the *Gertz* classification, celebrities are viewed as those "who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures." Gertz, 418 U.S. at 342. *See also* Howard I. Berkman, *The Right of Publicity-Protection for Public Figures and Celebrities*, 42 BROOK. L. REV. 527 (1976); David Branson & Sharon Sprague, *The Public Figure-Private Person Dichotomy: A Flight from First Amendment Reality*, 90 DICK. L. REV. 627 (1986); Frederick Schauer, *Public Figures*, 29 WM. & MARY L. REV. 905 (1984).

[110] For a discussion of judicial balancing, *see, e.g.*, Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of "Definitional Balancing" as a Methodology for Determining the "Visible Boundaries of the First Amendment,"* 39 AKRON L. REV. 483 (2006); Frederick Schauer, *The Boundaries of the First Amendment: A*

recognized that the proprietary right of publicity is not always trumped by free speech. The majority appeared to balance, on the one hand, the threat to the economic value of the plaintiff's performance and the impact of his ability to earn a living[111] with the social purposes of preventing "unjust enrichment" and providing "an economic incentive . . . to make the investment to produce a performance of interest to the public,"[112] and on the other hand, the benefit of news and entertainment to the public.[113] However, without elaboration, the majority held that the plaintiff was entitled to compensation as the media was not always immunized by the First Amendment in right of publicity claims, a conclusion that was criticized by the dissent for its perfunctory brevity.[114]

In contrast to the majority opinion, which focused on the economic value of the plaintiff's act and whether this value was taken by the defendant, the dissent looked to the intent of the media defendant as a starting point in its analysis. Nevertheless, both the majority and the dissent "recognized that any formula to be used when deciding the First Amendment issue should be based on a consideration of the public's benefits and losses resulting in the absence of the privilege."[115] This aspect of *Zacchini* is often ignored by judges and commentators who champion a particular test. For present purposes, it is notable that the *Zacchini* balancing approach can accommodate a participatory theory of democracy, where greater protection may be given to uses of the celebrity identity that promote attention to public issues and engender public debate.[116]

B.Judicial Approaches

Regardless of the judicial test ultimately used, the circuit and state courts agree that if the defendant's use of the plaintiff's identity is categorized as protected "core" speech, such as political speech, entertainment, and art, then the defendant *may* be immune from liability; but if it is classified as commercial speech, the defendant will be liable for

Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765 (2004); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

[111] Zacchini, 433 U.S. at 575–76. The plaintiff claimed that he suffered damages to the extent of US$25,000. *Id.* at 575 n.12.

[112] *Id.* at 576–77.

[113] *Id.* at 578.

[114] *Id.* at 579 (Powell, J., dissenting).

[115] Daniel E. Wanat, *Entertainment Law: An Analysis of Judicial Decision-making in Cases Where a Celebrity's Publicity Right is in Conflict with a User's First Amendment Right*, 67 ALB. L. REV. 251, 255 (2003).

[116] *See* Part IV below for a discussion of such uses as political speech by minority groups.

the commercial exploitation of the associative value of the plaintiff's identity.[117]

Generally, the use of the celebrity identity by the media has a presumptive constitutional protection known as the "newsworthiness" exception which may be explained by both the First Amendment theories of the marketplace of ideas and participatory democracy; this protection of the media in conveying news to the masses has been broadly construed to include virtually all types of information and entertainment communicated by the media.[118] Moreover, as a constitutionally protected medium, owing in part to its being singled out by the Free Press Clause, the media may also advertise itself by reproducing previous articles, programs, and news stories containing the celebrity identity.[119] In applying the newsworthiness exception, courts are generally unconcerned if the media's use of the celebrity's identity contributes to democratic deliberation.[120] The strong presumption in favor of the media is based primarily on the enlightenment function of the First Amendment; thus a media defendant who invokes the newsworthiness exception often escapes liability. However, for *non-media* defendants, the courts are more circumspect about protecting such speech under the newsworthiness exception.[121] Unauthorized uses of celebrity identities in merchandise like posters, buttons, t-shirts and games are often

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[117] As pointed out by McCarthy, "[i]mposing liability for the unpermitted taking of one's identity to attract attention to the product or its advertisement in no way impairs the constitutional right to 'the free flow of commercial information.'" MCCARTHY, *supra* note 8, § 7:3.

[118] *E.g.*, Guglielmi v. Spelling-Goldman Prods., 603 P.2d 454 (Cal. 1979); Stephano v. News Group Publ'ns, Inc., 474 N.E.2d 580 (N.Y. 1984).

[119] *See generally* MCCARTHY, *supra* note 8, §§ 7:14–7:18, 8:69–70; Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639 (Ct. App. 1995); Schivarelli v. CBS, Inc., 776 N.E.2d 693 (Ill. App. Ct. 2002); Booth v. Curtis Publ'g Co., 223 N.Y.S.2d 737 (App. Div. 1962); Stern v. Delphi Internet Servs. Corp., 626 N.Y.S.2d 694 (Sup. Ct. 1995); James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 669–71 (1973).

[120] Myskina v. Condé Nast Publ'ns., Inc., 386 F. Supp. 2d 409, 417 (S.D.N.Y. 2005); Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501, 506 (Sup. Ct. 1968). *See generally* Dora v. Frontline Video, Inc., 18 Cal. Rptr. 2d 790 (Ct. App. 1993); Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596–99 (1979).

[121] The courts usually will not allow the non-media defendant to wrap "its advertising message in the cloak of public interest, however commendable the educational and informational value." Beverley v. Choices Women's Med. Ctr., Inc., 587 N.E.2d 275, 278 (N.Y. 1991). *See also* Downing v. Abercrombie & Fitch, 265 F.3d 994, 1002 (9th Cir. 2001); Abdul-Jabbar v. General Motors, 85 F.3d 407, 416 (9th Cir. 1996); Titan Sports, Inc. v. Comic World Corp., 870 F.2d 85, 88 (2d Cir. 1989).

held to be infringing uses despite the presence of some newsworthy content.[122]

As this Article is concerned with uses of celebrity identity in political speech, often by non-media speakers, the rest of this Part will focus on an analysis of three judicial tests most prominently used by non-media defendants to articulate a First Amendment defense—the direct balancing approach, the transformative elements test, and the predominant purpose test.[123] At present, these approaches tend to ignore the *political* significance of the celebrity sign, and overwhelmingly focus on the *informational*, *artistic*, and *entertainment* aspects of the defendant's use. The following sections will discuss the limitations of these three approaches in their evaluation of how particular uses of the celebrity identity contribute toward advancing participation in democratic deliberation.

1.Direct Balancing Approach in *Russen* and *Cardtoons*

The direct balancing approach explicitly engages in the weighing of benefits and harms to determine if the public interest served by the First Amendment (e.g., expressing a political viewpoint, commentary, criticism, or informing or entertaining the public) outweighs the public interest served by publicity rights (e.g., recognizing the right to exploit the value of one's property, preventing unjust enrichment, or providing an incentive to engage in artistic or sporting endeavor). Although it does not on its face accord special status to political speech, its open-ended nature potentially allows greater "weight" to be given to political speech relative to art or entertainment that does not contribute anything of substantial value to democratic debate. It can expose policy considerations requiring courts to explain the constitutional value given to different types of speech. However, its shortcomings lie in its potential for abstract application, as illustrated by the courts balancing what they perceive to be the public interests that the parties' rights represent rather than the direct benefits and harms to each party.

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[122] *E.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995); Bi-Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1983); Winterland Concessions Co. v. Sileo, 528 F. Supp. 1201 (N.D. Ill. 1981), *aff'd* 735 F.2d 257 (7th Cir. 1984); Rosemont Enters. Inc. v. Choppy Prods., Inc., 347 N.Y.S.2d 83 (Sup. Ct. 1972); Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979).

[123] Other tests include the "artistic relevance" test applicable to the title of artistic works and the relatedness test proposed by the *Restatement (Third)*. *E.g.*, Rogers v. Grimaldi, 875 F.2d 994, 997 (2d Cir. 1989); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

In *Estate of Presley v. Russen*,[124] a New Jersey district court relied on the reasoning of the *Zacchini* majority and weighed the public interest in the informational value of the defendant's speech against the "right of the individual to reap the reward of his endeavors."[125] The court found the defendant's "use of the likeness of [Elvis Presley] in a performance mainly designed to imitate that famous entertainer's own past stage performances" in *The Big El Show* "does not really have its own creative component and does not have a significant value as pure entertainment."[126] Implicitly endorsing the participatory theory, the court points out that "although [the defendant's use] contains an informational and entertainment element, the show serves primarily to commercially exploit the likeness of Elvis Presley *without contributing anything of substantial value to society*."[127]

Fifteen years later, the Tenth Circuit in Cardtoons, L.C. v. Major League Baseball Players Ass'n rejected the framework established in Lloyd Corp. v. Tanner128 to reconcile the conflict between free speech and property rights in the context of governmental regulation, and opted instead to "directly balance the magnitude of the speech restriction against the asserted governmental interest in protecting the intellectual property right."129 Relying on a combination of different First Amendment theories, the court examined the value of parody of celebrities "both as social criticism and a means of self-expression . . . in the marketplace of ideas."130 The court was attuned to how celebrities, as a result of their symbolic significance, are "an important element of the shared communicative resources of our cultural domain."131 The court then weighed the consequences of limiting the defendant's right to free speech132 against the effect of infringing the plaintiffs' right of

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124 513 F. Supp. 1339 (D.N.J. 1981).

125 *Id.* at 1361 (internal quotations omitted).

126 *Id.* at 1359.

127 *Id.* at 1359 (emphasis added).

128 407 U.S. 551, 567 (1972) (where it would be "an unwarranted infringement of property rights to require [the owner] to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist"). The *Zacchini* court did not consider the application of *Lloyd Corp.* to publicity claims.

129 Cardtoons, 95 F.3d 959, 972 (10th Cir. 1996). Legal commentators McCarthy and Kwall have also endorsed this approach. MCCARTHY, *supra* note 8, § 8:39; Kwall, *supra* note 11, at 63.

130 95 F.3d at 972.

131 *Id.* (referring to JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION 3 (1990); Madow, *supra* note 66, at 128).

132 Cardtoons, 95 F.3d at 972-73.

publicity133 and concluded that the detrimental effect of upholding free speech on the plaintiffs' publicity rights in that case was negligible.134 Some courts in California135 and the Eighth Circuit[136] have applied the direct balancing approach, but it is unclear if other courts are likely to follow suit. This form of ad hoc balancing has been applied in other areas of constitutional law like procedural due process analysis[137] and has received some support from Supreme Court justices who advocate a more candid approach to resolving free speech conflicts.[138]

For courts that favor a participatory theory of democracy, direct balancing can be used to examine how the presence of expressive content in the defendant's speech contributes to democratic deliberation and debate. If courts adopt the balancing approach, they ought to consider, on the one hand, the content, form, and context of the defendant's speech and the benefit of the communication to both the defendant and the intended recipient, and on the other hand, the harm to the celebrity individual in having his or her identity used in that manner. This refined approach allows courts to examine the constitutional value of the communication and better evaluate the relative benefits and harms to the parties in a claim.

2.Transformative Elements Test in *Comedy III*

The California Supreme Court in *Comedy III* initiated the "transformative elements" test, also known as the "transformative use" test.[139] It draws from the first factor of the fair use doctrine in copyright law:[140] an unauthorized use of celebrity identity would be permitted if it was "transformative." However, its lack of clear guidelines can encourage judges to be art critics or base decisions on external factors like the fame of

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133 *Id.* at 973–76.

134 *Id.* at 976.

135 *E.g.*, Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 315 (Ct. App. 2001); Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1182–83 (C.D. Cal. 2002).

136 C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media L.P., 505 F.3d 818, 823 (8th Cir. 2007).

137 *E.g.*, Mathews v. Eldridge, 424 U.S. 319, 334–45 (1976).

138 *E.g.*, Branzburg v. Hayes, 408 U.S. 665, 745–46 (1972) (Stewart, J., dissenting); Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); Barenblatt v. United States, 360 U.S. 109, 126–27 (1959).

139 Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).

140 Copyright Act of 1976, 17 U.S.C. § 107(1). *See also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579–85 (1994); Blanch v. Koons, 467 F.3d 244, 251–56 (2d Cir. 2006); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268–69 (11th Cir. 2001); Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 142–43 (2d Cir. 1998).

the artist.[141] Furthermore, "fair use" has been criticized as one of copyright's "most nebulous and unpredictable aspects" and should only be "invoked as a last resort [in publicity claims] after all other solutions have been tried and found wanting."[142] In addition, the cryptic judicial comments that literal depictions like Andy Warhol's silkscreens of celebrities may also be transformative if they carry a particular social message[143] lend little guidance to how a court may meaningfully determine what constitutes the criteria for transformative use. As shown by recent California decisions, the test is focused on visual transformation which can be overprotective of art and entertainment that contribute little to the discussion of public issues, but underprotective of political speech which may be contextually transformative (because of its recoding) though not visually transformative. However, dicta from the *Comedy III* court suggest that contextually transformative uses could also be protected.

The key question for courts adopting this test is "whether the depiction or imitation of the celebrity is the very sum and substance of the work in question" (in which case the defendant is liable for commercial appropriation of identity) or "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness" (in which case the First Amendment trumps the plaintiff's claim).[144] The *Comedy III* court has also looked to determine whether the marketability and economic value of the challenged work derives primarily from the fame of the celebrity depicted.[145] In *Comedy III*, the court held that charcoal drawings of the Three Stooges (used on T-shirts sold to the public) were not sufficiently transformative. The court observed that "the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting . . . to fictionalized portrayal . . ., from heavy-handed lampooning . . . to subtle social criticism."[146]

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[141] *E.g.*, Kwall, *supra* note 11, at 58; Levine, *supra* note 11, at 216–19; Volokh, *supra* note 11, at 913–25. *See also* Cardtoons, L.C. v. Major League Baseball Players Ass'n, 868 F. Supp. 1266, 1272 (N.D. Okla. 1994) (the analysis loses integrity when only one of the fair use factors is considered).

[142] MCCARTHY, *supra* note 8, § 8:38.

[143] Comedy III, 21 P.3d 797, 811 (Cal. 2001) ("Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.").

[144] *Id.* at 809.

[145] *Id.* at 810.

[146] *Id.* at 809.

Thus it appears that a transformative use of identity may be determined by reference to the content, form, and context of the expression. This suggests that contextual transformations, such as the recoded use of a celebrity identity to challenge the majoritarian values that the celebrity sign represents, may merit First Amendment protection. But the court seemed to contradict itself when it later emphasized the primacy of visual transformation: that the inquiry is "in a sense more *quantitative* than qualitative, asking whether the literal and imitative or the creative elements predominate in the work."[147]

Two years later, the California Supreme Court, in a case involving a well-known comic book using depictions of musicians Edgar and Jonathan Winter as wormlike creatures, applied the transformative elements test to conclude that the use was visually transformative.[148] The court initially suggested that a qualitative or non-visual transformation by the defendant, like communicating a different message from that which is ordinarily conveyed by the celebrity sign, may be sufficiently transformative. But it later held that "[w]hat matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression."[149] This seems to indicate that as long as the defendant's depiction of a celebrity is visually different from his or her literal likeness, it will meet the transformative standard without the further need for the defendant to convey any discernible message. Furthermore, the court appeared to reject a consideration of the origin of the economic value of the defendant's work, which was referred to in *Comedy III*, when it added: "the question is whether the work is transformative, not how it is marketed."[150] Subsequently, in *Kirby v. Sega of America*, the California Court of Appeal found that the defendant's videogame character that was based on the likeness of the plaintiff, pop singer Keirin Kirby, was transformative as the defendant had "added creative [visual] elements to create a new expression."[151] The court declined to refine the transformative elements test by considering whether the defendant's use of the plaintiff's

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147 *Id.* (emphasis added).

148 Winter v. DC Comics, 69 P.3d 473, 480 (Cal. 2003).

149 *Id.* at 479. *Cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("Parody has an obvious claim to transformative value . . . . Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.").

150 Winter, 69 P.3d at 479.

151 50 Cal. Rptr. 3d 607, 616 (Ct. App. 2006). The court ignored the fact that a Sega affiliate had previously approached Kirby to endorse the game, but when negotiations failed, the defendant nevertheless created a videogame character that appeared to be an imitation of her performing persona. *Id.* at 613, 616.

identity has to "say [anything]—whether factual or critical or comedic—about a public figure."[152]

In summary, the usefulness of this test appears confined to visual depictions of the plaintiff, and the extent to which the defendant's use has departed from a realistic rendition of the plaintiff's likeness.[153] The judicial application of the test in *Winter*, *Kirby*, and *ETW Corp*[154] suggests that these rules do not necessarily entail greater awareness and discussion of public issues. On the other hand, political speech comprising literal depictions of celebrities that are recoded by counterpublics to express a particular viewpoint may not be sufficiently transformative under the present judicial approach. Hence the current test tends to overprotect artistic speech[155] but underprotect political speech despite the latter's greater constitutional value.

3.Predominant Purpose Test in *Doe*

First proposed by intellectual property litigator Mark Lee,[156] the predominant purpose test was adopted by the Missouri Supreme Court in *Doe v. TCI Cablevision*,[157] protecting an unauthorized use of identity if it was predominantly "expressive" but finding an infringement of the right of publicity if it was predominantly "commercial." Although this test can offer significant protection to uses that convey predominantly expressive political speech, it currently makes no distinction between the constitutional values of political speech and apolitical art and entertainment, and it does not provide clear criteria to resolve hybrid uses (e.g., where there is a mix of political speech and commercial speech, like selling of celebrity-related merchandise in connection with a political rally).

The Missouri court was especially critical of the transformative elements test, observing that it gave "too little consideration to the fact that many uses of a person's [identity] have both expressive and commercial components" and operated to "preclude a cause of action whenever the use of [identity] is in any way expressive, regardless of its commercial

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[152] *Id.* at 616.

[153] McCarthy is especially critical of the transformative elements test. MCCARTHY, *supra* note 8, § 8:72.

[154] 332 F.3d 915 (6th Cir. 2003). *See* discussion below in Part IVB2.

[155] It is worth noting the Sixth Circuit's critical observation that "crying 'artist' does not confer *carte blanche* authority to appropriate a celebrity's name" and "crying 'symbol' does not change that proposition and confer authority to use a celebrity's name when none, in fact, may exist." Parks v. LaFace Records, 329 F.3d 437, 454 (6th Cir. 2003).

[156] Lee, *supra* note 11, at 488–500.

[157] 110 S.W.3d 363, 373 (Mo. 2003).

exploitation."[158] Hence, the predominant purpose test is purportedly designed to address works that are both expressive and commercial,[159] and may be stated thus:

> If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should . . . not be protected by the First Amendment, even if there is some "expressive" content in it that might qualify as "speech" in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.[160]

Unlike the transformative elements test, the mere presence of any visually expressive elements will not bar a right of publicity claim; for the defendant to escape liability, the use of the celebrity's identity must rise above bare transformation to significant expressive commentary. The *Doe* court found, inter alia, that the defendant's use of hockey player Tony Twist's identity as the name and persona of a comic book character and its targeted marketing to the plaintiff's fan base to be "predominantly a ploy to sell comic books and related products rather than an artistic or literary expression" and hence "free speech must give way to the right of publicity."[161]

The predominant purpose test arguably uses "commercial advantage" as its foundation, remaining more faithful to the origins of the right of publicity as expressed in *Haelan Laboratories* and *Zacchini*. This test has been rejected by the California courts,[162] and it has not been explicitly applied by jurisdictions outside Missouri.[163] It does have particular shortcomings.[164] Although the test purports to strike a better balance between free speech and property rights, its definitional approach based on

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158 *Id.* at 374.

159 Levine, *supra* note 11, at 220.

160 Doe, 110 S.W.3d at 374 (citing Lee, *supra* note 11, at 500).

161 *Id.* at 374.

162 *E.g.*, Kirby v. Sega of America, Inc., 50 Cal. Rptr. 3d 607, 617 (Ct. App. 2006).

163 However, the methodology of other courts in focusing on the intent of the defendant in examining whether commercial exploitation of the associative value of the plaintiff's identity has taken place resembles the "predominant purpose" test. *E.g.*, Pooley v. National Hole-In-One Ass'n, 89 F. Supp. 2d 1108, 1113 (D. Ariz. 2000).

164 *E.g.*, Michael S. Kruse, *Missouri's Interfacing of the First Amendment and the Right of Publicity: Is the "Predominant Purpose" Test Really That Desirable?*, 69 MO. L. REV. 799 (2004); F. Jay Dougherty, *All the World's Not A Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J. L. & ARTS 1, 14 (2003).

the judicial determination of the defendant's predominant purpose does not, unlike the *Cardtoons* approach, engage in a balancing exercise that exposes the values and interests at stake. Moreover, the test fails to consider the hierarchy of First Amendment-protected speech, and offers little guidance to judges in relation to the determination of what qualifies as predominantly expressive.

Perhaps the predominant purpose test produced the correct result in *Doe*, aided by the defendant's admission that the use was not to make any expressive comment about Twist[165] and the sustained efforts of the defendant in exploiting the associative value of Twist's identity through marketing merchandise directly to his fan base.[166] In other situations, where the defendant asserts the presence of a parodic element or other social commentary,[167] or where the defendant has not so blatantly marketed its product to the plaintiff's fans,[168] or where the defendant makes a living by selling works of art,[169] it is unclear what criteria the courts will use to determine the "predominant purpose" of the defendant.

While the predominant purpose test does not explicitly rely on a particular theory of the First Amendment, its focus on protecting expressive comment is compatible with a participatory understanding of democracy. It appears that the defendant's unauthorized use of a celebrity's identity will most likely be deemed "predominantly expressive" if it contributed to debate on public issues or drew attention to the subordinate position of minority groups and, at the same time, the celebrity's fan base has not been specifically targeted as potential customers of the defendant's product. In practice, the court's multi-factor analysis to determine whether expressive or commercial components predominate resembles the direct balancing approach. The judicial evaluation of the different factors in *Doe* may well have been performed under the rubric of "direct balancing" where the constitutional value of the defendant's comic book, in terms of its critical commentary and contribution to debate about public issues, is taken into account, and policy considerations more openly discussed.

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165 Doe, 110 S.W.3d at 374.

166 *Id.* at 371.

167 *E.g.*, Winter v. DC Comics, 69 P.3d 473 (Cal. 2003); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996); White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992) (White I). For a criticism of the predominant purpose test on this issue, *see, e.g.*, John Grady et al., *A New "Twist" for the "Home Run Guys"?: An Analysis of the Right of Publicity versus Parody*, 15 J. LEGAL ASPECTS SPORT 267, 283-87 (2005).

168 *E.g.*, Kirby v. Sega of America, Inc., 50 Cal. Rptr. 3d 607 (Ct. App. 2006); Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003).

169 *E.g.*, ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003).

C.Interim Conclusions

As this Part has demonstrated, the three main judicial approaches used in claims involving non-media defendants are not based on any clearly defined theory of the First Amendment. They also do not adequately advance the deliberative democratic ideals that the Supreme Court suggests are important in the cases concerning governmental regulation of speech. Unlike these cases, only a handful of right of publicity decisions have accorded any prominence to the discussion of the *value* of the defendant's expression to democratic deliberation.[170]

Certain commercial uses of the celebrity identity can transcend their apparent status as mere celebrity memorabilia depending on the content, form, and context of the message conveyed by the defendant speaker. Political speech extends beyond expressing support for or opposition to candidates and issues about elections and public office. As the Supreme Court has noted on numerous occasions, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[171] Part IV will show how the analysis of the political symbolism of the celebrity semiotic sign in cultural studies can assist courts in determining when the non-media use of the celebrity identity may be categorized as "purely political speech in a special category [that] helps considerably to clear the decks for a clearer analysis of the First Amendment significance of celebrity merchandise."[172] It will examine cultural studies perspectives on the use of the celebrity personality by minority groups in contemporary society to express their cultural—and political—identities, and explore how this understanding can help shape the development of the First Amendment defense.

IV. IDENTITY POLITICS AND THE CELEBRITY: A CULTURAL STUDIES PERSPECTIVE

If the celebrity semiotic sign is recognized to represent the values of a majoritarian public, then the debate and opposition to these "encoded" ideals may be expressed by using the same signs in a "recoded" manner, and such counterpublic uses can therefore be categorized as "political speech." In order for political speech to be given adequate breathing space, it would be beneficial to understand the free speech issues in publicity

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[170] *E.g.*, Estate of Presley v. Russen, 513 F. Supp. 1339, 1359 (D.N.J. 1981); Paulsen v. Personality Posters, Inc., 299 N.Y.S.2d 501, 507 (Sup. Ct. 1968).

[171] Connick v. Myers, 461 U.S. 138, 145 (1983) *and* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[172] MCCARTHY, *supra* note 8, § 7:22.

claims within the context of a First Amendment theory that "preserves the independence of public discourse so that a democratic will within a culturally heterogeneous state can emerge under conditions of neutrality, and so that individuals can use the medium of public discourse to persuade others to experiment in new forms of community life."[173]

Section A explores, through the lens of cultural studies, how the celebrity personality may be used in the construction and contestation of social and political identities and the significance that particular celebrity personalities may have for minority groups in expressing a particular viewpoint. Section B argues that the use of celebrity signs by these groups may be categorized as political speech in First Amendment doctrine, and examines how the three judicial tests considered above may be refashioned to take this into account.

A.The Celebrity Personality as a Political Site of Interpretive Practice and Contested Meanings

This section demonstrates that cultural studies perspectives can complement and augment a participatory theory of the First Amendment because uses of the celebrity identity by those who are "subordinated" to communicate their disagreement with majoritarian values and to draw wider public attention to their social positions can be viewed as political speech. This contention was mooted three decades ago in Richard Dyer's star studies regarding the gay community's use of the Judy Garland star sign; and other scholars today can be seen to draw on the classic idea of the political significance of star signs, with the support of the general writings of Roland Barthes and Stuart Hall about recoding of semiotic signs. First mentioned in *Stars*, and later more thoroughly explored in *Heavenly Bodies*, Dyer's analysis of the use of the Judy Garland semiotic sign by the gay community provided a valuable foundation for subsequent studies on the use of celebrity personalities by subcultural groups in their identity formation.[174] Described as a "foundational observation" in the study of the cultural function of celebrities,[175] Dyer claims that "[s]tars articulate what it is to be a human being in contemporary society."[176] Most celebrities may be seen "as representing dominant values in society, by affirming what those

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[173] Post, *The Constitutional Concept of Public Discourse*, *supra* note 48, at 684.

[174] *See also* CHRIS ROJEK, CELEBRITY 70 (2001) ("Judy Garland's iconic status in gay culture partly derived from her ability to cope with disapproval, rejection and marginalization"); Madow, *supra* note 66, at 194; Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1876–77 (1991).

[175] GRAEME TURNER, UNDERSTANDING CELEBRITY 103 (2004).

[176] DYER, HEAVENLY BODIES, *supra* note 13, at 7.

values are in the 'hero' types (including those values which are relatively appropriate to men and women) or as alternative or subversive types that express discontent with or rejection of dominant values."[177] His work on the politics and cultural dominance of whiteness[178] also exposes an Anglo-Saxon hegemony said to be characteristic of American society. According to Dyer's pioneering analyses, celebrities can have an ideological function of not only reiterating dominant values, but also concealing prevalent contradictions or social problems.[179] More generally, cultural scholars have argued that "identities can function as points of identification and attachment only *because* of their capacity to exclude, to leave out, to render 'outside' abjected."[180]

Dyer's *Stars*,[181] which laid the groundwork for the celebrity studies of Marshall[182] and Turner,[183] appears to have influenced the thinking of legal commentators like Rosemary Coombe[184] and Michael Madow.[185] In the later *Heavenly Bodies*, Dyer contends, "Stars are also embodiments of the social categories in which people are placed and through which they have to make sense of their lives . . . categories of class, gender, ethnicity, religion, sexual orientation, and so on."[186]

Using a postmodern analysis, Coombe argues how the value of a celebrity's image may reside "in its character as a particular human embodiment of a connection to a social history" when one is provoked to reflect upon one's "own relationship to the cultural tradition in which the star's popularity is embedded."[187] Coombe's description of the political potential of the contemporary celebrity draws much from Dyer: "The celebrity image is a cultural lode of multiple meanings, mined for its

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[177] DYER, STARS, *supra* note 13, at 52. *See also* DYER, HEAVENLY BODIES, *supra* note 13, at 12 ("the star phenomenon reproduces the overriding ideology of the person in contemporary society").

[178] RICHARD DYER, WHITE (1997).

[179] DYER, STARS, *supra* note 13, at 27–28. *See also* TURNER, *supra* note 175, at 102–07; Paul McDonald, *Reconceptualising Stardom*, *in* RICHARD DYER, STARS 175, 192–93 (2d ed. 1998).

[180] Hall, *Introduction: Who Needs "Identity?"*, *supra* note 24, at 5 (emphasis in original). *See also* Hall, *The Local and the Global*, *supra* note 24; LACLAU, *supra* note 24; BUTLER, *supra* note 24.

[181] DYER, STARS, *supra* note 13.

[182] *E.g.*, MARSHALL, *supra* note 14.

[183] *E.g.*, TURNER, *supra* note 175.

[184] *E.g.*, Coombe, *supra* note 174; ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (1998).

[185] Madow, *supra* note 66.

[186] DYER, HEAVENLY BODIES, *supra* note 13, at 18.

[187] Rosemary J. Coombe, *Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365, 375 (1992).

symbolic resonances and, simultaneously . . . invested with . . . social longings and political aspirations."[188]

In highlighting the "radical potential of the stars," Dyer further observes that there is a political dimension to the use of stars for repressed groups like "the working class, women, blacks, gays – who have been excluded from the culture's system of representations in all but marginal and demeaning forms";[189] the subordinated social groups are using these star signs which are associated with the dominant ideology to appropriate power for themselves in a democracy.[190]

In the U.S., the "structural barriers or limits of class [that] would obstruct [the] process of cultural absorption" have not assisted the "democratic enfranchisement of all citizens within political society."[191] Reading culture politically can reveal how celebrity signs can "reproduce the existing social struggles in their images, spectacle, and narrative."[192] Indeed there is a significant emphasis in contemporary cultural studies on the notion of audience participation—be it their complicity or resistance—in the hegemony of cultural texts propagated by the media and other producers.[193] It is in these studies of semiotic disruptions that one may find the relevant tools for establishing a conceptual framework within First Amendment doctrine that addresses the political agenda of the active audience. Individuals outside the majoritarian value system often have an "alternative foci of integration" and are thus defined as "sub-cultural,"[194] "subaltern,"[195] or "counterpublics;"[196] and there is an increasing judicial

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188 *Id.* at 365.

189 DYER, STARS, *supra* note 13, at 183–84.

190 *See also* McDonald, *supra* note 179, at 192.

191 Stuart Hall, *The Rediscovery of "Ideology:" Return of the Repressed in Media Studies*, *in* CULTURE, SOCIETY AND THE MEDIA 56, 60 (Michael Gurevitch et al. eds., 1982).

192 DOUGLAS KELLNER, MEDIA CULTURE: CULTURAL STUDIES, IDENTITY AND POLITICS BETWEEN THE MODERN AND THE POSTMODERN 56 (1995).

193 *E.g.*, JOHN FISKE, MEDIA MATTERS: EVERYDAY CULTURE AND POLITICAL CHANGE (1996); DAVID MORLEY, THE NATIONWIDE AUDIENCE (1980); IEN ANG, WATCHING DALLAS: SOAP OPERA AND THE MELODRAMATIC IMAGINATION (1985); IEN ANG, DESPERATELY SEEKING THE AUDIENCE (1991); THE AUDIENCE AND ITS LANDSCAPE (James Hay et al. eds., 1996); NICK ABERCROMBIE & BRIAN LONGHURST, AUDIENCES: A SOCIOLOGICAL THEORY OF PERFORMANCE AND IMAGINATION (1998); AUDIENCES AND PUBLICS: WHEN CULTURAL ENGAGEMENT MATTERS FOR THE PUBLIC SPHERE (Sonia Livingstone ed., 2005); JONATHAN BIGNELL, BIG BROTHER: REALITY TV IN THE TWENTY-FIRST CENTURY (2005); JONATHAN GRAY, WATCHING WITH THE SIMPSONS: TELEVISION, PARODY, AND INTERTEXTUALITY (2006).

194 Hall, *supra* note 191, 62.

195 Lawrence Grossberg, *Identity and Cultural Studies: Is That All There Is?*, *in* QUESTIONS OF CULTURAL IDENTITY 87, 92 (Stuart Hall & Paul Du Gay eds., 1996).

196 MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS 119 (2002).

recognition of these groups asserting their alternative views in the political sphere.[197]

Building on Jürgen Habermas's work on the public sphere,[198] Michael Warner's analysis of the struggles that bring individuals together as a public postulates that "subaltern counterpublics" usually articulate alternative power relations with the dominant public defined by race, gender, sexual orientation, and other subordinated status.[199] Counterpublics are "counter" to the extent that they try to supply different ways of imagining participation within a political or social hierarchy by which its members' identities are formed and transformed.[200] According to Warner, a counterpublic maintains "an awareness of its subordinate status . . . [with respect] not just to ideas or policy questions, but to the speech genres and modes of address that constitute the public."[201]

As "icons of democracy and democratic will,"[202] each celebrity persona can be a powerful signifier that is synonymous with the dominant culture. Especially with the increase in celebrity political activism through each celebrity individual championing particular causes, and even appearing at congressional hearings,[203] the persona of well-known individuals like Oprah Winfrey, an ardent Barack Obama supporter, can embody very distinct political ideologies. Thus a counterpublic use of a particular celebrity persona can acquire a political dimension, and may be seen as a "discursive space . . . for contesting and engendering the American character."[204] Hall has also defined the taking of an existing meaning and appropriating it for new meanings as "trans-coding"[205] and explained that repressed groups may

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[197] *E.g.*, Hurley v. Irish-Am Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 557 (1995) (where the defendant professed to express its members' pride as openly gay, lesbian, and bisexual individuals and support their march in the New York St Patrick's Day parade); Raymen v. United Senior Ass'n Inc., 409 F. Supp. 2d 15, 22–23 (D.D.C. 2006) (where the defendants were protected by the First Amendment in the use of the plaintiff's images in an advertising campaign which challenged various public policy positions taken by the American Association of Retired Persons).

[198] *E.g.*, JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., 1989); HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1992).

[199] WARNER, *supra* note 196, at 44–63, 117–20.

[200] *Id.* at 121–2.

[201] *Id.* at 119.

[202] MARSHALL, *supra* note 14, at 246.

[203] *See generally* Kathryn Gregg Larkin, *Star Power: Models for Celebrity Political Activism*, 9 VA. SPORTS & ENT. L.J. 155 (2009).

[204] Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 49 STAN. L. REV. 143, 164–65 (1996).

[205] Stuart Hall, *The Spectacle of the 'Other,' in* REPRESENTATION: CULTURAL

use trans-coding strategies to reverse stereotypes, substitute "negative" portrayals with "positive" ones or contest subordinate representations from within.[206]

For example, with reference to global sport icon David Beckham, the dominant coding for the Beckham sign may be construed to represent not just sexual desirability, but also reinforcing the hegemony of *white heterosexual* desirability (thus excluding the representation of the *non-white non-heterosexual*).[207] Viewed in this manner, those opposing this majoritarian signification may want to recode the Beckham sign to highlight their subordinate or hidden status in society, and to increase the visibility of their political participation through the use of the celebrity symbol. In the words of Garry Whannel, known for his writings on the signification of sporting celebrities, the image of Beckham that departs "from the dominant masculinised codes of footballer style" may also represent "a challenge to the heterosexual conformity of sport's modes of male self-presentation."[208] Thus, if one accepts that ideological challenges may be effected through certain recoded uses of the celebrity sign,[209] then one could use a celebrity sign like Beckham to interrogate "the categories of whiteness, men, ruling class, heterosexuality, and other dominant powers and forms that ideology legitimates, showing the social constructedness and arbitrariness of all social categories and the binary system of ideology."[210]

In summary, from a cultural studies perspective, the political agenda of counterpublics or subaltern groups may be best communicated to

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REPRESENTATIONS AND SIGNIFYING PRACTICES 223, 270 (Stuart Hall ed., 1997). The term "transfunctionalize" has also been used to describe how subcultures assign new and often contradictory meanings to signs as understood by mainstream society. PAUL NATHANSON, OVER THE RAINBOW: *THE WIZARD OF OZ* AS A SECULAR MYTH OF AMERICA 241 (1991).

[206] Hall, *supra* note 205, at 270–75. For example, the genre of real person slash ("RPS") or real person fiction ("RPF") which features celebrity individuals is a form of fan fiction that adopts the public personae of celebrities as their own characters, building a fictional universe based on the supposed real-life histories of these celebrities. *E.g.*, Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U.J. GENDER SOC. POL'Y & L. 461, 489 (2006).

[207] *See, e.g.*, The Walt Disney Co., *Stars Play Out Disney Park Fantasies in New Images Unveiled by Annie Leibovitz*, DISNEY.COM, http://corporate.disney.go.com/corporate/moreinfo/beckham_parks012607.html (last visited Oct. 13, 2010) (describing a common representation of Beckham emphasizing his "whiteness").

[208] GARRY WHANNEL, MEDIA SPORTS STARS: MASCULINITIES AND MORALITIES 202 (2002).

[209] Arguments have been made regarding the use of trademarks and copyrighted works in a similar fashion. *See, e.g.*, COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, *supra* note 184; Aoki, *supra* note 66; Katyal, *supra* note 206; Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429 (1986).

[210] KELLNER, *supra* note 192, at 61.

mainstream society through the use of widely recognized celebrity signs to which the public have ascribed particular representative values or characteristics. For example, with respect to gay and lesbian communities, legal commentator Madhavi Sunder explains that "[c]entral to this project is a cultural play with signs and symbols aimed, first, at illustrating that gays, lesbians, and bisexuals always have been and always will be part of the 'normal' operations of society and, second, challenging the normality of such operations by exposing the hidden homosexual."[211]

Thus the celebrity signs that are constitutive of cultural heritage—like "Judy Garland," "Oprah Winfrey," "Tiger Woods," and "David Beckham"—each transcend the human individuals who bear these names and are symbolic of the ideological hegemonies of social identities in contemporary society. Their recoding by counterpublics may be viewed as "[p]ractices of articulating social difference [that] are central to democratic politics."[212] The next section will investigate when such practices ought to be categorized as political speech that merits the highest level of First Amendment protection.

B.Using Celebrity Signs within First Amendment Doctrine

1.Rethinking the Use of the Celebrity Sign as Political Speech

The recoding practices of subaltern groups, as Coombe astutely points out, may "seem distant, if not utterly divorced from the legal regime of personality rights"[213] and "are neither readily appreciated using current juridical concepts nor easily encompassed by the liberal premises that ground our legal categories."[214] But closer inspection reveals that through different modes of expressing the celebrity personality—like adulation, parody, satire, and burlesque—subaltern groups are able to advance their political ideologies and assert alternative identities that "affirm both community solidarity and the legitimacy of their social difference by empowering themselves with cultural resources that the law deems the properties of others."[215]

At first sight, the public forum doctrine[216] in First Amendment

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[211] Sunder, *supra* note 204, at 167.

[212] COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, *supra* note 184, at 295. *See also* WARNER, *supra* note 196, at 210.

[213] Coombe, *supra* note 187, at 386.

[214] COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, *supra* note 184, at 6.

[215] Coombe, *supra* note 187, at 366.

[216] The Supreme Court has identified three categories of forum in which government property and institutions are divided for the purposes of analysing permissible regulation of expressive activity: traditional public, designated public and non-public. *See, e.g.*, Perry

jurisprudence appears to have some relevance for right of publicity laws as one may argue that the celebrity persona, because of the audience's active role in its production, circulation, and consumption, can be treated as a *quasi*-public forum.[217] However, it is inapposite to apply public forum principles to uses of the celebrity identity for expressive activity as the celebrity persona lacks the quintessential qualities of government control, physical location, and public access that are evident in cases which primarily dealt with disputes in relation to shopping arcades and malls, pedestrian sidewalks and schools.[218] Courts have to consider whether there is sufficient state action to "transform government property into a public forum."[219] Moreover, the public forum rules have only been applied to determine whether government regulation of expressive activity in a particular category of forum was subject to heightened scrutiny; generally, content- or viewpoint-based legislation in traditional and designated public fora are subject to strict scrutiny while time-place-manner restrictions may be permitted. Although a number of attempts have been made to categorize privately owned shopping malls as public fora, the Supreme Court has steadfastly held that there is no constitutional right to engage in expressive activity on such private properties.[220] In addition, in order to convert a privately owned business location into a public forum, courts have required "either a symbiotic relationship or a sufficiently close nexus between the government and the private entity so that the 'power, property and prestige'

Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); United States v. Kokinda, 497 U.S. 720 (1990); Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

[217] *E.g.*, Leslie Kim Treiger-Bar-Am, *The Moral Right of Integrity: A Freedom of Expression, in* NEW DIRECTIONS IN COPYRIGHT LAW VOLUME 2 127, 157 (Fiona MacMillan ed., 2006). The assertion that "the public forum argument could be raised by modifiers of speech" with respect to cultural icons like Mickey Mouse or Barbie is unfortunately not explained.

[218] *E.g.*, Hotel Empls. & Rest. Emps. Union, Local 100 v. City of New York Dep't of Parks & Recreation, 311 F.3d 534, 540 (2d Cir. 2002) (distinguishing between a public and a non-public forum for free speech purposes, a court should examine the forum's physical characteristics and the context of the property's use, including its location and purpose); *See also* Kokinda, 497 U.S. at 726–30; PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 79–85 (1980).

[219] Perry, 460 U.S. at 47 (1983). The state action doctrine, related to the public forum doctrine, requires a significant nexus, not just between the state and the private actor, but also between the state and the allegedly unconstitutional act, before the court would find state action. *See, e.g.*, Alexander, *supra* note 99, at 23–26.

[220] *See* Hudgens v. NLRB, 424 U.S. 507, 520 (1976). *See also* Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) (holding that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes"). *See generally* PruneYard, 447 U.S. 74, 80.

of the state has been in fact placed behind the challenged conduct."[221] Unlike the disputes in public fora cases regarding the physical space *on* which expressive activity takes place, the celebrity identity is an intangible symbol which would usually form an integral *part of* the alleged expressive activity—it is not a functional equivalent of town halls, public parks, and downtown business districts. It is more appropriate to consider other approaches in First Amendment jurisprudence to give effect to the semiotic significance of celebrity signs.

The participatory theory of the First Amendment supports the protection of the making of "representations about self, identity, community, solidarity, and difference" or the articulation of political and social aspirations using the celebrity sign within a "dialogic democracy"[222] as political speech. In First Amendment doctrine, such recoded circulations can be viewed as a form of political activism akin to *Raymen v. United Senior Ass'n Inc.*,[223] characterized by their ability to "reverse perceptions of social devaluation or stigma, articulate alternative narratives of national understanding, and challenge exclusionary imaginaries of citizenship."[224]

In this light, the recoding of celebrity signs by gay and lesbian counterpublic groups may be conceived as political speech expressing an opposition to "heteronormativity"[225] that embodies "a constellation of practices that everywhere disperses heterosexual privilege as a . . . central organizing index of social membership."[226] Similar arguments may be made for other subaltern categories of race, gender or class. For example, the celebrity signs of Tiger Woods or Jacqueline Onassis, as articulated through

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[221] City of West Des Moines v. Engler, 641 N.W.2d 803, 806 (Iowa 2002) (quoting State v. Wicklund, 589 N.W.2d 793, 802 (Minn. 1999)). Generally, the courts have declined to extend any right of free expression on privately owned property. *E.g.*, Shad Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1218 (N.Y. 1985); Illinois v. DiGuida, 604 N.E.2d 336, 348–349 (Ill. 1992). But California, interpreting its State Constitution, has held that mall owners must permit such access in certain instances, and has employed a balancing test to resolve the issue. *E.g.*, Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 822–823 (Cal. 2001) (Werdegar, J., dissenting); Albertson's, Inc. v. Young, 131 Cal. Rptr. 2d 721, 735 (Cal. Ct. App. 2003).

[222] COOMBE, *supra* note 184, at 248–49.

[223] 409 F. Supp. 2d 15 (D.D.C. 2006).

[224] COOMBE, *supra* note 184, at 12. *See also* Kembrew McLeod, *The Private Ownership of People*, *in* THE CELEBRITY CULTURE READER 649, 658 (P. David Marshall ed., 2006) (explaining how communities may use celebrity signs, like John Wayne, that represent a certain ideal in mainstream society as a "resistive reading"). *See also* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

[225] Heteronormativity has been defined as "the institutions, structures of understanding, and practical orientations that make heterosexuality seem . . . privileged." WARNER, *supra* note 196, at 188 n.3.

[226] *Id.* at 195.

widely distributed photographic and televisual images, especially in advertising, embody certain values for the majoritarian public.[227] Therefore, their recoding, like an ironic use of the Tiger Woods image by the National Association for the Advancement of Colored People (NAACP)[228] to highlight the discrimination of colored people or on t-shirts as "an extensive . . . message of social advocacy" to express their pride in being associated with a successful African-Asian American icon in a festival or parade,[229] can be categorized as political speech. One could argue that their pertinent viewpoints significantly contribute to democratic participation and debate.[230]

However, conferring on such uses the status of political speech does not guarantee immunity from liability for every subaltern group or individual speaker who tacks on a political message to unauthorized uses of the celebrity sign. As McCarthy cautioned, "[I]f all it took for a defendant to wrap itself in the First Amendment was to add an appropriate 'Express Your Support for _____' slogan on all celebrity merchandise, then the right of a celebrity to control the commercial property value in his or her identity would be destroyed."[231]

In assessing a publicity claim, especially in the context of advertising, courts should distinguish whether the recoding of the celebrity sign is "genuinely a political statement" or an attempt to "appropriate 'difference' . . . in order to sell a product."[232] Accordingly, if one views the First Amendment as informed by a pragmatic cultural studies approach, regardless of whatever formulation the court adopts, one should consider: (i) the content of the expressive elements of the use of the celebrity personality (e.g., whether it was to advance a political cause or affirm the political identity of a particular social group); (ii) the form of expression (e.g., whether the use was commercial in the form of advertising, character merchandising or product sale, or non-commercial, or a hybrid); and (iii) the context of the use (e.g., whether it was to express a particular viewpoint

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[227] *See generally* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003); Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984).

[228] "The mission of the NAACP is to ensure the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination." NAACP, *Our Mission*, http://www.naacp.org/pages/our-mission (last visited Oct. 18, 2010).

[229] Ayres v. City of Chicago, 125 F.3d 1010, 1014 (7th Cir. 1997). *See also* One World One Family Now v. City & Cnty. of Honolulu, 76 F.3d 1009, 1012 (9th Cir. 1996); Heffron v. Int'l Soc'y for Krishna Consciousness Inc., 452 U.S. 640, 647 (1981).

[230] NAACP also seeks, inter alia, to "remove all barriers of racial discrimination through democratic processes." NAACP, *supra* note 228.

[231] MCCARTHY, *supra* note 8, § 7:22.

[232] Hall, *supra* note 205, at 273 (emphasis in original).

at a parade, rally, or some other public forum).[233] In propertizing identity, right of publicity laws should aim to strike a balance between protecting, on the one hand, both the proprietary right of the celebrity individual to exploit the associative value of identity and his or her right as an individual speaker not to propound a particular point of view,[234] and on the other hand, the right of others to express a political viewpoint through connotative recoded uses of the celebrity sign. The next section will evaluate how the three main judicial tests may take into account such politically expressive uses.

2. Revisiting the Current Judicial Approaches

This section will focus on examining how the three main judicial tests can accommodate the classification of recoded uses of the celebrity identity as political speech within their analyses. To illustrate their operationalization, the revised tests will be applied to the facts of two cases which have attracted significant commentary and judicial discussion, *Samsung Electronics America v. White*, 508 U.S. 951 (1993) (involving the attractive blonde Anglo-Saxon television personality Vanna White) and *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003) (involving African-Asian American sport icon Tiger Woods).

In *White*, the defendant Samsung had depicted a robot dressed in a wig, gown, and jewelry reminiscent of Vanna White's hair and dress on the *Wheel of Fortune* show in an advertisement for videocassette recorders (VCRs). The Ninth Circuit rejected the defendant's First Amendment defense which posited that the advertisement was a parody of Vanna White's television act and was therefore protected speech. As a semiotic sign, White is widely associated with a consumption culture epitomized by the game show, or can be seen to represent, like Marilyn Monroe and other blonde Anglo-Saxon celebrities, the privilege of "whiteness" in contemporary American society.[235] If the sign of Vanna White were

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[233] The location of the speech is important. In *Ayres*, the selling of expressive t-shirts by the Marijuana Political Action Committee to be worn at city-sponsored festivals in Grant Park was held to be political speech. 125 F.3d at 1013–14.

[234] *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 574 (1995) (recognizing the Council's "right as a private speaker to shape its expression by speaking on one subject while remaining silent on another").

[235] RICHARD DYER, WHITE 73, 138 (1997). Dyer also comments that through "narrative structural positions, rhetorical tropes and habits of perception . . . white people in white culture are given the illusion of their own infinite variety" and is one of the means by which subordinated social groups are "categorized and kept in their place." *Id.* at 12. *See also* DYER, *supra* note 13, at 17-63; Grant McCracken, *Marilyn Monroe, Inventor of Blondness*, *in* GRANT MCCRACKEN, CULTURE AND CONSUMPTION II: MARKETS, MEANING AND BRAND MANAGEMENT 93, 93–96 (2005).

recoded as a critique of these ideals, and particularly by subaltern groups who seek to "achieve equality of rights and eliminate race prejudice among the citizens of the United States,"[236] then the relevant speech may be categorized as political speech. In *Raymen*, for example, the court found that the advertisement, which features the photograph of the plaintiffs kissing, was part of a campaign by USA Next challenging various public policy positions purportedly taken by the American Association of Retired Persons.[237] The court found that the photograph "discusses public policy issues that are currently the subject of public debate"[238] and held that USA Next, a nongovernmental organization, was therefore protected by the First Amendment against liability for right of publicity infringement. However, the Samsung print advertisement in *White*, unlike the *Raymen* or infamous Benetton advertisements,[239] contains no discernible political expression that contributes to democratic debate.

In *ETW Corp*, the defendant Jireh Publishing, a commercial company, released for sale over 5,000 prints bearing Tiger Woods's likeness based on a painting by Rick Rush titled *The Masters of Augusta*, which commemorates Woods's historic victory.[240] In the foreground of Rush's

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[236] For example, as reflected in one of the principal objectives of the NAACP in its constitution. NAACP, *supra* note 228.

[237] Raymen v. United Senior Ass'n Inc., 409 F. Supp. 2d 15, 19 (D.D.C. 2006). The photograph featured the plaintiffs, a gay couple, kissing, and was said to be used in the advertisement "to incite viewer passions against the AARP because of its alleged support of equal marriage rights for same-sex couples." *Id.*

[238] *Id.* at 24.

[239] Benetton describes its brand as "a subverter of stereotypes" and by "associating its name with the representation of conflict and pain," it has consistently drawn attention to political and social issues by portraying in its advertisements images that include death row prisoners, a man dying of AIDS, a soldier gripping a human thigh bone, and a ship being stormed by emigrants. BENETTON GROUP, *UCB ADVERTISING PRESENTATION*, http://press.benettongroup.com/ben_en/about/campaigns/history/pubblicita.pdf (last visited Nov. 18, 2009). *See also* Stuart Elliott, *Benetton Stirs More Controversy*, N.Y. TIMES, July 23, 1991 at D22, *available at* http://www.nytimes.com/1991/07/23/business/the-media-business-advertising-benetton-stirs-more-controversy.html?scp=5&sq=benetton%20ads&st=cse; Deborah Feyerick, *Victims' Rights Advocates Denounce Benetton 'Death Row' Ads*, CNN.COM (Jan. 18, 2000), http://archives.cnn.com/2000/STYLE/fashion/01/18/benetton.ads/.

[240] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003) (the majority arguably used a combination of the different approaches from Kozinski's dissent in *White*, the transformative elements test in *Comedy III*, and some balancing drawn from *Comedy III*, to dismiss Woods's claim). The majority's opinion has spawned numerous articles critical of its reasoning. *E.g.*, Michael Sloan, *Too Famous for the Right of Publicity:* ETW Corp. *and the Trend Towards Diminished Protection for Top Celebrities*, 22 CARDOZO ARTS & ENT. L.J. 903 (2005); Michael Suppappola, *Is Tiger Woods's Swing Really a Work of Art? Defining the Line Between the Right of Publicity and the First Amendment*, 28 W. NEW ENG. L. REV. 57 (2005).

painting are three views of Woods in different poses; in the background is the Augusta National Clubhouse and likenesses of famous past golfers looking down on Woods.[241] The accompanying text contains laudatory narrative of Woods's achievement at Augusta.[242] The Sixth Circuit dismissed both Woods's right of publicity and *Lanham Act* claims, noting that "sports and entertainment celebrities have come to symbolize certain ideas and values in our society and have become a valuable means of expression in our culture,"[243] but without discussing the constitutional value of the defendant's speech. Cultural commentators C. L. Cole and David Andrews argue that Woods as a popular American icon was "coded as a multicultural sign of color-blindness,"[244] and such "racially-coded celebrations [can] deny social problems and promote the idea that America has achieved its multicultural ideal."[245] This dominant coding of the Woods celebrity sign[246] offers myriad possibilities for recoding by subaltern African-American or Asian-American groups to assert their particular viewpoints about the role of race and ethnicity in public policy. However, the almost literal rendition of Woods's image and its contextual setting against the background of other famous golfers and the clubhouse lack important elements of criticism or parody that usually suggest a high constitutional value.[247] The defendant's depiction of Woods, despite its momentous occasion, contains no definable political expression and contributes little to any public awareness or discussion of the issues relating to minority groups in American society.

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241 ETW, 332 F.3d at 918.

242 *Id.* at 919 n.1.

243 *Id.* at 937–38.

244 C.L. Cole & David L. Andrews, *America's New Son: Tiger Woods and America's multiculturalism*, *in* SPORT STARS: THE CULTURAL POLITICS OF SPORTING CELEBRITY 70, 81 (David L. Andrews & Steven J. Jackson eds., 2001). Woods has also described himself as a "Cablinasian"—a combination of Caucasian, black, Indian, and Asian. *Id.* (quoting *The Oprah Winfrey Show* (television broadcast, Apr. 24, 1997)).

245 *Id.* at 70.

246 Woods has been said to be a "multicultural myth" perpetrated by advertisers, particularly by Nike in their commercial advertisements as an "emblem" of "racial progress . . . that combined race, sport, masculinity, national healing, and proper citizenship." *Id.* at 78, 82.

247 Parody and satire have served for generations as a means of criticizing public figures, exposing political injustice and communicating social ideologies—all objectives deserving of First Amendment protection. *See, e.g.*, Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998).

a. Direct Balancing Approach

The Supreme Court has acknowledged a "fundamental interdependence exists between the personal right to liberty and the personal right in property" and both are "basic civil rights."[248] It has also been observed that "[p]rivate property rights, despite the public interests to which they have been compelled to yield during the past century, remain firmly entrenched in American constitutional fabric."[249] Direct balancing can take into account this special status of property rights, and at the same time, give "greater weight" to political speech by counterpublics that use the celebrity identity to challenge majoritarian beliefs or positions, compared to that accorded to art or entertainment that do not express a political viewpoint. Presently, the balancing test tends to be applied at an abstract level and does not clearly balance the benefit to the defendant speaker against the harm to the celebrity plaintiff, including the plaintiff's own First Amendment rights, if the right of publicity was not enforced.

Of the three tests examined, its open-ended nature best allows courts to consider the content, form, and context of the use of the celebrity identity and to explicitly evaluate the relative harms and benefits to the parties involved.[250] In recognizing the recoding possibilities of the celebrity identity for political speech, the factors that a court may consider include (i) the primary motivation of the defendant speaker in using the celebrity plaintiff's identity, (ii) the nature of the defendant's commercial enterprise, (iii) the content of the defendant's expressive speech, (iv) the medium of the defendant's expression, (v) the occasion and location of the defendant's use, (vi) the presence of alternative avenues of communication, and (vii) the intended audience of the defendant's communication.

In evaluating the harm to the plaintiff, the court may consider (i) the nature and extent of damage to the plaintiff's ability to exploit the associative value of his or her identity,[251] and (ii) whether the defendant's products were a substitute for products offered by the plaintiff or the

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[248] *E.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

[249] Friedelbaum, *supra* note 92, at 1262 n. 266.

[250] After a lengthy review of various approaches to incorporate First Amendment considerations into right of publicity doctrine, McCarthy, citing the *Cardtoons* direct balancing approach with approval, has also concluded that one needs to "meet the conflict head on" and "[t]he balance must be laboriously hacked out case by case." MCCARTHY, *supra* note 8, § 8:39.

[251] *E.g.*, Doe v. TCI Cablevision, 110 S.W.3d 363, 367 (Mo. 2003) (where the plaintiff introduced evidence that the defendant's use "resulted in a diminution in the commercial value of his name as an endorser of products" and had in fact cost the plaintiff endorsement opportunities).

plaintiff's authorized licensees.[252] This approach can better provide "adequate breathing space to the freedoms protected by the First Amendment"[253] and is compatible with the Supreme Court's current analysis involving speech on private property that requires balancing of the competing interests of the property owner and of the public with respect to the particular property to determine expressive access.[254]

White v. Samsung

In dismissing the defendant's First Amendment defense, the Ninth Circuit found that the case involved "a true advertisement run for the purpose of selling Samsung VCRs" and "the ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary [commercial] message."[255] Even if the court had used a direct balancing approach, the low constitutional value of Samsung's speech in the context of an advertisement for VCRs contributes little to the debate of public issues and would have been outweighed by the damage to White's ability to exploit the associative value of her identity.

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The majority's "single-sentence attempt at balancing" was criticized by the dissent as falling "woefully short of any meaningful consideration of the matter."[256] In phrasing the issue as one that requires "balancing the societal and personal interests embodied in the First Amendment against Woods's property rights,"[257] the former will inevitably prevail.[258] As indicated above, a better approach to balancing is to consider the direct harms and benefits to

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[252] *E.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 973-76 (10th Cir. 1996); Winter v. DC Comics, 69 P.3d 473, 479 (Cal. 2003); Charles J. Harder & Henry L. Self III, *Schwarzenegger vs. Bobbleheads: The Case for Schwarzenegger*, 45 SANTA CLARA L. REV. 557, 575-76 (2005).

[253] Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

[254] *E.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82-88 (1980); Hudgens v. NLRB, 424 U.S. 507, 518-21 (1976); Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 563 (1972). *See also* Albertson's, Inc. v. Young, 131 Cal. Rptr. 2d 721, 727 (Ct. App. 2003).

[255] White v. Samsung Electronics Am., Inc., 971 F.2d 1395, 1401 (9th Cir. 1992) (*White I*).

[256] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 949 (6th Cir. 2003) (Clay, J., dissenting).

[257] *Id.* at 938.

[258] *E.g.*, *id.* at 959; Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 841 (Kennedy, J., dissenting) (6th Cir. 1983).

the parties involved.[259] Rush's depiction of Woods arguably constitutes the type of conventional depiction of the celebrity likeness in traditional merchandising that appeals to fans. Clearly the content of the defendant's expression may not be classified as political speech for African-American or Asian-American counterpublic groups; the sale of the prints was not in the context of expressing a particular viewpoint about social or political identity. When one weighs the relatively low constitutional value of the defendant's artwork against the interference with the proprietary publicity right of Woods, it appears that Jireh Publishing may not avail itself of the protection of the First Amendment.

b.Transformative Elements Test

Under its present formulation as applied in *Winter* and *Kirby*, the transformative elements test may restrict subaltern groups from appropriating celebrity signs for the construction of their social identities in everyday activities unless the celebrity's likeness has been *visually* transformed. For example, the groups may be prohibited from using a literal depiction (e.g., a photograph) of a particular celebrity on silkscreened t-shirts or other merchandise bearing the celebrity's image for sale to group members to highlight a public issue like the subordinated social position of the homosexual community.

However, depending on the identity of the speaker and the context of the unauthorized use, certain expressive uses of merchandise may qualify as political speech, like the wearing of black armbands in *Tinker v. Des Moines Independent Community School District* or flag-burning in *Texas v. Johnson*.[260] For example, the sale of t-shirts to be worn at a Gay Pride Parade by counterpublic groups like Lambda Legal,[261] bearing the images of actors like Heath Ledger, Jake Gyllenhaal, and Tom Hanks—who have been honored at the Academy Awards for playing gay characters in critically acclaimed movies—should be viewed as "transformative" because the recoded meaning of the celebrity signs now carries significant political content. Moreover, in *Comedy III*, where the transformative elements test was first articulated, the court had emphasized that "the transformative

[259] *E.g.*, Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 971-76 (10th Cir. 1996).

[260] *See* Texas v. Johnson, 491 U.S. 397, 405-06 (1989) (flag-burning); Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503, 505 (1969) (wearing black armbands).

[261] Lambda Legal is a U.S. "national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work." Lambda Legal, *About Lambda Legal*, *available at* http://www.lambdalegal.org/about-us (last visited Nov. 18, 2009).

elements or creative contributions that require First Amendment protection . . . can take many forms . . . from heavy-handed lampooning to subtle social criticism."[262] Thus, by examining the content, form, and context of the impugned use, the transformative elements test may be adapted to protect non-visually transformative uses of the celebrity identity.

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The transformative elements test had not been formulated when *White* was handed down. Although there may not be a politically expressive message that presents a critique of the privilege of whiteness in American society, Samsung's use of a robot evocative of Vanna White nevertheless can be argued to be contextually transformative as a recoding of her *Wheel of Fortune* persona to comment on the interchangeability of the contemporary celebrity. The advertisement's suggestion—that a human role may be replaced by a robot in 2012 A.D.—may be construed as a critical comment on the artificiality or dehumanization of the contemporary celebrity sufficient to meet the transformative standard.[263]

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Applying the transformative elements test, the Sixth Circuit majority held that Rush's artwork was more than a literal rendition of the celebrity golfer, and that the artist had "added a significant creative component of his own to Woods' identity."[264] However, the painting of Woods was a conventional depiction of the celebrity golfer that resembled the literal charcoal drawing of the Three Stooges in *Comedy III*. In a tenuous application of the test, the majority concluded that the artwork was transformative because the work conveyed a message "that Woods himself will someday join that revered group"[265] and it "communicates and celebrates the value our culture attaches to such events."[266] By attempting to

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[262] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001) (citing Andy Warhol's literal silkscreened celebrity portraits as a First Amendment-protected critique of the celebrity phenomenon).

[263] *Id.* at 810–11 (referring to John Coplans, Jonas Mekas and Calvin Tomkins, *Andy Warhol* 52 (1970)).

[264] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 938 (6th Cir. 2003). In a highly critical dissent, Circuit Judge Clay would have entered summary judgment for the plaintiff based on the lack of transformative elements in Rush's literal rendition of Woods, finding that it is "nearly identical to that in the poster distributed by Nike." *Id.* at 959–60 (Clay, J., dissenting).

[265] *Id.* at 936.

[266] *Id.*

analyze the constitutional *value* of the defendant's use, the Sixth Circuit appears to have refined the transformative elements test in a manner that contrasts sharply with the refusal of the California courts to do so.[267] But as explained earlier, Rush's painting of Woods conveys no discernible political expression that contributes to democratic deliberation, and the Sixth Circuit should have followed the reasoning in *Comedy III* and found a right of publicity infringement.[268]

c. Predominant Purpose Test

In *Beverley v. Choices Women's Medical Center*, although the New York court did not use Missouri's predominant purpose test, it appears that the defendant's commercial use of the plaintiff's identity must have significant constitutional value in order to avail itself of the First Amendment defense:

> [A]lthough women's rights and a host of other worthy causes and movements are surely matters of important public interest, a commercial advertiser . . . may not unilaterally neutralize or override the long-standing and significant statutory privacy protection by wrapping its advertising message in the cloak of public interest, however commendable the educational and informational value.[269]

In *Raymen*, the use of a photograph of the plaintiffs in an advertisement by USA Next to challenge various public policy positions was rightly categorized as political speech that trumped the plaintiffs' right of publicity.[270] Under the predominant purpose test, non-governmental organizations and civic groups like NAACP and Legal Lambda that highlight the subordinated position of minorities in American society and lobby the government for policy changes are more likely to benefit from the protection of the First Amendment than commercial enterprises. But to protect all speech that is "predominantly expressive" does not make a distinction between speech that arguably has a higher constitutional value (because it contributes to public debate about political issues) and speech

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[267] *See* Winter v. DC Comics, 69 P.3d 473, 477–80 (Cal. 2003); *cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); *see also* Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 616 (Ct. App. 2006); *see also* text, *supra* notes 149 and 152.

[268] *See also* criticisms of the application of the transformative elements test by the *ETW Corp* majority in Franke, *supra* note 11, at 970–4; Webner & Lindquist, *supra* note 11, at 200–01; Sloan, *supra* note 240, at 918–20.

[269] Beverley v. Choices Women's Med. Ctr., Inc., 587 N.E.2d 275, 279 (N.Y. 1991).

[270] *See* 409 F. Supp. 2d 15, 19 (D.D.C. 2006); *see also* text, *supra* notes 237–238.

that has a comparatively lower value (because it merely entertains or is simply aesthetic).

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Most advertisements will be deemed "predominantly commercial" unless the advertisement clearly conveys a politically expressive viewpoint that draws public attention to particular social issues or is critical of a public figure or public policy. As explained in Part IVB1, the content, form, and context of the use must be examined. However, it is doubtful a commercial defendant like Samsung can show that an advertisement is predominantly expressive when its product is also depicted in the advertisement. Unlike the Benetton advertisements which poignantly highlight political issues like religious, racial, sexual, and moral conflicts,[271] the *White* advertisement, bearing the caption "The VCR you'll tape it on. 2012 A.D.,"[272] suggests an infringement of the plaintiff's publicity right as it is predominantly commercial with "[the] primary message: 'buy Samsung VCRs.'"[273]

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The Masters of Augusta appears to be a commemorative work produced for sale to the public and does not contain "expressions of value, opinion, or endorsement"[274] of significant democratic value. The work does not critically comment on a specific attribute of Tiger Woods, like his ethnic heritage or the values he embodied, or draw attention to political or social issues facing subaltern groups. Neither Rush nor Jireh Publishing had recoded the Woods sign, and the literal rendition simply reproduces the dominant preferred reading of the Woods celebrity sign as a national hero consistent with his *commercial* positioning.[275] Consequently, the Sixth Circuit should have decided that the freedom of speech would not have been impermissibly abridged by the prohibition of the sale of the prints.

In contrast, if the NAACP or other subaltern groups had produced literal depictions of Woods for sale to support their advocacy efforts, such

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[271] *See* BENETTON GROUP ADVERTISING PRESENTATION, *supra* note 239.

[272] *See* John F. Hyland & Ted C. Lindquist III, *Torts – White v. Samsung Electronics Am., Inc.: The Wheels of Justice Take an Unfortunate Turn*, 23 GOLDEN GATE U. L. REV. 299, 301 n. 20 (1993).

[273] White v. Samsung Electronics Am., Inc., 971 F.2d 1395, 1401 (9th Cir. 1992) (*White I*).

[274] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995); *See also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995).

[275] *See* Cole & Andrews, *supra* note 244, 73–81 (examining Nike's "Hello World" and "I am Tiger Woods" advertising campaigns).

uses arguably may be construed as politically expressive. In these circumstances, the commercial nature of the sale of prints and any other products bearing Woods's likeness can be said to be incidental to the predominant purpose of constructing particular social identities for minority groups by these non-profit counterpublics which will in turn empower their political participation. For example, the use of the images of Ledger, Gyllenhaal, and Hanks—as a result of the connotations of their celebrity signs from the widely lauded gay characters they have portrayed in the movies *Brokeback Mountain* and *Philadelphia*—by Legal Lambda to convey the subordinated status of homosexuals in society and to advocate policy changes can also be considered political speech. But this does not mean that counterpublics have carte blanche to appropriate the identities of celebrities under the banner of political speech. Each case has to be evaluated based on the content, form, and context of the use, and one needs to be on the lookout for defendants who tack on a political message to products that exploit the associative value of identity in the hope of securing First Amendment protection.[276]

V. SUMMARY & CONCLUSIONS

The investigation of judicial decisions, legal commentary, and cultural studies writings undertaken in this Article has yielded the following conclusions.

First, a participatory theory in which the First Amendment is seen to be advancing public decision-making in a democracy suggests that expressive uses of the celebrity identity, particularly by subaltern groups, that contribute to democratic processes have a higher constitutional value than either artistic speech or entertainment. This observation is reinforced by the Supreme Court's consistent positioning of political speech at the apex of the speech hierarchy. The cultural studies analysis of politically expressive uses of the celebrity identity also augments the participatory argument that political speech ought to be given greater weight in the First Amendment defense as articulated in right of publicity claims.

Second, in the absence of clear Supreme Court precedent governing the treatment of free speech arguments by non-media defendants in publicity claims, lower courts have developed various tests that do not cohere with the prevailing speech hierarchy that appears to accord political speech the highest constitutional value. Most of First Amendment jurisprudence is focused on an examination of governmental control of speech, but this Article has examined the private control of speech through right of publicity laws with the assistance of the lens of cultural studies. Its major conclusion

[276] *See supra* note 231 and accompanying text.

is that existing tests under the First Amendment defense as argued in publicity claims do not make a clear distinction between the constitutional value of different kinds of speech, and consequently can unduly restrict political speech.

Third, the broad definition of political speech in First Amendment jurisprudence would easily encompass the recoding of celebrity signs by counterpublics that enables "the practice of persons sharing common views banding together to achieve a common end [which] is deeply embedded in the American political process."[277] As such, cultural studies can inform the revision of existing judicial tests to better take into account the content, form and context of politically expressive uses of the celebrity identity when engaging in an evaluation of the conflict between property and speech rights.

However, a cautionary note is warranted about the judicial use of cultural studies. In reaching its decision in *ETW Corp.*, the Sixth Circuit majority departed from the traditional examination of the clash between publicity and First Amendment rights, and attempted, in a most unsatisfactory and inadequate manner, to import cultural studies into its judicial reasoning. The court dedicated just three paragraphs to a cursory mention of the symbolic value of the celebrity sign and the associative value of Woods's identity,[278] without any discussion of the uses of the celebrity sign by audiences in their interpretive practices. If the court were to consider the political significance of recoded celebrity signs and the consequent constitutional value of the defendant's speech that incorporated Woods's identity, the outcome in *ETW Corp.* might have been different. Unfortunately, the court devoted much of its analysis to the rationales for recognizing a right of publicity[279] instead of how social groups use the celebrity personality as a communicative resource in a manner that deserves First Amendment protection.[280] This type of brief reference to cultural studies as ex-post facto rationalization is not a desirable practice.[281] But, as

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[277] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 906 (1982); Connick v. Myers, 461 U.S. 138, 145 (1983); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269, 270 (1964); Roth v. United States, 354 U.S. 476, 484 (1957); NAACP, 458 U.S. at 906, 913–14; Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

[278] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 938 (6th Cir. 2003).

[279] *Id.* at 931–38. *Contra id.* at 955 (Clay, J., dissenting) ("Despite various commentary and scholarship … the fact remains that the right of publicity is an accepted right").

[280] Passing comments were made with regard to the use of the celebrity personality as an important expressive and communicative resource to "symbolize individual aspirations, group identities and cultural values," but no further analysis was undertaken of *what* particular uses merit First Amendment protection. *Id.* at 935.

[281] Jones, *supra* note 103, at 957 ('in many instances the courts' reasoning is result oriented, with the court creating a test that validates the result it wants to reach in the given

this Article has shown, judicial reference to cultural studies could be much more productive. Elsewhere I have argued that cultural studies can also be beneficial to the analyses of the elements of evocation[282] and commercial appropriation[283] in a right of publicity claim.

In conclusion, this Article has demonstrated that cultural writings on the *political* value of the celebrity sign, its meaning and potential uses by counterpublics or subaltern groups, can add to the richness of First Amendment jurisprudence. It contributes to the legal scholarship through its examination of the potential importance of the celebrity sign in political advocacy efforts and its illustration of how these insights may be incorporated into the judicial tests. Courts like the Sixth Circuit can benefit from a structured analysis of how cultural studies may be meaningfully integrated into the First Amendment defense. Regardless of the confusing morass that may surround the application of First Amendment considerations to a right of publicity claim, recognizing the potential of the celebrity sign to function as a political site of contestations offers valuable assistance to the refinement of the current tests.

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[282] David Tan, *Much Ado About Evocation: A Cultural Analysis of "Well-Knownness" and the Right of Publicity*, 28 CARDOZO ARTS & ENT. L.J. 313 (2010).

[283] David Tan, *Affective Transfer and the Appropriation of Commercial Value: A Cultural Analysis of the Right of Publicity*, 9 VA. SP. & ENT. L.J.272 (2010).