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Molander: Machiavellian Jurisprudence

MACHIAVELLIAN JURISPRUDENCE: THE UNITED STATES SUPREME COURT'S DOCTRINAL APPROACH TO POLITICAL SPEECH UNDER THE FIRST AMENDMENT

INTRODUCTION

Constitutional scholarship is currently reliving the great Federalist/Anti-Federalist debate of 1787-88.¹ The focus of this discussion will be on whether or not Lockean liberal individualism² was the central philosophical influence on the Founders' design.³ Phrased differently, contemporary constitutional scholars have misgivings on whether Lockean liberalism's counter-ideology, that of classic civic republicanism,⁴ has had more to do with American political and

1. See, e.g., MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988); Frank I. Michelman, Symposium, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice of Constitutional Adjudication*, 72 *VA. L. REV.* 543 (1986); Cass R. Sunstein, Symposium, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988). But see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 *U. PA. L. REV.* 801 (1993); Martin H. Redish, et. al., *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 *CAL. L. REV.* 267 (1991).

2. See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955). Lockean liberalism is founded on the notion of natural rights, which are beyond the repressive control of the community. These natural or personal rights exist prior to entering civil society, thus there are limits to societal abrogation of these rights.

3. According to Louis Hartz, "[t]he national acceptance of the Lockean creed [was] ultimately enshrined in the Constitution." HARTZ, *supra* note 2, at 9.

4. Civic republicanism is the concept that individual needs and interests are subordinate to community interests. Therefore, the parameters of personal behavior must comport with community values. For a more conceptual difference between liberalism and republicanism, see Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 *WM. & MARY L. REV.* 57 (1987).

constitutional thought than previously believed.⁵ Proponents of this proposition argue that the American political philosophy, from which the Constitution's genius sprung, is indebted to the republican theorists of the Renaissance Era,⁶ namely, Machiavelli,⁷ rather than European Enlightenment philosophers,⁸ particularly John Locke.⁹ The central thrust of this article will be that the Founding Fathers were "confronted [with] two [principal] traditions of political theory that exist[ed] in a

5. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* vii-xi, 22-35 (1967). Bernard Bailyn, the progenitor of this recent scholarship, argued that the colonists were powerfully influenced by the writings and traditions of the English common law, classical philosophical thought, and New England Puritanism, in addition to those of Enlightenment rationalism.

6. J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 462-552 (1975) [hereinafter *MACHIAVELLIAN MOMENT*]. Pocock's magisterial work on republicanism posits that the American Revolution was the last of a series of British revolutions, an episode in the history of the Renaissance and the early modern era, not the first act in a new Age of Enlightenment that embraced Lockean liberal individualism. *Id.*

7. Niccolo Machiavelli was born in 1469 and died in 1527. Two of his more famous works are *THE PRINCE* and *THE DISCOURSES*. Scholars today believe Machiavelli to be in the first line of liberal democratic theorists.

8. See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-87* (1969). Wood's seminal work supports the thesis that the colonialists were experiencing a "Lockean Moment" during the Revolution and Constitution drafting years whereby the dominant political influence was Lockean liberal individualism. This is in opposition to Pocock's Machiavellian Moment whereby the American colonialist's political philosophy was dictated by their concern in nurturing civic republicanism. See also Isaac Kramnick, *Republican Revisionism Revisited*, 87 *AM. HIST. REV.* 629 (1982). Kramnick posits: "For over a hundred years, the world of scholarship agreed that Locke was the patron saint of Anglo-American ideology in the eighteenth century and that liberalism with its stress on individuality and private rights was the dominant ideal in that enlightened revolutionary era." *Id.*

9. John Locke (1632-1704) was born into a well-to-do family in England. Locke entered political life beginning with his association with the Earl of Shaftesbury. This relationship eventually embroiled him into a confrontation with Charles II and precipitated Locke's self imposed exile to Holland in 1683. Locke wrote the *Second Treatise of Government* prior to his exile, and upon his return to England in 1689, used it as a defense to justify his personal commitment to the Whig position during the Whig Revolution.

dialectical relationship with one another,”¹⁰ the synthesis of which resulted in a paradigm shift¹¹ in American political and constitutional theory that merged the two principal traditions of liberalism and republicanism.¹² The modern debate concerning the theoretical underpinnings of the American political culture during the Constitution’s ratification process, has focused on how liberal or republican the Constitution and its attendant Bill of Rights was to be construed.¹³

Although there has been academic disagreement as to the underlying philosophical influence of American political and constitutional thought, constitutional scholars agree that the Bill of Rights was added to the Constitution because of Anti-Federalist pressure.¹⁴ Ironically, however, the First Amendment

10. Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 24 (1990).

11. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-11 (1962) (a paradigm is that underlying belief structure common to all practitioners in a given discipline); see also *THE FEDERALIST PAPERS* 119 (Isaac Kramnick, ed. 1987). Alexander Hamilton’s dialogue in *THE FEDERALIST NO. 9* evidenced a paradigm shift in American political theory which fused republican and liberal principles whereby Publius, spokesman for the Federalist political theory, stated that:

[T]he science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, . . . [and] these are wholly new discoveries, . . . [T]hey are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.

Id.

12. See Sunstein, *supra* note 1, at 1558 (arguing that colonial constitutional theory fused pluralism [Lockean liberalism] with republicanism).

13. Jordan M. Steiker, *Creating a Community of Liberals*, 69 TEX. L. REV. 795 (1991) (reviewing C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (Oxford University Press 1989)). Professor Steiker argues that the question becomes whether the framers of the constitution adopted a liberal republic where a “robust political community with basically liberal values” appeared, or a republican liberal state where the “political community is [first devoted] to individual autonomy and then to republican dialogue” *Id.* at 811.

14. See *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTIONAL DEBATES* (Ralph Ketcham ed., 1986) [hereinafter ANTI-

found its expression in Lockean liberal discourse.¹⁵ Yet, even though First Amendment jurisprudence has been representative of liberal constitutionalism, that jurisprudence has been applied to

FEDERALIST PAPERS]. The anti-federalist objections to the powers granted to the federal government began to crystallize in specific proposals for amendments that would limit those powers. The Massachusetts Convention proposed a relatively short list of amendments, while Virginia, in June, 1788, put forth a much larger list, in large measure duplicated by the North Carolina and New York conventions later in the year. *Id.* at 217-26. A full elaboration of anti-federalist thought was offered in a lengthy series of articles, usually entitled *Letters from the Federal Framers*, circulated in pamphlet form in New York City in which a letter distributed in October 9th 1787 stated:

[t]here are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed - a free and enlightened people, in forming this compact, will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers, which will soon be plainly seen by those who are governed, as well as by those who govern; and the latter will know they cannot be passed unperceived by the former, and without giving a general alarm - [t]hese rights should be made the basis of every constitution

Id. at 266. After the Pennsylvania Convention ratified the Constitution on December 12, 1787, by a vote of 46 to 23, twenty-one members of the minority signed a dissenting address stating:

The first consideration that this review suggests, is the omission of a Bill of Rights, ascertaining and fundamentally establishing those inalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary for a good government to have the control.

Id. at 247. DeWitt's Essays appearing in the Boston American Herald on October 27, 1787 stated "[t]hat the want of a *Bill of Rights* to accompany this proposed System, is a solid objection to it" *Id.* at 195. *But see* THE FEDERALIST PAPERS, *supra* note 11, at 476. In THE FEDERALIST NO. 84, Alexander Hamilton argued that the inclusion of a bill of rights was unnecessary: "why declare that things shall not be done which there is no power to do?," essentially arguing that the proposed government was one of limited powers. *Id.*

15. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) (freedom of speech representative of Lockean discourse); *see also* Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 947 (1919). *But see* LEONARD W. LEVY, LEGACY OF SUPPRESSION, vii-xii, at 176-309 (1960) (noting that the framers had no liberal conception of what the Bill of Rights meant and therefore the liberal basis for First Amendment interpretation is unsupported).

achieve republican results at times.¹⁶ The fears expressed by the American colonialists about the possibility of the judicial institution being the conduit through which the government could encroach on individual liberty were a legitimate concern.¹⁷

The purpose of this article is to explore the United States Supreme Court's doctrinal approach in decisions concerning freedom of speech. In particular, it will examine political speech since 1919, and discuss whether the Court's holdings have been

16. *See, e.g.*, *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). These post World War I cases, wherein Justice Holmes wrote in a libertarian prose for the Court, arose in the context of political speech against the war and opposition to the draft during World War I. In all three cases the Court elevated community concerns over individual liberties presumably protected under the free speech clause of the First Amendment.

17. *See* ANTI-FEDERALIST PAPERS, *supra* note 14, at 293-309. The "Brutus" Essays, sixteen in all, appeared in the New York Journal between October, 1787 and April, 1788. This was at the same time Hamilton was publishing THE FEDERALIST PAPERS in New York City. On February 7, 1788, in Essay # 12, "Brutus" attacked the Federalist's second object to "establish justice" by stating:

This must include not only the idea of . . . making laws which shall be the measure or rule of right, but also of providing for the application of this rule or of administering justice under it. And under this the courts will . . . extend the power . . . to all cases they possibly can . . . to wit, pass laws and provide for the execution of them, for the general distribution of justice between man and man.

Id. at 301. On March 20, 1788, "Brutus" repeats his warning: "[t]heir decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, . . . [and] [t]hese cases will immediately affect individuals only" *Id.* at 308. *But see* THE FEDERALIST PAPERS, *supra* note 11. In THE FEDERALIST NO. 78, Hamilton states a number of propositions: first, that "the courts of justice are to be considered as the bulwarks of a limited Constitution and against legislative encroachments;" *id.* at 440; second, that the courts are "to guard . . . the rights of individuals from the effects of those ill humors which . . . have a tendency . . . to occasion . . . serious oppressions of the minor party in the community," *id.*; and further posits that "the general liberty of the people can never be endangered from that quarter," *id.* at 437, since it is the branch least dangerous to the political rights of the Constitution.

consistent with Machiavellian theory.¹⁸ The period from 1919 to the present has been characterized as a period of Supreme Court jurisprudence whereby the Court has increasingly recognized and developed a doctrinal approach consistent with Lockean liberal individualism.¹⁹ However, I hope to show that the Supreme Court's doctrinal approach during this period has been anything but consistent²⁰ with the American liberal political tradition. In fact, the Court's decisions have consistently reflected Lockean liberal individualism in politically pacific or concordant times, reflecting the presence of a republican liberal state,²¹ and Machiavellian civic republicanism in politically discordant times, demonstrating the presence of a liberal republic.²² Further, such a dichotomous approach is consistent with Machiavellian principles of justice with respect to individual liberty, as set out in Machiavelli's two seminal works -- *The Prince*²³ and *The Discourses*.²⁴

18. See, e.g., Michelman, *supra* note 1, at 1515-16 (1988). Professor Michelman views constitutional interpretation as a Machiavellian practice of return-to-the-founding-principles. *Id.*

19. See, e.g., David A.J. Richards, *A Theory of Free Speech*, 34 UCLA L. REV. 1837, 1839 (1987). Professor Richards tracks the liberalization of the free speech clause from the standpoint of Lockean principles of toleration. *Id.*

20. See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 299 (1978). BeVier noted that the Supreme Court's doctrinal approach has not "embraced a unifying theory of the free speech clause . . . nor [has it] reached a consensus on appropriate premises for first amendment cases" *Id.*

21. See *infra* part I (political community is first devoted to personal autonomy and then to the collective good).

22. See *infra* part II (a political community with basically liberal values).

23. See *infra* note 70.

24. See *infra* note 34. Basically, the thesis advanced in this article is central to Machiavelli's theory as expressed in his two major works - THE PRINCE and THE DISCOURSES - in which he describes an overall political evolution of the state. Once the state is threatened, the Prince is justified in using coercive means to achieve the security of the state. However, it is the natural, sociopolitical evolution of the state that more liberal or less tyrannical republics will follow once the state has been secured.

Part I of this article will be devoted to the principal premise that colonial Americans of the Revolutionary period experienced a moment in American history where they fused Machiavellian republicanism with Lockean liberalism – the founding moment. A subsidiary premise will focus on the two original constitutional principles that were embodied within the Bill of Rights during the founding moment as a result of the liberal-republican synthesis. First, I will discuss a system of deliberative politics, and second, an analysis of the Framers' commitment to a strong and energetic government with the necessary and requisite powers to promote nationhood and national unity.

Part II will examine three areas. First, it will examine Machiavelli's and the Supreme Court's analogous approach in balancing republicanism and individual liberalism. Second, it will review the principal case law from 1919 to the present concerning Supreme Court decisions that have addressed political speech.²⁵ Third, I will try to tie together the first and second issues in an effort to reveal the Court's consistency with Machiavellian theory of justice. Finally, I have several concluding remarks.

I. THE FOUNDING MOMENT: THE LIBERAL REPUBLICAN SYNTHESIS

Historians and constitutional scholars have traced civic republicanism throughout the sociopolitical economic

25. See Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 *FORDHAM L. REV.* 263 (1986). Gibson noted that Justice Holmes wrote as many as seven opinions on the subject of free speech, whereas most justices, from 1791 to 1917, wrote only three or four opinions on that subject during their entire tenures on the bench. *Id.*; see also Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 *U. PA. L. REV.* 975 (1968). The author noted that "it was not until the end of World War I that there had been any major decisions by the Supreme Court applying the guarantees of the First Amendment . . ." *Id.* at 975. This is the primary reason the analysis in this article is limited to the period from 1919 to the present.

development of the United States.²⁶ The creators and supporters of the Constitution argued strenuously that the Constitution was a fulfillment and not a repudiation of civic republicanism. Theoretically the Constitution provided for a thoroughly republican form of government, which embodied Lockean liberal individualism.²⁷ This has led a number of scholars, specifically, Pocock, to postulate that the “Founding Fathers occupied a ‘Machiavellian moment’ -- a crisis between personality and society, virtue and corruption - . . . and the ambiguity of the republic’s position, [at this time, could be more] . . . appreciated [through a civic republican perspective] than it could have been from a Lockean perspective.”²⁸

The great debate of 1787-88, between the Federalists and Anti-Federalists, was resolved by the Founding Fathers balancing the liberal concept of the autonomous individual with the republican concept of the community or preservation of the

26. MACHIAVELLIAN MOMENT, *supra* note 6, at 522-45 (classical influence and awareness of the “Machiavellian Moment” continues to the present day); *see also* RALPH KETCHAM, *PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY 1789-1829* (University of North Carolina Press 1984) (classical politics ended with the rise of Jacksonian democracy); DANIEL W. HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS 301-05* (1979) (republican or Whig principles lasted until after the Civil War).

27. *See* Frank Goodman, *Mark Tushnet on Liberal Constitutional Theory: Mission Impossible*, 137 U. PA. L. REV. 2259 (1988) (reviewing TUSHNET, *supra* note 1) (arguing that the Federalists and Anti-Federalists shared many theoretical concepts to government including general theories about citizenship -“civic virtue”- and assumptions about human nature). *But see* Wood, *supra* note 8, at 606 (stating that 1787 and the adoption of the Constitution signaled “the end of classical politics”); Kramnick, *supra* note 8, at 664 (the American experience during the 1770’s and 1780’s represented part of the ongoing paradigm shift initiated by Enlightenment theorists specifically John Locke); Hartz, *supra* note 2 (Hartz’s thesis holds that the founding fathers wholeheartedly endorsed the paradigm of the enlightenment rejecting classical notions of virtue and polis).

28. *See* J.G.A. Pocock, *The Americanization of Virtue: Corruption, Constitution and Frontier*, in MACHIAVELLIAN MOMENT, *supra* note 6, at 545. For a discussion of the “crisis between personality and society, virtue and corruption” *see* J.G.A. Pocock, *The Eighteenth-Century Debate: Virtue, Passion and Commerce*, in MACHIAVELLIAN MOMENT, *supra* note 6, at 462.

union.²⁹ The difficulties of that task were inextricably related to the inherent conflict between the Machiavellian principles of justice – virtue and corruption³⁰ – that political philosophers of that era addressed.³¹ It was the Founding Fathers’ design to create a government that would be capable of filtering partial and impulsive individual desires (corrupt action) through the government’s structural design. This would achieve a deliberate and virtuous result – the common good – while at the same time

29. THE FEDERALIST PAPERS, *supra* note 11, at 482. In THE FEDERALIST NO. 85, Hamilton notes that “additional securities to republican government, to liberty, . . . consist chiefly in the restraints which the *Preservation of the Union* [sic] will impose on the local factions . . . and on the ambitions of powerful individuals . . . who might . . . become the despots of the people” *Id.* Earlier, in THE FEDERALIST NO. 59, Hamilton states that he is “greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation.*” *Id.* at 352 (emphasis added).

30. See Quentin Skinner, *The Republican Ideal of Political Liberty*, in MACHIAVELLI AND REPUBLICANISM 293 (Gisella Bock et al. eds., 1990). According to Skinner, for Machiavelli to be “corrupt [is] a term of art to denote our natural tendency to ignore the claims of our community as soon as they seem to conflict with the pursuit of our own immediate advantage, thus to be virtuous would be to forego personal interests for the common good.” *Id.* at 304. In short, virtue is the quality of mind and action that creates, saves or maintains the state’s interests. *Id.*

31. Many of the Founding Fathers were well versed in Machiavellian political theory. For example, Thomas Jefferson’s library contained an extensive collection of works by both Aristotle and Machiavelli, the two seminal thinkers of the classical republican tradition. See THOMAS JEFFERSON’S LIBRARY 80 (James Gilreath & Douglas L. Wilson eds., 1989). The point being introduced here is that, although it was James Madison who was the principal theoretical architect and draftsman of the Bill of Rights, he nonetheless presented the twelve original amendments to Thomas Jefferson for his commentary and recommendations. Thus there is inferential support for the notion that it is quite possible that a “Machiavellian Moment” was occurring during the theoretical development and construction of the Bill of Rights. See 3 BERNARD SCHWARTZ, *THE ROOTS OF THE BILL OF RIGHTS: AN ILLUSTRATED SOURCE BOOK OF AMERICAN FREEDOM*, 593-623 (1971). The author noted that “the correspondence between Jefferson and Madison was important for two reasons: [the first principal reason was that] each influenced the other’s thinking, particularly . . . the evolution of Madison’s thinking on the Bill of Rights” *Id.*

protect individual liberty.³² Similarly, Machiavelli espoused the traditional belief in the importance of the common good. Under Machiavellian theory, however, the government plays a more central role in promoting what it believes to be virtuous values, that is, community values ensuring the common good or the preservation of the state's interests.³³ In fact, Machiavelli argues, in the beginning of Book I of *The Discourses*, that the most important method to induce people to acquire virtue is by using the coercive powers of the law in such a way as to force them to place the good of their community above all selfish interests.³⁴

32. See, e.g., MORTON WHITE, *PHILOSOPHY, THE FEDERALISTS, AND THE CONSTITUTION* 205 (1987); see also *THE FEDERALIST PAPERS*, *supra* note 11. James Madison stated that every action of man must first have a motive and an opportunity for it to occur. *THE FEDERALIST NO. 10* (James Madison). He sought to extend the republic over a vast and populated area in order to divide or separate the factious motive from its opportunity to act on that motive. *Id.* at 122-28. Thus, this diminished the probability that they would have the opportunity to command a majority. The effect was to inhibit actions under the influence of partial and immediate interests that might act against the public good. *Id.* In *THE FEDERALIST NO. 51*, Madison noted that federalism would also act as an institutional device to protect individual liberty by constructing tiers of protection between the people and government. *Id.* at 319-21.

33. See NICCOLO MACHIAVELLI: *THE DISCOURSES* 112 (Bernard Crick et al. eds., Penguin Classics 1983) (1970). In Book I, chapter 3, Machiavelli stated "that men never do good unless necessity drives them to it, . . . [and] when they are free to choose and can do just as they please, confusion and disorder become everywhere rampant. Hence it is said that . . . laws will make them good." *Id.* To Machiavelli, the ultimate common good was the preservation of the state itself. *Id.* at 100-38.

34. See *supra* note 33, at 124. In Book I, Chapter 3, Machiavelli states: No authority more useful or necessary can be granted to those appointed to look after the liberties of the state than that of being able to indict before . . . some . . . court such citizens as have committed an offense prejudicial to the freedom of the state. Such an institution has two consequences most useful in a republic. First, for fear of being prosecuted, its citizens attempt nothing prejudicial to the state, and, if they do attempt anything, are suppressed forthwith without respect to persons. Secondly, an outlet is provided [that allows] recourse [when] abnormal methods likely to bring disaster on the republic as a whole [are used by persons].

Id.

Furthermore, in Book III, chapter 1 of *The Discourses*, Machiavelli emphasizes that republics advance to glory “either by the virtue of some individual or by the virtue of an institution.”³⁵ Therefore, according to Machiavelli, corruption is any civil/political discord that threatens the republic’s general welfare in light of its founding principles.³⁶ It is at this juncture that the state must cleanse itself by returning to its original principles for the good of the community.³⁷ As Machiavelli so aptly points out:

The reason is easy to understand; for it is not the well-being of individuals that makes cities great, but the well-being of the community; and it is beyond question that it is only in republics that the common good is looked to properly in that all that promotes it is carried out; and, however much this or that private person may be the loser on this account, there are so many who benefit thereby that the common good can be realized in spite of those few who suffer in consequence.³⁸

Thus, classic civic republicanism advances the notion that individual liberties can be abrogated when the community’s founding principles are threatened.³⁹

A problematic question arises as to what were the founding principles that gave birth to the Constitution? It is the position of this article that the original principles were defined by the

35. *Id.* at 387. Machiavelli asserts that the power of the courts is an institutional device to force individuals to be virtuous, that is, to subordinate their personal interests for the good of the community or to preserve the state. *Id.* at 124.

36. *Id.* at 385-90.

37. Machiavelli, in Book III, Chapter 1, states:

[M]en are emboldened to try something fresh and to talk sedition. Hence provision has of necessity to be made against this by restoring that government to what it was at its origin. Such a return to their original principles in republics is [accomplished by virtuous individuals as well as by virtuous laws and institutions].

Id. at 388.

38. *Id.* at 275. Machiavelli, in Book II, Chapter 2, expresses the central guiding principle of civic republicanism - individual freedom must be subordinate to achieving the good of the community. *Id.* at 274-81.

39. See *supra* notes 37, 38 and accompanying text.

synthesis of liberal and republican maxims.⁴⁰ The existence of the liberal-republican synthesis, that of Lockean liberal individualism fused with Machiavellian civic republicanism is evidenced by many references in the Federalist Papers. The Federalist Papers are generally accepted as the authoritative discourse on American political and constitutional theory during the Constitution framing period.⁴¹

The Federalist Papers systematically outline the theoretical and political assumptions that undergird the Constitution, which was once thought to be premised on Lockean liberalism. Upon review, however, this Lockean premise seems to be more the result of historical distortion than of American reality. For example, the Constitution is more of a balance between the two opposing traditional theories.⁴² In essence, the Federalists did not win, but rather, constructed their “new science of politics”⁴³ from both classical traditions.⁴⁴

Both the liberal and republican traditions advanced the general concept that institutions had to be arranged so as to moderate the

40. This article recognizes two original First Amendment principles concerning the issue of liberty. First, a system of deliberative politics woven into the philosophical fabric of the Constitution; and second, a strong desire by the framers to provide for a strong and energetic government with the necessary and requisite powers to go about the business of governing - a process that in itself secures liberty. The latter principle advocates that the former principle only protects speech that participates in the process of deliberation. However, it does not protect speech that drastically impedes that process, because impeding the very process that the state relies on to promote collective responsibility would directly affect the stability of the state itself.

41. See generally GEORGE W. CAREY, *THE FEDERALISTS* (University of Illinois Press 1989).

42. See Goodman, *supra* note 27, at 2304. Professor Goodman argues that classical liberals did not have a monopoly on their political assumptions, and that many, if not all, of these assumptions were shared by both classical republicans and classical liberals, i.e., Anti-Federalist and Federalists. *Id.*

43. *THE FEDERALIST PAPERS*, *supra* note 11, at 119 (*THE FEDERALIST NO. 9*, Alexander Hamilton).

44. *THE FEDERALIST NO. 37*, at 243 (James Madison). In addition, Madison states that “[a]mong the difficulties encountered by the [constitutional] convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form.” *Id.*

conflict between self-interest and public interest, if the latter motive had any chance of survival. The Founding Fathers believed that it was their task to make sure that whatever form of government was instituted, it would promote virtuous results. This was founded on the belief that the people would be led “by a deep conviction of the necessity of sacrificing private opinions and partial interests to the public good.”⁴⁵

The principle of deliberative politics was essential to the founders’ design. In fact, the Founding Fathers made an honest attempt to institute a government so that the governing process would reflect a “cool and deliberate sense of the community.”⁴⁶ This Federalist observation supports the liberal-republican thesis in that both liberal and republican traditions attached a similar value to virtue by recognizing the importance it plays in achieving the public good or even preserving the state itself.⁴⁷

The importance of the balance between the deliberative politics principle and the preservation of the state principle is further evidenced by the Federalists contending that “[t]he republican

45. *Id.* at 247.

46. *Id.* at 371. In THE FEDERALIST NO. 63, Madison asserts a further protection afforded by the deliberative politics principle when associated with the Senate whereby he states:

I shall not scruple to add that such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow mediated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?

Id. at 370-71.

47. See Quentin Skinner, *Machiavelli's Discorsi and the Pre-humanist Origins of Republican Ideas*, in MACHIAVELLI AND REPUBLICANISM, *supra* note 30, at 121. Professor Skinner’s position is that Machiavelli endorsed the traditional belief in the common good. Additionally, unless all citizens’ actions are not governed by virtue, in a sense placing the good of the community above their own private interests, civic greatness cannot be achieved. *Id.* at 138. Machiavelli repeats this theme throughout THE DISCOURSES. Crucial passages referring to acts reflecting this republican principle can be found in Book I, chapter 9; Book II, chapter 2; Book III, chapters 23, 30, & 47. See THE DISCOURSES, *supra* note 33.

principle demands that the deliberate sense of the community should govern . . . [and] . . . it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men”⁴⁸ Therefore, the Framers felt a need for a governing system consisting of deliberative reflection that would be imposed on the people in order to induce them to act in a collective and civically responsible manner. The Federalists based their republican assertions on the observation that “the mild voice of reason . . . is but too often drowned . . . by the clamors of an impatient avidity for immediate and immoderate gain.”⁴⁹ The Federalists further reasoned that “[i]t is a just observation that the people commonly *intend* the PUBLIC GOOD. . . . [but they do not] always *reason right* about the *means* of promoting it.”⁵⁰ Subsequently, a central remedy of the Framers’ scheme of government was to install, within the machinery of the government, the processes of due deliberation and reflection in determining enlightened policy outcomes, so that reasoned consideration of social consequences would be extended over space and time.⁵¹ Publius⁵² concluded that the solution to this

48. THE FEDERALIST NO. 71, at 409-10 (Alexander Hamilton) (Issac Kramnick ed. 1987). In THE FEDERALIST NO. 71, Hamilton notes the importance of the deliberative politics principle working its magic, stating:

When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection.

Id. at 410.

49. THE FEDERALIST NO. 42, at 276 (James Madison) (Issac Kramnick ed., 1987).

50. THE FEDERALIST NO. 71, at 410 (Alexander Hamilton) (Issac Kramnick ed., 1987).

51. See VINCENT OSTROM, THE POLITICAL THEORY OF A COMPOUND REPUBLIC 43 (2d ed. 1987).

52. See, e.g., Martin Diamond, *The Federalists*, in HISTORY OF POLITICAL PHILOSOPHY 573 (Leo Strauss & Joseph Cropsey eds., 1963). Professor Diamond states:

Publius, the educated reader knew, was the Publius Valerius Publicola, described in Plutarch. Publius like Caesar was a “Strong Man,” but

circumstance was that “[i]n framing a government . . . you must first enable the government to control the governed[.]”⁵³ reasoning that the deliberative politics model requires that “[t]he passions [of the public] ought to be controlled and regulated by the government.”⁵⁴ Again, for the Federalists to assert that self-interest should be channeled to promote a collective interest underlines the importance the Framers placed on restraining “deliberative politics” in order to preserve the very system that provides the “deliberative politics model” stability.

Not surprisingly, republican theorists such as Machiavelli also argued that the government should take a focal role in regulating and controlling individual passions, and thereby creating a virtuous body politic, which would further assure that all would act in furtherance of the public good.⁵⁵ Just as Machiavelli had asserted nearly three hundred years earlier, the Federalists in true republican dialogue, believed that virtue was the building block of good government. Although Publius noted that:

between them there was an enormous difference: Caesar destroyed a republic, Publius saved one. Unlike Caesar, Publius makes his contribution to the Republic in a way compatible with its continued existence. He brings to its salvation qualities it cannot itself supply, but leaves it essentially intact after his efforts . . . the character of Publius . . . was exactly appropriate to the situation . . . Publius, with a capacity and knowledge that people cannot themselves supply, brings to the people the Constitution (sic) that will preserve, indeed will safely found the Republic.

Id. at 575.

53. THE FEDERALIST PAPERS, *supra* note 11, at 320 (THE FEDERALIST NO. 51, James Madison).

54. *Id.* at 315 (THE FEDERALIST NO. 49, James Madison) (Issac Kramnick, ed. 1987); *see also* THE DISCOURSES, *supra* note 33, at 112. Machiavelli observes that “men never do good unless necessity drives them to it; but when they are free to choose and can do just as they please, confusion and disorder become everywhere rampant.” *Id.*

55. *See* Quentin Skinner, *Machiavelli*, in GREAT POLITICAL THINKERS 56-86 (Keith Thomas ed., 1992) (1981). Professor Skinner noted that Machiavelli believed the most important and effective means of inducing people to acquire virtue is by using the coercive powers of the law in such a way as to force them to place the good of the community above self-interest. *Id.*

there is a degree of depravity in mankind which require a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.⁵⁶

In essence, the strength of a republic was, for Publius, public virtue.⁵⁷ But, since the Federalists believed that reason was the slave to passion⁵⁸ the process of deliberative politics was important in slowing down the probability of impulsive acts from occurring, which were inevitably “adverse to the rights of other citizens, or to the permanent and aggregate interests of the

56. THE FEDERALIST NO. 55 (James Madison) (Issac Kramnick ed., 1987) at 339; *see also* ANTI-FEDERALIST PAPERS, *supra* note 14, at 231 (“Centinel,” Number I, October 5, 1787) (observing in the first of eighteen “Centinel” articles printed in the Philadelphia Independent Gazetteer and the Philadelphia Freeman’s Journal between October 5, 1787 and April 9, 1788 “Centinel” “[a] republican or free government, can only exist where the body of the people are virtuous[]”).

57. THE FEDERALIST NO. 10, at 122-28 (James Madison) (Issac Kramnick ed., 1987). The Madisonian theory postulates that “impure virtue” is distilled by refining the voice of the people in a scheme of indirect elections. *Id.*; *see also* GARRY WILLS, EXPLAINING AMERICA: THE FEDERALISTS 223-26 (1981) The author stated that the electoral process purifies the popular vote, since bias and private interest is purged and the distilled product is disinterest, impartiality, candor, clarity, and virtue. *Id.*

58. *See* FREDERICK G. WHELAN, ORDER AND ARTIFICE IN HUME’S POLITICAL PHILOSOPHY 138 (1985); *see also* WHITE, *supra* note 33, at 217 (1987). Professor White posits that it is the application of Publius’ theory of knowledge that dictates his belief that “[a]n ordinary man might be stupid or he might be prevented by passion, selfish interest, or prejudice from seeing what would bring long term happiness to the community” *Id.* In THE FEDERALIST NO. 31, Hamilton asserts that:

[in disquisitions] of every kind there are certain primary truths, or first principles, upon which all subsequent reasoning must depend. These contain an internal evidence which, . . . commands the assent of the mind. Where it produces not this effect, it must proceed either from some disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice.

THE FEDERALIST NO. 31, at 216 (Alexander Hamilton) (Issac Kramnick ed., 1987).

community.”⁵⁹ Hence, a degree of constraint was necessary to secure the public good.⁶⁰

The “deliberative politics model” would not only require external constraints, but also internal constraints as well. These constraints would come into play by implementing certain institutional mechanisms also called “auxiliary precautions,”⁶¹ but even this, to some extent, was not new to classic republican theory.⁶² Moreover, even pre-political rights, traditionally

59. THE FEDERALIST PAPERS, *supra* note 11, at 123.

60. *See id.* at 482 (THE FEDERALIST NO. 85). In THE FEDERALIST NO. 15, Hamilton asserts that “the passions of men will not conform to the dictates of reason and justice without constraint.” *Id.* at 149. Therefore, to Publius, the political process is one that should enable human reason to be transformed from a consideration of momentary passion into a more general and long term consideration of policy, utility, and justice. *See OSTROM, supra* note 51.

61. THE FEDERALIST PAPERS, *supra* note 11, at 318-22. Madison, in THE FEDERALIST NO. 51, introduces the concept of separation of powers and checks and balances as a “means of keeping each [department] in their proper places.” *Id.* Madison also introduces the concept of a compound republic whereby:

the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people, [namely], [t]he different governments will control each other, at the same time that each will be controlled by itself.

Id. at 321; *see also* George Carey, *Separation of Powers Revisited and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCIENCE REV. 151, 154 (Mar-June 1978) (“[T]he chief end sought through separation was the avoidance of capricious and arbitrary government . . .”).

62. THE DISCOURSES, *supra* note 33, at 109. Machiavelli, in the early 16th century, alluded to a system of checks and balances and separation of powers when he proposed that a mixed constitution is the best form in constructing a government. *Id.* He stated that in creating a government you should: “choose instead one that shared in them all, since . . . such government would be stronger and more stable, for if in one and the same state there was principality, aristocracy and democracy each would keep watch over the other.” *Id.* Thus, in combination, they would withstand degenerating into corruption by checking one another’s excesses, preserving and complementing one another’s virtues, while imparting the necessary stability of good government. *Id.*; *see also* THE FEDERALIST PAPERS, *supra* note 11, at 309. In THE FEDERALIST NO. 48, Madison states that “power is of an encroaching nature and that it ought to be effectually restrained from passing the limits

associated with classical liberalism, were not as sacrosanct as once believed.⁶³ It can be stated that our governmental institutions were, and still are, a creature of our liberal-republican political culture and have been imbued and continue to be imbued with the guiding principles of liberalism and republicanism.

Therefore, it is not surprising that the synthesis of liberal and republican principles have underlined the United States Supreme Court's doctrinal approach in reference to political speech. In Anti-Federalist republican discourse, the "power in the judicial, will enable [the Court] to mold the government, [which is presumably the people,] into almost any shape they please."⁶⁴ Moreover, if virtue were to play an important role in achieving the common good, and "[t]he passions ought to be controlled and regulated by the government,"⁶⁵ then an institution would be required to ensure that the body politic would remain virtuous to the republic's founding principles.⁶⁶ Machiavellian republican

assigned to it . . . [and] the next and most difficult task is to provide some practical security for each, against the invasion of the others."

63. THE FEDERALIST PAPERS, *supra* note 11, at 90. In THE FEDERALIST NO. 2, John Jay asserts that "[n]othing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers."; *see also* ANTI-FEDERALIST PAPERS, *supra* note 14, at 195 (even the Anti-Federalists agreed that "[a] people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society []").

64. ANTI-FEDERALIST PAPERS, *supra* note 14, at 298.

65. THE FEDERALIST PAPERS, *supra* note 11, at 315; *see also* THE DISCOURSES, *supra* note 33, at 238. Machiavelli stressed the role of virtuous institutions by stating: "[f]irst of all, the populace, misled by the false appearance of good, often seeks its own ruin, and, unless it be brought to realize what is bad and what is good for it by someone in whom it has confidence, brings on republics endless dangers and disasters." *Id.*

66. THE FEDERALIST PAPERS, *supra* note 11, at 436-42. In THE FEDERALIST NO. 78, Hamilton states that the members of the Court "may be an essential safeguard against the effects of occasional ill humors in the society." *Id.* at 441. In the same essay, he notes that the judges "ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental." *Id.* at 439. In THE FEDERALIST NO. 81, Hamilton assures the American people that the national courts are not to stray from the original

theory held that a virtuous prince or an institution (presumably with prince-like powers) would be necessary to ensure that the citizens remain loyal⁶⁷ to the original principles of the republic.⁶⁸ The main theoretical premise of this article is that the Supreme Court has become an important institution that has consistently demonstrated that it is capable of forcing Americans to remain virtuous to our liberal-republican principles. In essence, the Court has functioned as a modern “prince” or an institution with prince-like powers.

In view of the above, an instructive review of Machiavelli’s theory of justice is essential in understanding the Supreme Court’s doctrinal approach to political speech. *The Prince* was written to provide a prince or prince-like institution, a practical methodology,⁶⁹ to help guide the state against any perceived threat,⁷⁰ generally occurring in politically tumultuous times.

principles of the republic: “there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution” *Id.* at 451 (emphasis in original).

67. See THE DISCOURSES, *supra* note 33, at 139-52. Machiavelli devotes a whole section in THE DISCOURSES on how “love of country” (patriotism) becomes a form of secular religion that bonds the people together in order to ensure that they remain virtuous to the state’s interests, thus acting with due regard for the preservation of the state itself. *Id.*

68. *Id.* at 224. Machiavelli states that “[a] republic, therefore, ought to have some institution whereby to prevent its citizens from doing wrong under pretense of doing right, and to see their popularity is helpful, and not harmful to liberty” *Id.* at 224-25. Similar to the Federalist political theory, Machiavelli thought that factious activity was to be controlled in order to guarantee the common good, which was ultimately the preservation of the state. *Id.* at 481-82.

69. THE PRINCE 61 (Harvey C. Mansfield, Jr. trans., University of Chicago Press 1985). In Chapter XV, Machiavelli informs the reader that his “intent is to write something useful to whoever understands it . . . for it is so far from how one lives to how one should live that he who lets go of what is done for what should be done learns his ruin rather than his preservation.” *Id.* Accordingly, scholars today hold Machiavelli to be a forerunner of modern political science, because he was the first political theorist to be concerned with what “is” rather than what “ought” to be. *Id.*

70. *Id.* at 62. Machiavelli further concludes that:

Once the republic is secured, however, changing circumstances would require the prince to modify his methods.⁷¹ In short, as political discord abates and normality resumes, the prince-like institution, in order to continue its success, must reform its methods to conform with the changing circumstances.⁷² To Machiavelli, this change is mandated by the necessity of a prince acting in accordance with his fortune.⁷³ In reference to Machiavelli's principles of justice, when a prince-like institution is confronted with politically threatening circumstances it can employ repressive tactics because such means are justified under

one should not care about incurring the reputation of those vices without which it is difficult to save one's state; for if one considers everything well, one will find something appears to be virtue, which if pursued would be one's ruin, and something else appears to be vice, which if pursued results in one's security and well-being.

Id.

71. *Id.* at 99. In chapter XXV, Machiavelli first states the following proposition:

I believe, further, that he is prosperous who adapts his mode of proceeding to the qualities of the times; and similarly, he is unprosperous whose procedure is in disaccord with the times. For one sees that in the things that lead men to . . . glories and riches, . . . [t]his arises from nothing other than from the quality of the times that they conform to or not in their procedure.

Id. See also THE DISCOURSES, *supra* note 33, at 430. Machiavelli echoes THE PRINCE stating that "I have often thought that the reason why men are sometimes unfortunate, sometimes fortunate, depends upon whether their behavior is in conformity with the times [or circumstances]." *Id.*

72. THE PRINCE, *supra* note 69, at 61. Machiavelli insightfully states that: [f]or a man who wants to make a profession of good in all regards must come to ruin among so many who are not good. Hence it is necessary to a prince, if he wants to maintain himself, to learn to be able not to be good, and to use this and not use it according to necessity."

Id.; see also THE DISCOURSES, *supra* note 33, at 432 ("The downfall of [republics] also comes about because institutions in republics do not change with the times . . .").

73. THE PRINCE, *supra* note 69, at 101. Machiavelli concludes Chapter XXV by reiterating that "when fortune varies and men remain obstinate in their modes, men are prosperous while they are in accord, and as they come into discord, unprosperous." *Id.*

the circumstances in effectuating the laudable end of maintaining the security of the republic.⁷⁴

On the other hand, *The Discourses* temper the harshness of Machiavelli's theory of justice found in *The Prince*. In a number of chapters in *The Discourses*, Machiavelli observes that in less tumultuous times the repressive means utilized to secure the state will, with the passage of time, become unnecessary or "out of sync" with present conditions; and therefore, these means should be relaxed or even done away with.⁷⁵ Thus, once the state is secured Machiavelli supports principles of tolerance and respect for individual liberties,⁷⁶ and even suggests that more reliance

74. *Id.* at 65. In Chapter XVII, Machiavelli introduces another proposition:

[a] prince, therefore, so as to keep his subjects united and unfaithful, should not care about the infamy of his cruelty, because with the very few examples he will be more merciful than those who for the sake of too much mercy allow disorders to continue, from which come killings or robberies; for these customarily harm a whole community, but the executions that come from the prince harm one particular person.

Id. at 65-66; see also THE DISCOURSES, *supra* note 33, at 163 ("[W]hen corruption [has] set in, . . . normal methods will not suffice now that normal methods are bad. Hence it is necessary to resort to extraordinary methods, such as the use of force . . . so that one can dispose [of corruption] as one thinks fit.").

75. *Id.* at 428.

There are two things here which should be borne in mind. One is that, in order to obtain glory, a man must use different methods in a [republic] that is corrupt from what he would use in one in which political life is still vigorous. The other, which is almost the same as the first, is that in the way they behave, and especially where deeds of moment are concerned, men should take account of the times, and act accordingly.

Id.

76. *Id.* at 162. Machiavelli continues with this theme by stating: "[a]nyone anxious to serve the public should be able to propose his plan. It is also a good thing that everyone should be at liberty to express his opinion on it, so that when the people have heard what each has to say they may choose the best plan." *Id.* Interestingly, this republican dialogue is strikingly similar to the liberal dialogue used by Justice Holmes where he formulated his "marketplace of ideas" justification for expanding individual liberties concerning free speech. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added). Justice Holmes stated that "the best test of the

can be placed on the people.⁷⁷ Although in normal times the prince-like institution will eventually be restricted by laws, the people must always be bound to the original principles of the republic.⁷⁸ Machiavelli concludes *The Discourses* by observing that, in reality, the preservation of the republic is of utmost importance, for without it, there can be no laws and consequently no liberty.⁷⁹ Hence, Machiavelli reserves to the republic the right

truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [one's] wishes safely can be carried out." *Id.*

77. *Id.* at 116. Machiavelli argues as to whether the haves (the rich and influential) or the have-nots (the common people) should be entrusted to protect liberty once the state is secured. "[I]t will be seen that in the former there is a great desire to dominate and in the latter merely the desire not to be dominated." *Id.*; see also *THE PRINCE*, *supra* note 69, at 39. Machiavelli expressed this theme in chapter IX:

He who arrives in the principality with popular support finds himself alone there, and around him has either no one or very few who are not ready to obey. Besides this, one cannot satisfy the great with decency and without injury to others, but one can satisfy the people; for the end of the people is more decent than that of the great, since the great want to oppress and the people want not to be oppressed.

Id.

78. *THE PRINCE*, *supra* note 69, at 69 ("Thus, you must know that there are two kinds of combat: one with laws, the other with force . . . [b]ut because the first is often not enough, one must have recourse to the second.").

79. *THE DISCOURSES*, *supra* note 33, at 515. In Book III, chapter 41, Machiavelli observes that the good of the community above all private interests and ordinary considerations or morality is held to be no less essential in the case of the rank-and-file citizens. Machiavelli states: "it is good to defend one's country in whatever way it be done, whether it entail ignominy or glory; for . . . if it were not saved . . . its freedom would be lost." *Id.* at 514-15. Machiavelli further adds that:

[W]hen the safety of one's country wholly depends on the decision to be taken, no attention should be paid either to justice or injustice, to kindness or cruelty, or to its being praiseworthy or ignominious. On the contrary, every other consideration being set aside, that alternative should be wholeheartedly adopted which will save the life and preserve the freedom of one's country.

Id. at 515.

to use force when its security is apparently threatened, whether the threat's origin is internal or external.⁸⁰

It is within this context that the Supreme Court has paralleled Machiavelli's theory of justice. In retrospect, the Supreme Court has acted with a certain practical flexibility that illustrates the Court's adherence to Machiavelli's methodology as developed in *The Prince* and *The Discourses*.⁸¹ Part II of this article will examine a number of Supreme Court cases that came before the Court during politically concordant and discordant times from 1919 to the flag burning case decided in 1989.⁸² The Court has followed a liberal-republican approach in deciding all of these cases. In essence, the Court has constrained individual liberty during politically stressful periods in America's history, but has relaxed this constraint during politically peaceful periods or where the perception of an internal or external threat was minimal.⁸³

II. THE SUPREME COURT, POLITICAL SPEECH AND MACHIAVELLI'S THEORY OF JUSTICE

After having devoted almost all of his effort in *The Discourses*, expounding his theory of justice by developing and explaining the principles of virtue, fortune, and necessity and the effect of these

80. *THE PRINCE*, *supra* note 69, at 72. Machiavelli states that "a prince should have two fears: one within, on account of his subjects; the other outside, on account of external powers." *Id.*

81. *See infra* part II.

82. *Texas v. Johnson*, 491 U.S. 573 (1989).

83. *See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 107-08 (1980). Professor Ely noted that during World War I and during the Communist Scare of the late 1940's and early 1950s, the Court took a narrow view of constitutional protection of speech. By contrast, in the 1920s, and beginning again in the late 1950s, after the Communist Scare had abated, the Court moved towards greater protection of speech. Therefore, the historical periods that will be reviewed begin with the first "red scare" after World War I, the second "red scare" of the McCarthy Era which coincided with the Korean War and the effort to contain communism during the Vietnam War, and then contrasting these politically tumultuous periods with the years falling in between and up to the present. *Id.*

concepts on the ends/means maxim, Machiavelli concludes by noting that force must at times be used when the laws become ineffective in guiding individuals to be virtuous. Machiavelli stresses that private ambitions must be compatible with the common good, which to him ultimately meant the preservation of the state. *The Discourses* revisit the harshness of Machiavelli's theory of justice in *The Prince*. Machiavelli's return to the basic formulations of justice espoused in *The Prince* evidence his republican concern for the preservation of the state. In contrast, his liberal dialogue in *The Discourses* addresses the importance of individual liberties. Machiavelli rationalizes this apparent inconsistency by observing that employing flexible methods in saving the state is a virtue in itself. This leads him to posit that changing circumstances not only require but justify different modes of action.⁸⁴ Therefore, to be flexible is to be virtuous, even if one is acting in his own self interests so long as his behavior is to serve (preserve) the community.⁸⁵ Not only is flexibility virtuous, it is also consistent with Machiavelli's theory of justice.

This same flexibility is apparent when viewing the pattern by which the Supreme Court has treated the balance between promoting the "system of deliberative politics" and the Court's concern for our second original constitutional principle - the preservation of the state itself. The Court has adopted two approaches that are dictated by the circumstances at hand. In one instance, the Court will advance liberal constitutionalism (deliberative politics), and in the other instance it will advance republican constitutionalism (preservation of the state). The

84. See THE DISCOURSES *supra* note 33, at 425-32.; see also THE PRINCE, *supra* note 69, at 98-101.

85. See, e.g., THE FEDERALIST PAPERS, *supra* note 11 (in THE FEDERALIST NOS. 1, 22, 57, & 73, both Hamilton and Madison posit that even selfish interests could be made to serve the public good); see also *supra* note 47 and accompanying text (in a number of passages Machiavelli illustrates that individuals acting in their own interests can also serve the public good).

difference between the two is whether or not there is a perceived threat to the state's ideological precepts.⁸⁶

Since 1919 the Court has generally interpreted the First Amendment in liberal terms.⁸⁷ However, the Court gets derailed at times from this liberal approach when the political system is tested by the strain of crisis conditions. Beginning with the Draft and Espionage Act cases of 1919, which were concerned about the spread of Bolshevism,⁸⁸ the Court has had trouble balancing the equities while developing the parameters of political speech when our original constitutional principle's conflict with each other. The trouble the Court encountered in adopting a truly libertarian First Amendment doctrinal approach in *Schenck v. United States*,⁸⁹ *Frohwerk v. United States*,⁹⁰ *Debs v. United*

86. See Robert M. Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349 (1981). Professor Cover notes that "since its decision in *Marbury v. Madison* in 1803 [the Supreme Court] has been the political philosopher or, if one prefers a more pejorative connotation, the ideologue of American democracy." *Id.*

87. See Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 975-76 (1968) (reviewing First Amendment jurisprudence from 1919 to 1968 noting that the Court has followed a liberal track of interpretation).

88. STEVEN H. SHIFFRIN & JESSE H. COOPER, *THE FIRST AMENDMENT CASES-COMMENTS-QUESTIONS* 19 (1991) (the Espionage Act and state sedition laws were enacted in response to World War I and the fear of Bolshevism that developed in its wake); see also Gabriel Kolko, *The Decline of American Radicalism in the Twentieth Century*, in *FOR A NEW AMERICA* 197-220 (James Weinstein et al. ed., 1970) (noting that government repression contributed greatly to suppressing the influence of radical politics in the early 20th century); see also ROBERT GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA 1870 TO THE PRESENT* 121 (1978). Professor Goldstein noted that during World War I, the federal government and the conservative American Federation of Labor joined together an alliance to crush radical labor groups that drew their support from the Socialist Party. *Id.* By the end of World War I, the International Workers of the World, members of the left-wing of American socialist politics, had been effectively destroyed; the momentum of the New Partisan League, a Midwest group that was challenging the grain, banking and railroad interests, had been stopped; and, the Socialist Party itself had been seriously damaged. *Id.*

89. 249 U.S. 47 (1919). Although the defendant did not explicitly advocate illegal resistance to the draft, but rather merely advocated peaceful measures,

States,⁹¹ and *Abrams v. United States*⁹² was brought on by the inherent conflict between liberal versus republican constitutionalism. Although the test used by the Court in all four cases is generally viewed as grounded in liberal constitutionalism, even libertarian grounded formulations could not guarantee liberal results that would promote the free flow of political information necessary for the deliberative politics model to function within our various concepts of self-rule or liberal democratic theory.⁹³

The liberal-republican synthesis of 1787-88 recognized that “liberty - the ability of the people to do what they want - would be both acknowledged as a right and restricted as a power, since

such as petitioning for the repeal of the Conscription Act, the Court held that the defendants could be constitutionally convicted of conspiracy to violate the 1917 Espionage Act. *Id.* at 50-51.

90. 249 U.S. 204, 207-09 (1919) (upholding the Espionage Act convictions of defendant writers of editorials criticizing the draft in a German language paper).

91. 249 U.S. 211 (1919). Pursuant to the Espionage Act, the Court upheld the conviction of Eugene Debs, a prominent socialist and presidential candidate who was convicted for criticizing the involvement of the United States in World War I. *Id.* at 216.

92. 250 U.S. 616 (1919). Defendants of Russian-Jewish nationality were convicted, under the Espionage Act for publishing two Bolshevik leaflets “intended to provoke and to encourage resistance to the United States in the war,” *id.* at 624, as well as to urge “a general strike of workers in ammunition factories for the purpose of curtailing the production of ordinance and munitions necessary and essential to the prosecution of the war” *Id.*

93. *See, e.g.,* Paul Brest, *The Thirty-First Cleveland Marshall Fund Lecture Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 185 (1986) (explaining that part of the consumer conception of democracy is the fact that it is driven by self-interested citizen participation influencing constitutional discourse and decision making); C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 6 (1977). Professor Macpherson identifies four liberal democratic models - the protective model, the developmental model, the equilibrium model and the participatory model. *Id.* at 22. All of these models, though, depend upon the mainspring of human political behavior, which is self interest. *Id.* As he states, “liberal democracy, to be workable, must not be far out of line with the wants and capabilities of the human beings who are to work with it.” *Id.* at 21. Professor Macpherson further notes that “liberalism had always meant freeing the individual from the outdated restraints of old institutions.” *Id.*

the potential for abusing power, [according to the framers,] was now in the hands of the people themselves.”⁹⁴ However, as mentioned earlier, Federalist humanism was based on the premise that the mainspring of human conduct was self-interest and this human trait precluded the people from acting for the collective interest.⁹⁵ An apparent outgrowth from this historical reading of the Federalist’s motivational theory of political behavior, has resulted in Supreme Court Justices⁹⁶ and constitutional scholars⁹⁷

94. See JOHN P. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS* 78 (Basic Books 1984); see also *THE FEDERALIST PAPERS*, *supra* note 11, at 320 (“A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”).

95. See *THE FEDERALIST PAPERS*, *supra* note 11, at 410. The Founding Fathers believed that their principal responsibility was to make sure that their proposed system of politics would allow for “time and opportunity for more cool and sedate reflection[,]” the necessary requisite for due deliberation, so that reason might prevail in their political judgments. *Id.* In *THE FEDERALIST* No. 15, Hamilton notes that “the passions of men will not conform to the dictates of reason and justice without constraint.” *Id.* at 149; see also WILLMOORE KENDALL ET. AL., *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* (1970). Professor Kendall notes that the scheme of government embodied in the Constitution reflects a “republican remedy” without jeopardizing “our supreme symbol as a people: namely, self-government through deliberative processes.” *Id.* at 79.

96. See *Brandenburg v. Ohio*, 395 U.S. 444, 454 (1968). The Court in *Brandenburg* announced an “incitement to imminent lawless action” test as opposed to Judge Learned Hand’s “not improbable” test and Justice Holmes’ “clear and present danger” test to overturn *Whitney v. California*, 274 U.S. 357 (1927), and thus effectively expanded the scope of free speech protection. *Brandenburg*, 395 U.S. at 454; *Dennis v. United States*, 341 U.S. 494, (1951) (Douglas, J., dissenting). Justice Douglas proclaimed in libertarian discourse that “[f]ull and free discussion has indeed been the first article of our faith” *Id.* at 584-85; *Gitlow v. New York*, 268 U.S. 652, (1925) (Holmes and Brandeis JJ., dissenting). Writing in support of libertarian concept of free speech, the dissenters stated that “[t]he general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given the word ‘liberty’” *Id.* at 673; *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes J., dissenting) (dissenting in libertarian discourse and supporting the further expansion of protections for free speech).

97. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (asserting that the principal societal value protected by the

developing certain freedom of speech theories. These theories justify the ebb and flow of First Amendment protection concerning the role of information and advocacy in democratic government or deliberative politics.⁹⁸ During the disposition of the early Espionage Act cases in 1919, the Court developed the “clear and present danger” test,⁹⁹ which would become instrumental in helping the Court determine how libertarian or republican it would view the First Amendment protection of free speech.

Although Justice Holmes agreed with the Court’s application of this test in the earlier Espionage Act and Draft cases, by the time *Abrams v. United States*¹⁰⁰ came before the Court, Holmes was becoming increasingly uncomfortable with the republican results his test was producing. In response, Justice Holmes dissented in *Abrams* and introduced his ‘marketplace of ideas’ theory.¹⁰¹ For Justice Holmes, the competition of ideas would determine whether the present ideological underpinnings of the state were worthy of preservation. Similarly, for Justice Brandeis, the other libertarian on the Court, the ultimate objective was not the order itself, but rather, the order necessary to achieve deliberative

First Amendment is to help promote self-realization); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (freedom of speech based upon a broader libertarian theory than afforded under the market place theory); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (Oxford University Press 1965). The free speech clause basically serves a political function by promoting the free flow of information necessary in informing the electorate in public affairs so that they can carry on the business of self-government. *Id.*

98. *See supra* note 93 and accompanying text.

99. *Schenck v. United States*, 249 U.S. 47, 51-52 (1919) (introducing the “clear and present danger” test).

100. 250 U.S. 616 (1919).

101. *Id.* at 630 (Holmes, J., dissenting). Justice Holmes reformulated the “clear and present danger” test and based his constitutional theory on the principal premise that there was to be free trade in ideas, and truth would become accepted through the competition of the market. *Id.* He stressed that only where the circumstances were such that there was no time to expose evil ideas through more speech, should the state suppress political speech. *Id.*

politics of popular government.¹⁰² To Brandeis, the “clear and present danger” test was an exception to political deliberation.¹⁰³ Moreover, to further extend these constitutional protections, both Justices insisted that the “clear and present” evil should be sufficiently substantial to warrant the inhibition of public debate or suppression of street politics.¹⁰⁴ Interestingly though, Schenck, Debs, Frohwerk, Abrams, Gitlow and Whitney were all sent to jail despite the presence of the “clear and present danger” test, which had libertarian underpinnings.¹⁰⁵ Clearly, where insurgent or radical politics appear to threaten the state, the test itself is applied in a republican manner.¹⁰⁶ Thus, the “preservation of the state” principle will always trump the “deliberative politics” principle.¹⁰⁷ This Machiavellian

102. See *supra* note 86, at 383. Professor Cover observed that in Brandeis' concurrence in *Whitney v. California*, 274 U.S. 357 (1927), “Brandeis' most powerful statements on behalf of liberty of expression had been closely tied to the political deliberation of popular government, of which the legislative process was paradigmatic.” *Id.*

103. See Cover, *supra* note 86, at 381-82. Professor Cover notes that Justice Brandeis “had confined ‘clear and present danger’ to the status of an emergency exception to political deliberation Brandeis had not accounted for the many non-political and informal ways, [i.e., street politics] that cultures and societies arrive at the truth.” *Id.*

104. See *Whitney*, 274 U.S. at 377-78 (Brandeis and Holmes JJ., concurring). In 1919, Whitney was convicted of the felony of assisting in organizing the Communist Labor Party of California, of being a member of it, and of assembling with it. The Court held that these acts constituted a crime, because the party was formed to teach syndicalism. Ironically, both Holmes and Brandeis found the evil presented to be substantial enough to warrant upholding Whitney's conviction despite their libertarian views on political speech. *Id.* at 379.

105. See WALTER BERNS, *FREEDOM, VIRTUE AND THE FIRST AMENDMENT* 50-56 (1965).

106. See Cover *supra* note 86, at 353. Professor Cover noted that during the early 20th century, the Court took a very conservative approach in the disposing of free speech cases because disorderly street politics were viewed as a primary threat not only to property but to civil society itself. *Id.*

107. *But cf.* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1973). Professor Dworkin's liberal theory of justice stands for the fundamental proposition that our constitutional individual rights, secured by the Bill of Rights, are “trumps” over collective goals.

jurisprudential approach can be traced throughout the Court's history.

Not surprisingly, when viewing the libertarian perspectives of Justice Holmes and Justice Brandeis, it is possible to see traces of Machiavellian republican theory.¹⁰⁸ This might explain why republican results can be produced under a libertarian theory of justice.¹⁰⁹ In short, the presence of republican theory resonates

108. THE DISCOURSES, *supra* note 33, at 162. Justice Holmes' libertarian dialogue in his dissent in *Abrams* mirrored Machiavellian liberal dialogue found in THE DISCOURSES. *Id.* See also Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J. L. & POL. 451 (1988). Professor Lahav noted that Brandeis' concurrence in *Whitney* was lodged in republican theory. *Id.* at 460-61. According to Lahav, Brandeis' "theory rest[ed] on two central themes: the idea of civic virtue and the idea that the end of politics (or the state) [was] the common good, which in turn [was] more than the sum of individual wills." *Id.* at 461.

109. See JOHN STUART MILL, ON LIBERTY (Appleton-Century-Crofts & Co. 1947) (1859). Although Justice Holmes's "marketplace of ideas" theory echoes Mill's utilitarian justifications for free speech as instrumental in arriving at the truth, Mill also believed that what people ought to be allowed to do varied with the circumstances. *Id.* at 75-94. Mill regarded "utility as the ultimate appeal on all ethical questions." *Id.* at 10. He stated that "even opinions lose their immunity, when the circumstances . . . are such as to constitute . . . a positive instigation to some mischievous act." *Id.* at 55; see also JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 69 (C.B. Macpherson ed., 1980) (1690). Although it is traditionally accepted that the American polity was conceived in Lockean liberalism, even Locke himself admitted that

the first and fundamental positive law of all commonwealths is the establishing of the legislative power; as the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of society, and as far as will consist with the public good of every person in it.

Id. Therefore, both Mill's and Locke's political philosophies recognized the ultimate republican good - the preservation of the state itself. Accordingly, Justice Brandeis' "deliberative politics" model endorses formal legislative politics as opposed to informal street-corner politics as the principal form of deliberative politics and thus embraces the Lockean importance of the majority's duty to preserve the state. Alternatively, Justice Holmes' "marketplace of ideas" theory, if it has any associational value with Mill's theory of freedom of speech, must also incorporate the hidden importance of republican theory found in Mill's discourse. MILL, *supra*, at 95.

within Brandeis' concurring opinion in *Whitney v. California*.¹¹⁰ Although Brandeis espoused libertarian constitutionalism, it was republican constitutionalism that prevailed. Similarly, Holmes' "clear and present danger" test, even as modified in his dissent in *Abrams*,¹¹¹ resulted in the Court always being able to elevate the "preservation of the state" principle above the "deliberative politics" principle or at least allow the Court to narrowly define the proper parameters of deliberative politics so that the state's preservation would always appear to be imminently in danger. In truth, the "clear and present danger" test would not be an adequate test to protect political speech, since the Court would always find the wherewithal during politically discordant times to protect state interests at the expense of deliberative politics.

Conversely, the "deliberative politics" principle seems to prevail when the "heated circumstances" surrounding the occurrence of radical politics have abated. For example, in *De Jonge v. State of Oregon*,¹¹² the Court decided in favor of the "deliberative politics" principle.¹¹³ Obviously, something happened in between 1927 and 1937 for the *De Jonge* Court to side with the "deliberative politics" principle. A valid explanation can be that the radical politics movement, which was strongly supported by socialist, communist and syndicalist elements, was having less and less of an independent impact upon the American political scene and this process continued well into the 1930's.¹¹⁴ Quite simply, there was no threat to the state

110. 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *see also* Lahav, *supra* note 108, at 461. Professor Lahav noted that Justice Brandeis' "observation that the end of the state is the individual freedom, joined by his observation that liberty is the secret of happiness, suggests that in *Whitney* he posited the common good as the goal of the American polity." *Id.*

111. 250 U.S. 616, 630 (1919).

112. 299 U.S. 353 (1937).

113. *Id.* at 363-65.

114. *See* IRA KIPNIS, *THE SOCIALIST MOVEMENT 1897-1912*, at 429 (1968). In the 1920's the socialists "concluded that the American big business was here to stay, and that there more was to be gained by working under it than fighting it" *Id.* "The Socialist Party had been organized to combat the institution, practices, and values of monopoly capitalism; [i]nstead, it had been corrupted

because the state itself was flexible enough to co-opt the radicalism of the Left.¹¹⁵ After 1937 and throughout World War II, the Court did not substantially decide any significant case law that abrogated freedom of political speech.¹¹⁶ It was not until the early 1950s that republican constitutionalism came to the forefront of the Court's political speech jurisprudence. In 1951, the Court again applied the "clear and present danger" test,¹¹⁷ but the application of this liberal test resulted in the republican principle prevailing.

The second Red Scare provided the Court with the opportunity to illustrate, once again, its Machiavellian methodological jurisprudential approach in constraining political speech

by them." *Id.*; see also JAMES WEINSTEIN, *THE DECLINE OF SOCIALISM IN AMERICA 1912-1925* (1967). Weinstein noted that after the 1924 national election, the Socialist Party's strength became increasingly anemic. *Id.* at 324-332. As Weinstein wrote, "for another two decades the socialists would continue to go through the motions but they would never regain their position as the political center of American radicalism." *Id.* at 326.

115. See DAVID SHANNON, *THE SOCIALIST PARTY OF AMERICA: A HISTORY* (1955). Franklin D. Roosevelt's state capitalism of the 1930's led historian David Shannon to note that "the story of the decline of the Socialist Party since 1933 is, for the most part, the story of the political success of the New Deal." *Id.* at 229. In short, Roosevelt "stole the thunder" of the socialists by virtue of his progressive politics. *Id.* at 228.

116. See Emerson, *supra* note 87, at 975 (noting that during World War II freedom of speech to oppose the war or criticize its conduct was not seriously infringed); see also *Taylor v. Mississippi*, 319 U.S. 583 (1943) (reversing the conviction of Jehovah's Witnesses prosecuted under a wartime state sedition law for publicly urging people not to support the war and for advocating and teaching refusal to salute the flag and illustrating the use of the Holmes' test to cause the triumph of free speech over national security). *But see* BERNIS, *supra* note 105, at 56 (1957). Professor Bernis noted that "the test as applied in *Taylor* actually bec[ame] a rationale for avoiding the impossible prohibitions of the First Amendment and for convicting persons for speech that the government ha[d] forbidden." *Id.*; see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73 (1942) (developing the "fighting words" doctrine to proscribe certain political speech).

117. *Dennis v. United States*, 341 U.S. 494, 514-15 (1951); see also *Feiner v. New York*, 340 U.S. 315, 320 (1951) (applying the *Chaplinsky* "fighting words" test, the Court upheld the conviction of a left-wing college student engaging in "radical" street-corner politics by calling President Truman a "bum" and the American Legion a "Nazi Gestapo").

freedoms. The Court basically imposed a containment policy on domestic radical politics similar to America's foreign policy of containment that justified our presence in Korea. Accordingly, once the apparent threat to the state's ideological underpinnings again threatened its own survival, the Court's containment policy dictated the outcome in the Court's decision in *Dennis v. United States*.¹¹⁸

However, six years later, in *Yates v. United States*,¹¹⁹ the Court demonstrated a willingness to recognize the importance of the "deliberative politics" principle and reversed the convictions of the "second string" of communist leaders who were convicted under the Smith Act of 1940.¹²⁰ The circumstances in 1957 were substantially different from the circumstances in 1951, and a Machiavellian response required the Court to change its mode of action to comport with the changing circumstances.¹²¹ This was

118. 341 U.S. 494 (1951).

119. 354 U.S. 298 (1957), *overruled on other grounds by* *Burks v. United States*, 437 U.S. 1 (1977).

120. *Id.* at 338; *see also* Hans A. Linde, "Clear and Present Danger" *Reexamined: Dissonance in the Brandenburg Concerto*, 22 *STAN. L. REV.* 1163, 1176-78 (1970) (contrasting the different justifications for upholding convictions under the Smith Act from 1940 to 1968); Robert Mollan, *Smith Act Prosecutions: The Effect of the Dennis and Yates Decisions*, 26 *U. PITT. L. REV.* 705 (1965). Professor Mollan observes a common thread in the Court's analysis in the Dennis and Yates decisions. *Id.* at 748. He notes that "[e]xpression in the form of statements of belief, or of passionate desire, or of fervent expectation might be construed to be related to the creation of attitudes in an audience which would render susceptible to an incitement to action at some time in the indefinite future." *Id.* In other words, the predisposition of the audience to be induced to act illegally is dispositive to attaining a conviction under the Smith Act, and given that the fear of communism had abated by 1957, the effect of the expression of advocacy to violently overthrow the government did not have the same dispositive effect on the *Yates* Court as it had on the *Dennis* Court. Therefore, *Yates* was free while *Dennis* was jailed. *Id.*

121. SHIFFRIN, *supra* note 88, at 30. Professor Shiffrin notes that:

By 1951, anti-communist sentiment was a powerful theme in American politics. The Soviet Union had detonated a nuclear weapon; Communists had firm control of the Chinese mainland; the Korean War was at a stalemate; Alger Hiss had been convicted of perjury in Congressional testimony concerning alleged spying activities for the Soviet Union

particularly true where the ultimate common good was not at stake.

Four years after *Yates*, however, the Court in *Scales v. United States*,¹²² again placed restraints upon political speech. Ironically, on that same day, the Court also decided not to act contrary to the “deliberative politics” principle set forth in *Noto v. United States*.¹²³ Obviously, something differed in the two cases decided by the Court in 1961 to justify dissimilar rulings concerning violations of the same membership clause in the Smith Act. That difference can be explained by noting that in *Yates* the convictions were against high American Communist Party officials, whereas in *Noto* the conviction was against an unimportant member of the American Communist Party. Interestingly, the *Yates* and *Noto* decisions were sandwiched between the “Bay of Pigs” fiasco of 1961, and the “Cuban Missile Crisis” of 1962, both of which occurred not more than 90 miles from the shores of the United States. With the heightened awareness of a surge in international communism, the Court reverted to Machiavellian jurisprudence,¹²⁴ but this time it targeted elite members of the American Communist Party. By 1968, at the height of both the Vietnam War and the international

while he was a State Department official; and, Senator Joseph McCarthy of Wisconsin had created a national sensation by accusation that many ‘card carrying communists’ held important State Department jobs.

Id. at 30-31. Shiffrin observes that in 1954:

Senator McCarthy was censored by the United States Senate for acting contrary to its ethics and impairing its dignity. Also the Korean War was resolved and by 1957, when the ‘second string’ of communist leaders reached the Supreme Court in *Yates*, McCarthy had died and so had McCarthyism. Although strong anti-communist sentiment persisted, the political atmosphere [surrounding the *Yates* decision in 1957] was profoundly different from that of *Dennis* in 1951.

Id. at 44.

122. 367 U.S. 203, 206 (1961).

123. 367 U.S. 290, 298-99 (1961).

124. See GALLUP POLL, Public Opinion 1935-1971 (vol. III 1959-1971) (1972); see also *supra* note 35 and accompanying text. Machiavelli alluded to the courts as being prince-like institutions that would hold the people in line.
Id.

battle of ideologies,¹²⁵ another political speech case, *United States v. O'Brien*,¹²⁶ reached the court. *O'Brien* involved the convictions of David O'Brien and three companions who burned their Selective Service registration certificates on the steps of the South Boston Courthouse. The Court upheld the convictions stating that “[w]hen O'Brien deliberately rendered unavailable his registration certificate, he willfully frustrated [the government's] interest.”¹²⁷

However, one year later the Court trumped the “first amendment republican principle” with the “first amendment liberal principle.”¹²⁸ What had changed in one year?¹²⁹ A valid

125. See WALTER LAFEVER, *AMERICA, RUSSIA, AND THE COLD WAR, 1945-1971* (1972) [hereinafter *COLD WAR*]. Professor Lafeber noted that President Johnson raised the American troop level in Vietnam to 535,000 during the summer of 1968. *Id.* at 293. This was the highest figure that American military personnel would reach during the Johnson administration. *Id.* During the summer of 1968, Soviet party leader Leonid Brezhnev proclaimed the “Brezhnev Doctrine” under which Soviet intervention in socialist states was justified because socialist nations had the right to save other socialists from “world imperialism” and the “counter revolution” to preserve the “indivisible” socialist system. *Id.*; see also THOMAS W. WOLFE, *SOVIET POWER AND EUROPE, 1945-1970* (1970). Professor Wolfe noted that since 1964, and even before President Johnson escalated the fighting in Vietnam, the Soviets rejected numerous American overtures for better East-West relations. *Id.* at 266-69.

126. 391 U.S. 367 (1968).

127. *Id.* at 382.

128. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In this decision the Court combined the most speech protective aspects of Holmes's “clear and present danger” test with Judge Learned Hand's “advocacy/incitement” test which Hand formulated in *Masses Publishing Co. v. Patten*, 244 F. Supp. 535 (S.D.N.Y. 1917), which in effect gives double protection to political speech. *Id.* at 447. Under the *Brandenburg* standard, direct advocacy of imminent unlawful action that would likely incite or produce an unlawful response is proscriptive speech. *Id.* However, governmental restraints on the advocacy of abstract doctrines will not be a legitimate governmental speech proscription. *Id.* at 448.

129. See, e.g., GALLUP, *supra* note 124. A Gallup poll taken in 1968 in which Americans were asked whether or not they were “Hawks” - standing for increasing America's military effort in Vietnam, or “Doves” - reducing America's military effort in Vietnam revealed associational values of 61% and 23%, respectively. *Id.* at 2105-06. However, in 1969, a Gallup poll revealed

explanation can be constructed from the fact that by 1969 national sentiment was against our involvement in the Vietnam War.¹³⁰ In effect, the national election of 1968 legitimized criticism of the war to the extent that the major political party platforms were based upon promises of honorably ending the Vietnam War. In other words, the American political consensus endorsed the position that the state's interests were best served by ending U.S. involvement in the Vietnam conflict.¹³¹ Essentially, all government institutions began to recognize and accept criticism of the war as part of the deliberation process. Consequently, the street politics of anti-war protesting began to enjoy greater liberal First Amendment protection.¹³²

In 1971, the Court was faced with another political speech case, *Cohen v. California*.¹³³ By this time, however, the Court had embraced the "deliberative politics" principle. The

that Americans were 59% in agreement that America should reduce troop levels in Vietnam as opposed to 25% in disagreement. *Id.* at 2199. And later that year, 57% agreed to the introduction of a congressional proposal to withdraw from Vietnam and to turn over Vietnam's defense to the Vietnamese. *Id.* at 2218.

130. See COLD WAR, *supra* note 125. Professor Lafeber alluded to the fact that national sentiment was not only against the war, but precipitated President Nixon, in the summer of 1969, to introduce his "Asian Doctrine" in which the President said that the United States expected Asians to defend themselves against Communism while American troops slowly withdrew from the whole Western Pacific region. *Id.* at 282.

131. See THE WORLD ALMANAC 525 (Mark S. Hoffman ed., 1993) (noting that the United States initiated troop withdrawal in July 1969, and President Nixon set Vietnamization policy on November 3, 1969).

132. See COLD WAR, 1945-1971, *supra* note 125, at 295-296. Professor Lafeber stated that, by 1971, the politics of the "New Left" to end America's involvement in Vietnam was greatly supported by most Americans. *Id.* WORLD ALMANAC, *supra* note 131, at 525 (noting that Anti-Vietnam War demonstrations reached a peak in the United States in 1969, and on November 15, some 250,000 antiwar demonstrators marched in Washington, D.C.); *Watts v. United States*, 394 U.S. 705, 706 (1969) (reversing the conviction of a black anti-war activist who threatened President Johnson's physical well-being); see also *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508-10 (1969) (upholding the right of students to wear black armbands in protest of the Vietnam War while in school).

133. 403 U.S. 15 (1971).

circumstances that gave rise to Cohen's conviction were that he had worn a jacket bearing the plainly visible words 'Fuck the Draft' in a Los Angeles courthouse.¹³⁴ He testified that he did so as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.¹³⁵ In reversing Cohen's conviction, Justice Harlan, writing for the Court, echoed Brandeis' concurring opinion in *Whitney*¹³⁶ He stressed that the First Amendment's principal function is to "remove governmental restraints for the arena of public discussion"¹³⁷ Since 1971 the Court has consistently expanded the protections for political speech.¹³⁸ An affirmation of this observation can be evidenced in *Texas v. Johnson*,¹³⁹ and

134. *Id.* at 16.

135. *Id.*

136. 274 U.S. 357, 372-80 (1927).

137. 403 U.S. at 24.

138. See COLD WAR, 1945-1971, *supra* note 125, at 301 (1971). Professor Lafeber ends his study by noting that the evacuation during the Vietnam War ended a quarter of a century of Cold War foreign policies of the United States, Russia and China. *Id.*; see also *Rankin v. McPherson*, 483 U.S. 378 (1987). The *Rankin* Court reversed the dismissal of a government clerical worker for making the comment, after John Hinckley's attempted assassination of President Reagan, that "if they go for him again, I hope they get him." *Id.* at 381-83. The Court viewed the speech as falling within the realm of "public concern" or "deliberative politics" and was therefore protected. *Id.* at 386; *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 442-43 (1974). The Court invalidated an Indiana statute that required a political party or its' candidates signing an affidavit stating that they do "not advocate the overthrow of local, state or national government by force or violence *Id.*"; *Hess v. Indiana*, 414 U.S. 105 (1973). The *Hess* Court reversed convictions growing out of a campus anti-war demonstration which overflowed onto the public streets causing a public disturbance. *Id.* at 109. Although the demonstrators were moved off the street, they threatened to "take the fucking street later." *Id.* at 107. The state unsuccessfully argued that this statement was proscriptive speech under the *Brandenburg* standard. *Id.* at 108-09. But see *Connick v. Meyers*, 461 U.S. 138 (1983), in which the Court, in reviewing speech by an Assistant District Attorney concerning the manner in which government is operated or should be operated, specifically the District Attorney's office, upheld the dismissal of the Assistant District Attorney. *Id.* at 154. This juristic assessment is analogous to the Court's liberal constitutional approach in *Noto*, as opposed to the Court's republican constitutional approach in *Scales*.

Eichman v. United States,¹⁴⁰ decided respectively in 1989 and 1990.

In *Johnson*, the defendant, while demonstrating at the Republican National Convention in 1984, unfurled the American flag and torched it.¹⁴¹ The central issue before the Court was whether burning a nationally venerated object was protected speech.¹⁴² In a five-to-four decision the Court reversed the conviction of Johnson.¹⁴³ Justice Brennan, writing for the Court, stated that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁴⁴

However, the dissent of Chief Justice Rehnquist, with whom Justice White and Justice O’Connor joined, resonates with republican theory. Rehnquist stated that:

the American flag, has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning . . . then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. . . . the flag is not simply another ‘idea’ or ‘point of view’ competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence For that flag every true American has not simply an appreciation but a deep affection.¹⁴⁵

139. 491 U.S. 397 (1989) (holding that the conviction of a defendant for publicly burning the American flag as a means of political protest was inconsistent with the guarantees of the First Amendment).

140. 496 U.S. 310 (1990) (holding that the burning of the American flag falls within the protective cloak of the First Amendment).

141. *Johnson*, 491 U.S. at 399. While the flag burned, the protesters assembled to protest the policies of the Reagan administration and of certain Dallas-based corporations, chanted: “America, the red, white, and blue, we spit on you.” *Id.*

142. *Id.*

143. *Id.* at 420.

144. *Id.* at 414.

145. *Id.* at 422, 429 (quoting *Halter v. Nebraska*, 205 U.S. 34, 41 (1907)).

To Rehnquist and his followers, the burning of the flag was an unvirtuous act punishable by the state.¹⁴⁶

Similarly, in *Eichman*,¹⁴⁷ the Court struck down the Flag Protection Act as unconstitutional because the Act “criminally proscribe[d] expressive conduct because of its likely communicative impact.”¹⁴⁸ Again Chief Justice Rehnquist, Justice Stevens, Justice White and Justice O’Connor dissented and argued that the government’s “legitimate interest in protecting the symbolic value of the American flag” outweighed the free speech interest.¹⁴⁹ In short, it was unpatriotic to burn the American flag. Furthermore, since the government had the duty to promote patriotic and virtuous acts that preserved our symbol of nationhood and national unity, this act was within the proscriptive limits of legitimate governmental restraint.¹⁵⁰

Today, with our leaders and the public both believing our nation to be relatively free of the danger of foreign

146. *Id.* at 422. *But see* Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337 (1990). Michelman, a modern day civic-republican, posits that flag burning as not “paradigmatically antithetical to [the] constitutional communitarian aspiration [,] . . . [because] the flag burner may be said to affirm an ideal vision of a possible nation whose identity is under contention . . . [and] Constitutions . . . are made of contention, all the way down.” *Id.* at 1362-63; *see also supra* note 34, at 139-64 (Machiavelli noting the importance of secular religion in unifying a nation).

147. *United States v. Eichman*, 496 U.S. 310 (1990).

148. *Id.* at 318. The Court, in response to the contention that the Act was spurred by a “national consensus” in favor of a prohibition on flag burning, stated that the Government’s interest in suppressing speech becomes more weighty as popular opposition to that speech grows in foreign to the First Amendment. *Id.*

149. *Id.* at 319.

150. *Id.* at 321-22. Writing for the dissent, Justice Stevens refers to his opinion in *Johnson*, where he discussed the historical symbolism that the American flag possesses. *Id.* *But see* Kent Greenawalt, *O’Er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925 (1990). Professor Greenawalt posits that “Johnson did not really question that the flag stands for nationhood and that nationhood exists; rather, he challenged the desirability of our concept of nationhood.” *Id.* at 946. Further, Professor Greenawalt notes that a constitutional amendment to protect against flag desecration should not be adopted, reasoning that “[t]he Bill of Rights, like the flag, has a traditional status not to be tampered with lightly.” *Id.*

infiltration,¹⁵¹ overthrow of democracy,¹⁵² or any other substantial evil, the Court gives greater protection to political speech than at any time previously. As seen in the dissents in *Johnson* and *Eichman*, there is a political philosophical strain of republicanism on the Bench. Whether or not the republican “preservation of the state” principle will someday trump the liberal “deliberative politics” principle as the theoretical basis for imposing republican constitutionalism will depend on the changing circumstances. More importantly, given the fact that there is still a strong presence of classical republican thought within our institutions, particularly the Supreme Court,¹⁵³ libertarian decisions concerning political speech are not a guarantee.¹⁵⁴

151. See, e.g., WORLD ALMANAC, *supra* note 131, at 521. The influx of “radical politics” resulted in about 250 alien radicals being deported on December 22, 1919; and, eventually led to over 2,700 communists, anarchists and other radicals being arrested during January-May in 1920. *Id.* Immigration rates between the years 1905 to 1921 were an unprecedented total in U.S. immigration history. *Id.* It eventually forced Congress to sharply curb immigration by establishing a national origins quota system on May 19, 1921. *Id.*

152. See GALLUP POLL, Public Opinion 1935-1971 (vol. II 1949-1958) (1972). In 1951 55% of the American people favored sending American troops overseas to help fight communism. *Id.* at 961. In 1951, three times as many Americans believed the Russians were winning the Cold War. *Id.* at 963. However, by 1957, 50% of Americans favored closer relations with the Russians. *Id.* at 1494-95. *But see* GALLUP, *supra* note 124, at 1704. In 1961 and 1962, Americans again believed that Russia was winning the propaganda war. *Id.* These statistics reflect the “political mood” of the country was on a roller coaster ride and, not surprisingly, so were the Court’s decisions during this period.

153. See, e.g., *Lee v. International Soc’y for Krishna Consciousness, Inc.*, 112 S. Ct. 2709, 2710 (1992). Chief Justice Rehnquist and Justices White, Scalia and Thomas dissented in the decision of the Court which upheld leafleting at airports, and ominously noting that:

[A]t some future date the Port Authority may be able to reimpose a complete ban, having developed evidence that enforcement of a differential ban is burdensome. Until now it has had no reason or means to do this, since it is only today that such a requirement has been announced.

Id.

The tenuous position that liberal constitutionalism holds in American jurisprudence has been highlighted by the present court's inclination to decide cases in a republican fashion.¹⁵⁵ Recently, in *Forsyth County, Georgia v. Nationalist Movement*¹⁵⁶ actual traces of classical republican constitutional principle can still be found in the dictum of important members on the Bench. Chief Justice Rehnquist and Justices White, Scalia and Thomas, in their dissenting opinion noted that "we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought."¹⁵⁷ Contemporary republican constitutionalism's concern, therefore, is mainly one that promotes the stability and conserves the system that liberty presumably relies upon.¹⁵⁸

154. See, e.g., *Burson v. Freeman*, 112 S. Ct. 1846 (1992) (reversing the Tennessee Supreme Court the Court held that only political speech, of all forms of speech, is proscribed at a polling place); see also *International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2701. Chief Justice Rehnquist, delivering the opinion of the Court upheld a Port Authority of New York and New Jersey regulation forbidding solicitation of money, reasoning that airports are non-public fora because they do not fall under the traditional categories of public fora since they are recent travel developments. *Id.* But see *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."), *overruled by* *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 223 (1989). The Court stated that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for public office." *Id.* (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

155. See *Burson*, 112 S. Ct. at 1846; *Lee*, 112 S. Ct. at 2701.

156. 112 S. Ct. 2395 (1992).

157. *Id.* at 2406 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941)).

158. See *supra* notes 40, 43 and accompanying text.

CONCLUSION

The Court has been very adept at concealing its Machiavellian pattern of jurisprudence¹⁵⁹ concerning constitutional protections of political speech. In fact, the Court's pattern of political speech jurisprudence has mirrored Machiavelli's "man/beast" metaphor.¹⁶⁰ This parallelism is evident in the Court's effort to dilute the further protection of political speech provided by the overbreadth doctrine¹⁶¹ or, by the Court's development of subsidiary proscriptive doctrines that can be applied to achieve republican results.¹⁶²

As Machiavelli pointed out, prince-like institutions must mix the personalities of the fox and the lion so as to achieve their

159. THE PRINCE, *supra* note 69, at 71. Machiavelli stresses that: [e]veryone sees how you appear, few touch what you are; and these few dare not oppose the opinion of many, who have the majesty of the state to defend them; and in the actions of all men, and especially of [prince-like institutions], where there is no [higher institution] to appeal to, one looks to the end. So let a prince win and maintain his state; the means will always be judged honorably, and will be praised by everyone.

Id.

160. THE PRINCE, *supra* note 69, at 69. Machiavelli introduces the "man/beast" metaphor:

[T]here are two kinds of combat: one with laws, the other with force. The first is proper to man, the second to beasts; but because the first is often not enough, one must have recourse to the second. Therefore, it is necessary for a [prince-like institution] to know well how to use the beast and the man Thus, since a [prince-like institution] is compelled of necessity to know well how to use the beast, [it] should pick the fox and the lion, because the lion does not defend itself from snakes and the fox does not defend itself from the wolves. So one needs to be a fox to recognize snakes and a lion to frighten wolves. Those who stay simply with the lion do not understand this.

Id.

161. See *Arnett v. Kentucky*, 416 U.S. 134, 158-64 (1974) (furthering the substantial requirement by generally stating that a significant degree of overbreadth is necessary to meet the substantiality requirement); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (stating the requirement that the overbreadth not only be real, but substantial compared with the legitimate application of the government restraint).

162. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words" doctrine).

ultimate end, that of the preservation of the state. In retrospect, one can argue that 1919-27, 1951, 1961 and 1968 were years demonstrating examples where the Court has acted in the personality of the lion. Since 1969 the Court has acted in the personality of the fox. As previously mentioned, one of the ways the Court has done this has been through its efforts to limit the legal force of the overbreadth doctrine. But the Court has also derogated the protections of the First Amendment by developing corollary proscriptive speech doctrines that have eviscerated the legal and substantive protections of the free speech clause.¹⁶³ Thus, by doing this the Court has used the first Machiavellian form of combat - the law.¹⁶⁴ Prior to 1969, where the Court had to confront the wolves of socialism and communism, the Court found it necessary to take on the personality of the lion and resorted to the second Machiavellian form of combat, namely, force.¹⁶⁵ It has done this by legitimizing the repressive forms of governmental restraints on political speech. Conclusively, where the Court has acted as the lion it has applied abrogating principles of justice. Where the court has acted as the fox, however, the Court has employed derogative principles of justice.

James Madison stated that “[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”¹⁶⁶ Similarly, Machiavelli noted that “if all men were good, this teaching would not be good; but because they are

163. See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (unwilling listener doctrine); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984) (no right to be heard guaranteed by the First Amendment); *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (reasonable time, place and manner regulations are constitutional even in true public forums); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1978) (captive audience doctrine).

164. *THE PRINCE*, *supra* note 69, at 69.

165. *Id.*

166. *THE FEDERALIST PAPERS*, *supra* note 11, at 319.

wicked and do not observe faith with the [state], [the state] also does not have to observe faith with them.”¹⁶⁷

Obviously, the United States Supreme Court, in an institutional sense, has found the teachings of Machiavelli to be good. Justifiably, at least to Machiavelli and as reflected in the Court’s pattern of political speech jurisprudence, the Court felt it “[needed] to have a spirit disposed to change as the winds of fortune and variations of things commanded . . . not to depart from good . . . but know how to enter evil, when forced by necessity.”¹⁶⁸

Garth Molander

167. THE PRINCE, *supra* note 69, at 69; THE DISCOURSES, *supra* note 33, at 111-12 (“[I]n constituting and legislating for a commonwealth it must be taken for granted that all men are wicked and that they will always give vent to the malignity that is in their minds when opportunity offers.”).

168. *Id.* at 70.