The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971

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INTRODUCTION

In the movie, Liar, Liar, actor Jim Carey portrayed a litigator who was the victim of his offspring's magical wish—that his father would never be able to tell a lie. Imagine that: A litigator who cannot lie. As they say in the trade, hijinks ensued, and although his compulsive truthfulness at first seemed to harm his client's interests, ultimately the good of all was advanced as a result of the litigator's mystical inability to manipulate the legal system on behalf of the evil and narrowly self-interested individuals he represented.

I bet some screenwriter/director/producer laughed himself silly when he came up with the idea for that movie. I bet that everyone involved in the creation of this movie laughed as well—all the way to the bank. I also bet that relatively little of the ungodly amounts of money, no doubt made as a result of the movie, was sent to Mother Teresa to help treat lepers. No; I bet the overwhelming majority of the money went into a number of private bank accounts. Of course, there is nothing really wrong with that result. Talented individuals sought to further their own economic interests by producing a product that would make the public happy. The public, therefore, paid money to see the product of the individuals' creative efforts, and the production of the movie advanced the welfare of everyone involved (with the possible exception of litigators, who took a pretty good beating). There can be little doubt, however, that the creation of the movie grew out of an attempt to advance self-interest, at least at some level.

How ironic. Litigators who operate within the framework of the adversary system are attacked and mocked for looking out only for the interest of their clients, while those who do the mocking are doing

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it for the very purpose of promoting their own self-interest. Of course, the drawing of such an ironic equation could be criticized on grounds of severe oversimplification. The argument could be made that litigators are deserving of attack not merely because they are pursuing self-interest, but because they are causing severe societal harms that are both substantive and procedural. Substantively, litigators could be thought to advance narrow self-interests through the manipulation of the truth inherent in the adversary system, thereby causing decision making and fact finding to be grounded ultimately on little more than fabrication. Procedurally, litigators could be accused of promoting adversarial conflict, thereby undermining the worthwhile goal of advancing the cooperative pursuit of the common good through a consensus-building process. To the extent that any movie starring Jim Carey can be thought to send a message, I suppose this was the message of *Liar, Liar*.

When one shifts focus from the adversary system in general to its specific application in the context of tobacco litigation, the attacks are likely to become even more stinging. Attacks on lawyers who have represented the tobacco industry have been commonly heard, particularly during the infancy of tobacco litigation during the 1950s through the early 1970s. Tobacco litigators, under this scenario, effectively serve as the poster children for the evils to which the adversary system may lead. Even under a best case factual scenario, the argument proceeds that from the onset of the serious modern controversy over the health effects of smoking, tobacco lawyers sought to shape the scientific debate in favor of the position most beneficial to the industry’s financial and legal status. They did this, whether or not they themselves actually believed in or agreed with this view of the scientific issues. Thus, it is argued that industry lawyers reflexively attacked the value and credibility of any scientific studies connecting tobacco use with serious illness and, at least when directly involved in legal representation of the industry, selectively sought to support and/or encourage only scientific inquiry that was likely to favor the industry’s position.²

1. At the outset, I should note that while disputes exist concerning the specific behavior of tobacco industry lawyers during the formative period of tobacco litigation, the focus of this Article is on the relevant theoretical issues; therefore, I do not plan to rehearse all of the arguments about exactly what tobacco industry lawyers did and did not do during the period in question. Rather, I will confine my analysis to a set of purely hypothetical contingencies of conceivable versions of attorney behavior during that time period.

2. It should also be noted that critics have in addition alleged that industry lawyers were involved in behavior that could be characterized as fraudulent. As already noted, this Article
In order to place the attack on the role of tobacco industry lawyers in a broader conceptual framework, it is first necessary to understand the more generalized scholarly attack that has been leveled in modern times against the adversary system in which those advocates functioned. Only with that understanding can we measure the alleged behavior against the tenets of the adversary system and the adversary system itself against the still broader framework of governing American political and constitutional theory.

One may argue that such an intensive inquiry into the nuances of American political theory is unnecessary to measure the ethical propriety of tobacco lawyers' behavior in the early years. The question, rather, involves a considerably more down-to-earth inquiry into whether the tobacco lawyers engaged in acts of crime or fraud: If the answer is yes, then their behavior was improper; if the answer is no, then their behavior was proper. It is, the argument would proceed, more a matter of legal doctrine than of political theory. Such a shortsighted, unimaginative line of argument ignores the absurd circularity by which it is constrained: One cannot realistically answer that doctrinal question unless one has a clear understanding of the definition of fraud. To be sure, there exists a long doctrinal history concerning the interpretation of the concept. The basic point of this Article, however, is that such a narrow historical inquiry is meaningless at best and counterproductive at worst. This is due to the fact that historically, courts have defined and applied the concept of fraud in the litigation context without recognizing the vitally important implications of their definition for the foundational interests of free speech and due process, which together provide the constitutional grounding for the adversary system. The point, in short, is that unless courts shape their definition of fraud in the litigation context in order to take account of these important political and constitutional interests, their definition of fraud will be hopelessly incomplete. Thus, a doctrinal inquiry into the propriety of tobacco lawyer behavior divorced from the broader foundational theoretical inquiry would be useless. It is for that reason that this Article focuses its inquiry primarily, if not exclusively, on the framework of American political and constitutional theory underlying the adversary system.

Roughly speaking, the scholarly attacks against the adversary system in general have fallen primarily under three headings: (1) attacks premised on the harms to the public interest deemed to flow from
pursuit of narrow self-interest; (2) attacks premised on the truth manipulation that is claimed to function as an essential element of the process; and (3) attacks premised on the harms thought to flow from the inherently antagonistic and conflict-encouraging nature of the adversary process. To a great extent, the latter two criticisms parallel recent developments in what has been referred to as "communitarian" or "civic republican" political theory, both of which focus primarily on the evils of the narrow, pluralistic pursuit of self-interest and the values fostered by the cooperative pursuit of the public interest or common good. What this parallelism establishes, I believe, is that in reality, the modern attacks on the adversary system are, for the most part, grounded in assumptions of normative political theory. Thus, it should not be much of a stretch to suggest that the debate over the adversary system is properly viewed as merely one skirmish within a much larger war for the hearts and minds of those responsible for shaping American democratic theory.

3. See infra note 8 and accompanying text.
4. See, e.g., Marvin E. Frankel, The Search for the Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1036 (1975);

[M]any of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth. We are unlikely ever to know how effectively the adversary technique would work toward truth if that were the objective of the contestants. Employed by interested parties, the process often achieves truth only as convenience, a byproduct, or an accidental approximation. The business of the advocate, simply stated is to win if possible without violating the law.

Id. at 1036-37.

5. Some examples of scholarly critiques are as follows:

Binary, oppositional presentations of facts in dispute is not the best way for us to learn the truth. Polarized debate distorts truth, leaves out important information, simplifies complexity and obfuscates where it should clarify. More significantly, some matters (mostly civil, but occasionally even a criminal case) are not susceptible to a binary (right/wrong, win/lose) conclusion or solution. This may be so because we cannot with any degree of accuracy determine the facts, because conflicting, but legitimate, legal rights give some entitlements to both (or all) parties, or because human or emotional equities cannot be sharply divided (parental rights in child custody, for example).


Once they are locked in legal combat, it is rare to see either party acknowledge much that is right or understandable from the other party's perspective. This phenomenon is what social and cognitive psychologists tell us is "reactive devaluation"—our inability to process accurately, if at all, any information, legitimate objectives, or desires of those who are oppositional to us.


The purpose of this Article is threefold. Initially, it explores both the abstract concept of adversary theory and its role as part of the essential framework of American political and constitutional theory. More specifically, it will examine the implications of adversary theory in the narrower contexts of free expression and procedural due process. Secondly, this Article will focus on the recent attacks on the adversary system, demonstrating that these attacks grow out of broader concerns of political theory, which improperly undermine or ignore the vital role that adversary theory plays in providing a normative foundation for American political and constitutional theory. It will further establish that political interest groups generally championed by the very scholars of the political left who attack the adversary system have historically relied upon the tenets of adversary theory. In modern times, it has often been the racially and economically suppressed groups who have, quite properly, taken full advantage of adversary theory in both the courts and the political process to advance their own interests. Deconstruction of many of the scholarly attacks on adversary theory in general and the adversary system in particular, then, reveals that in reality the fundamental objection is not reliance on adversary theory in the abstract, but rather reliance on adversary theory by interests opposed by the political left. As a result, in at least certain instances, these attacks amount to little more than one-sided political posturing and strategizing, and hence, should be rejected. The analysis will also consider, however, what behavior on the part of advocates should be deemed unacceptable within the framework of the adversary system.

Finally, this Article considers the implications of its analysis of adversary theory for determination of the proper role of lawyers representing the tobacco industry during the formative period of tobacco litigation. It concludes that if it were to be established that attorneys intentionally falsified information they presented to a court or to the public, such behavior would not be shielded by the tenets of adversary theory. However, the mere fact that they may have consciously chosen to present only one side of a scientific debate for no reason other than to advance the narrow interests of their clients would in no way have been improper. To the contrary, such behavior is fully consistent

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8. See infra notes 13-21 and accompanying text.
9. See infra notes 22-36 and accompanying text.
10. See infra note 26 and accompanying text.
11. See infra note 48 and accompanying text.
12. See infra notes 101-102 and accompanying text.
with the precepts of the adversary theory that underlies the American version of the democratic process.

II. ADVERSARY THEORY AND LIBERAL DEMOCRACY

A. Defining Adversary Theory

Recognition of the considerably higher theoretical stakes implicated by the debate over the adversary system actually strengthens and reaffirms our systemic commitment to the essential elements of the adversary system. The adversary system is properly viewed as a specialized manifestation of what is best described as liberal democratic “adversary theory,” which, when properly understood, provides the normative foundation for the core precepts of American political and constitutional theory. Indeed, it is my position that absent recognition of the essentials of adversary theory, the very DNA of American constitutional democracy would necessarily be altered in ways that ominously threaten the core values traditionally sought to be fostered by commitment to a constitutional democratic system in the first place. The essential elements of adversary theory can be seen in both the theory and doctrine of much modern constitutional law, particularly in the areas of free expression and procedural due process. The essential aspects of the adversary system, then, are dictated by foundational precepts of American democratic theory. That system could, therefore, not be abandoned without simultaneously excising the fundamental grounding of our constitutional democracy.

Because liberal democratic adversary theory is so essential to American political and constitutional theory, it is vital that one possess a full understanding of what the concept does and does not include. In fact, it is probably easier to begin the discussion with what adversary theory is not rather than with what it is. For example, adversary theory is not the antithesis of communitarianism.

13. I should emphasize that to defend the adversary system in its most fundamental form is by no means necessarily to reject all conceivable modifications or ameliorations of the extreme adversariness of the process. For example, one can quite readily accept the concepts of pretrial discovery and pretrial conferences and orders, though all three can be considered abandonments of a rigid or extreme adversary system. See infra notes 115-118 and accompanying text.

14. As will be seen in subsequent discussion, the version of adversary theory I describe is by no means identical to its traditional description given by scholars. See infra notes 15-21 and accompanying text. It is my view, however, that the traditional description is unnecessarily distorted in a narrowly negative manner that improperly caricatures the type of interest promotion inherent in adversary theory and that ignores many more positive aspects of the version of the philosophy underlying modern liberal democratic theory. See infra notes 22-36. Hence in order to avoid possible confusion, I will describe my version as “liberal democratic adversary theory,” and the more traditional philosophical version as “pluralistic adversary theory.”
theory does not necessarily glorify the narrow pursuit of individual self-interest at the expense of the broader community. Indeed, under certain circumstances, adversary theory may actually have the effect of promoting communitarianism because teamwork is fostered when a team works together in preparing to engage an adversary, and nothing builds national unity more than the presence of a common external enemy.

Under certain circumstances, adversary theory as employed in liberal democratic society may apply, even where an individual is seeking to protect or advance an interest other than his own. Thus, liberal democratic adversary theory may operate within a framework of altruism or idealism. For example, right-to-life advocates, either in the political or legal processes, surely are operating in an adversary mode, yet the concerns they seek to promote would have to be called altruistic or ideological, rather than narrowly self-interested or purely for personal gain.

The Freedom Riders of the 1960s also illustrate the point. White freedom riders from the north who were seeking to advance the civil rights of southern African Americans were simultaneously operating in both adversary and altruistic modes: adversary, because they clearly recognized that they had opponents whose views were diametrically opposed to their own; altruistic, because they were seeking to help others, not themselves. African American Freedom Riders from the north, on the other hand, arguably were operating simultaneously with both altruistic and personal concerns: altruistic, because they were seeking to help southern African Americans, and personal, because they would benefit if and when they traveled in the South. Yet, they too were quite clearly operating in an adversary mode. Both categories can be contrasted with civil rights sit-in demonstrations by southern African-Americans, which were clearly motivated in part by concerns of personal benefit although broader ideological considerations were also at work. They, too, were clearly operating in an adversary mode. To the extent the same groups were involved in litigation efforts to advance the identical interests, the same conclusions would apply. Thus, adversariness, in either the political or legal contexts, is by no means synonymous with the exclusive and narrow promotion of personal self-interest. Hence, adversariness, as it operates within liberal democratic theory, does not necessarily equate with selfishness.

Nor does adversary theory inherently imply a preference for antagonism and combat over reconciliation and cooperation. To the contrary, in the legal context, the overwhelming portion of formally antagonistic litigations are ultimately settled before any final judicial
resolution has been made. Adversary theory, then, is necessarily characterized by neither a rigid, pluralistic, and isolationistic individualism nor an unremittingly antagonistic approach to issues of conflict resolution.

What the concept of adversariness inherent in modern liberal democratic theory does provide is relatively clear. Liberal democratic adversary theory recognizes: (1) individuals and/or voluntary associations of individuals have both the moral right and the pragmatic need to resort to the political or judicial processes to protect or advance their own or other selected interests; (2) on many important issues, the interests or concerns of all relevant individuals and groups will not be identical; they will, in fact, often be diametrically opposed to each other; (3) there exists no empirical or intuitive basis on which to believe that those who do not share an individual's or group's interest will have as their goal the protection or advancement of that interest; and (4) even in situations of identical or overlapping interest, individuals or groups should not be required to trust in or defer to the competence, resources, or enthusiasm of others in the protection or advancement of their chosen interest.

Liberal democratic adversary theory recognizes that in any but the most homogeneous society, there are likely to exist opposing interests and, therefore, a potential for conflict. Unlike the modern communitarian or civic republican philosophies, which purport to shun conflict, especially conflict that is grounded in disputes over competing self-interests, in favor of consensus and universalism grounded in the use of deliberation and the vagaries of "practical reason," adversary theory embraces such conflict. Adversary theory views these conflicts as the reflection of the process-based values inherent in a democratic system, which acknowledge the virtual inevitability of individual diversity and differences of opinion on issues involving both societal and individual needs, interests, and values. The problem with modern civic republican philosophy is that by purporting to value consensus and moral universalism, it does not actually do away with the stark reality of conflict, both actual and potential. Indeed, at least in a society as large and diverse as ours, any hope of attaining such consensus through the voluntary use of deliberative processes is, at best, quixotic and, at worst, disingenuous. It is likely, then, that what is going on in the modern civic republican revolution is reliance on these terms and concepts as little more than euphemisms for the imposition of a left
wing political philosophy that favors the interests of the groups traditionally championed by the left.\textsuperscript{17}

Instead, liberal democratic adversary theory operates on a premise of "epistemological humility," a recognition that if a societal commitment to democracy is to work, government may not impose a predetermined set of controlling normative precepts derived by means external to an assessment of public will.\textsuperscript{18} Liberal democratic adversary theory recognizes the empirical reality that because individuals are integral units worthy of dignity and respect, it is quite conceivable that their interests will differ. Under such circumstances, conflict is inevitable, whether on ideological, economic, or personal grounds. This theory further recognizes that use of deliberation will not always result in agreement or consensus. The differences are often too ingrained and fundamental for such a result.

Liberal democratic adversary theory instead focuses on the need to resolve conflict in a fair and orderly manner through the use of democratic processes that will give effect to the wishes of the greatest possible number of individuals through free and open debate, rather than through violence or the assertion of naked physical power.\textsuperscript{19} To be sure, deliberation may and should play an important role in either resolving conflicts or achieving compromises among competing interests.\textsuperscript{20} There is nothing inherent in adversary theory that is inconsistent with the use of such conciliatory measures, but recognition of the

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\item \textsuperscript{17} One illustration may be Sunstein's rationale for finding the regulation of pornography to be consistent with the First Amendment. See Cass R. Sunstein, \textit{Pornography and the First Amendment}, 1986 \textit{Duke L.J.} 589, 591 (1986).
\item \textsuperscript{18} See Ian Shapiro, \textit{The Evolution of Rights in Liberal Theory} 282 (1986): "At the heart of the liberal conception of the purposes of rights in all its formulations is a pluralist account of the good." I have discussed the concept of epistemological humility in prior work. See also Martin H. Redish, \textit{Money Talks: Speech Economic Power, and the Values of Democracy} 13 (2001); Martin H. Redish & Gary Lippman, \textit{Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications}, 79 \textit{Cal. L. Rev.} 267, 268 (1991). I should emphasize that the commitment to the determinative power of public preference in no way implies rejection of the imposition of constitutional limitations on democratic processes. Rather, it means, simply, that to the extent such limitations are imposed, it must be on the basis of some super-majoritarian process, rather than by the external imposition of pre-empting values or principles.
\item \textsuperscript{19} Professor Sunstein has equated the implementation of majoritarian preferences with the philosophy that "[m]ight makes right." Cass R. Sunstein, \textit{Political Self-Interest in Constitutional Law, in Beyond Self-Interest} 212 (Jane J. Mansbridge ed., 1990). Such an analysis, however, completely misses the point: Far from manifesting a "might-makes-right" philosophy, majoritarian rule constitutes an orderly and democratic alternative to the assertion of naked physical power.
\item \textsuperscript{20} As Amy Gutmann has reasoned, "[d]eliberative democracy goes a long way toward reconciling democracy with liberalism by allying itself with autonomy, understood as self-determination through deliberation. Deliberative democracy is committed to expressing and supporting the autonomy of all persons in collective decision making." Amy Gutmann, \textit{The Disharmony of
role played by deliberation in no way necessarily implies rule by consensus, as civic republicans seem to assume. When, in the all too common situation in which conflict is not resolvable, the answer of liberal democratic adversary theory is to recognize the existence of such irreconcilable conflicts and to expect a consensus only on the procedural precept that the will of the majority will control, subject to applicable constitutional limits.

B. The Philosophical Grounding of Adversary Theory:
Distinguishing Between Pluralistic and Liberal Democratic Adversary Theory

Both the pluralistic and liberal democratic versions of adversary theory have long and partially intersecting philosophical traditions. What I have called pluralistic adversary theory finds its origins in the writings of Thomas Hobbes, who "developed a political theory based on self-interest alone." The theory corresponded with the free market capitalistic marketplace of Adam Smith. Such pluralistic self-interest based theories can be described as "possessive individualism." According to one scholar, "In the political theory of possessive individualism society is presumed to consist of relations among independent owners, and the primary task of government is to protect owners against illegitimate incursions upon their property and to maintain conditions of orderly exchange." This exposition of adversary theory may be characterized as a kind of skeptical, "self-protective" version of liberal political theory that effectively allows each individual to "watch his back" because someone inevitably will attempt to insert a knife into it. That exposition posits that only through...
self-protective efforts may the individual secure or advance his own interests.

This version of adversary theory has long been subject to attack, not only by communitarian and civic republican theorists but by certain individualist liberal theorists as well. To a certain extent, however, its skeptical elements have been utilized effectively by the most idealistic liberal forces in American society. For example, African-Americans' political and legal efforts toward racial integration of privately-owned public accommodations of the late 1950s and early 1960s were clearly grounded in the belief that individual dignity is inherently intertwined with the ability to challenge powerful and long established local communitarian traditions that interfere with personal welfare.

On the level of abstract political theory, the real world example of the integration movement underscores the philosophical and pragmatic intersection between the negative and skeptical pluralistic adversary theory on the one hand, and the considerably more positive and optimistic liberal democratic version often associated with the developmental theories of John Stuart Mill on the other. The developmental theory associated with liberal democracy assumes that the individual will is the cause of all actions, individual and collective; it ascribes decisive epistemic and hence moral authority to the individual over his actions, on the grounds that he has privileged access to the contents of his own mind. For this reason individual consent becomes vital to the whole idea of political activity.

The developmental model of democratic theory proceeds on the premise that

[h]uman dignity would be threatened by absolute power for without an opportunity to participate in the regulation of affairs in which one has an interest, it is hard to discover one's own needs and

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26. According to famed political theorist C.B. Macpherson, for example, possessive individualism is fundamentally flawed for two reasons. First, it generates an impoverished view of life, making acquisition and consumption central and obscuring deeper human purposes and capacities . . . . The possessive view of life distorts the democratic ideal, which Macpherson described as a commitment to 'provide the conditions for the full and free development of the essential human capacities of all the members of the society.' Id. at 3 (quoting C.B. MACPHERSON, THE REAL WORLD OF DEMOCRACY 37 (1966)).

27. JOHN STUART MILL, ON LIBERTY (1859). See also JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861). Another real world example of the intersection between pluralistic and liberal democratic adversary theory, in addition to the one mentioned in text, is the much earlier political activity of the Levellers in England of the 1640s, who argued that the poor needed an equal vote in order to defend their own interests. MANSBRIDGE, supra note 16, at 16.

28. SHAPIRO, supra note 18, at 275.
wants, arrive at tried-and-tested judgements and develop mental excellence of an intellectual, practical and moral kind. Active involvement in determining the conditions of one's existence is the prime mechanism for the cultivation of human reason and moral development.29

Recognition of the individual's mental integrity and autonomy gives rise to the corresponding recognition of developmental value inherent in liberal democracy.30 In the words of one commentator, "The most distinctive feature, and the principal orienting value, of classical democratic theory was its emphasis on individual participation in the development of public policy. . . . Above all else they were concerned with human development, the opportunities which existed in political activity to realize the untapped potentials of men."31

Because the concern with human development may be described as instrumental, it has qualities reminiscent of classical utilitarian theory. However, John Stuart Mill's version of utilitarianism differed substantially from that of his father, James Mill, and Jeremy Bentham. Where the theories of the elder Mill and Bentham sought to attain solely the greatest good for the greatest number, regardless of the impact on any particular individual, the younger Mill sought to shape the instrumental goal more in terms of individual development and advancement. Additionally, the individual dignitary theories that underlaid certain versions of liberal democratic theory have on occasion been grounded in Kantian moral abstractions, which posit individual liberty as a fundamental first principle.32

As the example of the 1960s sit-in movement demonstrates, the two versions of adversary theory intersect on certain levels, even though developmental concerns appear to be of no concern to the pluralistic version, because the pluralistic version may effectively serve as a type of bodyguard for attainment of the developmental values inherent in


The liberty model holds that the free speech clause protects not a [Millian/Holmesian] marketplace, but rather an arena of individual liberty from certain types of governmental restrictions. Speech or other self-expressive conduct is protected not as a means to achieve a collective good but because of its value to the individual. The liberty theory justifies protection of expression because of the way the protected conduct fosters individuals' self-realization and self-determination without improperly interfering with the legitimate claims of others.

Id.
the liberal democratic version. According to political scientist David Held, the Millian version of democratic theory posits that “[t]he best safeguard against the disregarding of an individual’s rights is when he or she is able to participate routinely in their articulation.”

While the two versions of adversary theory overlap to a certain extent, by no means are they identical. For example, pluralistic adversary theory, which is grounded in precepts of possessive individualism, is generally either agnostic or directly hostile to the developmental goals associated with more positive liberal democratic adversary theory. Yet, while liberal democratic adversary theory sees individual development and growth as the goal of democratic theory, it also recognizes the need for a healthy degree of concern about the potentially harmful impact that the behavior of others may have on an individual’s ability to advance his own interests. For example, the separation of powers structure adopted in the United States Constitution reflects a recognition of the need for such vigilance. Thus, while liberal democratic theory extends far beyond the unduly truncated perspective of pluralistic adversary theory, it nevertheless recognizes the need to employ the protections and skepticism inherent in pluralistic adversary theory. The protections and skepticism serve as a means of shielding the individual’s ability to develop her faculties by advancing her interests and ideals as she conceptualizes them against the hostile forces that exist in society.

33. Held, supra note 29, at 89.
34. See, e.g., Joseph A. Schumpeter, Capitalism, Socialism and Democracy 269 (1942).
   Suppose we reverse the roles of these two elements [choice of representatives vesting decisional power in the electorate] and make the deciding of issues by the electorate secondary to the election of the men who are to do the deciding. To put it differently, we now take the view that the role of the people is to produce a government, or else an intermediate body which in turn will produce a national executive or government. And we define: the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.
   Id. While Schumpeter is often identified with pluralistic adversary theory, he was not an advocate of widespread citizen participation in the everyday aspects of the political process. Id. Other developmental theorists would see such participatory activity as valuable to both moral and individual growth. See Benjamin Barber, Strong Democracy: Participatory Politics for a New Age 8 (1984).
Adversary theory is commonly attacked by communitarians because it values private self-interest over competing and more valuable efforts on behalf of interests other than one's own. As already shown, however, one may be adversarial in the promotion of interests having nothing whatsoever to do with one's narrow self-interest. Nevertheless, it is appropriate to devote more attention to the intersection between adversary theory and the communitarian-individualist debate to fully comprehend the role that adversary theory plays in American legal and political theory.

To understand how liberal democratic adversary theory interacts with the communitarian-individualist debate, one must first distinguish among concepts that are often confused. Initially, it is necessary to distinguish between the concepts of "the common good," which communitarians proclaim as the only legitimate focus of citizen attention, and "altruism," which describes efforts to help others rather than oneself. The confusion derives from the fact that both are often viewed as the antithesis of the narrow pursuit of self-interest. In a certain sense, this is true. One who pursues only her own narrow self-interest is simultaneously not being altruistic and not concerned with the good of society as a whole. It would, then, be incorrect to assume any inherent mutual exclusivity between the two types of activity: One may further one's own self-interest while being altruistic, such as contributing to a charity, in part, because of the tax deduction, and often one's personal interest will not differ from the common good. Yet, the two concepts are by no means identical.

The differences between altruism and self-interest can be grasped by attempting to determine the meaning of the phrase, "the common good." The concept is a surprisingly difficult one to define. Consider the following six options, each of which could arguably be thought to grasp the essence of the phrase:

37. See supra note 26 and accompanying text.
38. "Altruism" has been defined as "behavior promoting another's welfare that is undertaken for a reason 'independent of its effects on [one] own welfare.'" Jane J. Mansbridge, On the Relation of Altruism and Self-Interest, in BEYOND SELF-INTEREST 142 (Jane J. Mansbridge ed., 1990) (emphasis in original; citation omitted).
39. It might be argued that "altruistic behavior really springs from self-interest," because arguably "all rational action must be self-interested because it is ultimately motivated by the pleasure it brings to the agent." Jon Elster, Selfishness and Altruism, in BEYOND SELF-INTEREST 44 (Jane Mansbridge ed., 1990). Such an argument is quite probably inaccurate as an empirical matter and rings of sophistry. But see id. at 44-46.
(1) the interest of society as a whole, divorced from the interests of its individual members;

(2) the attempt, where possible, to maximize the welfare of all individuals through the restriction or rejection of the short-sighted or information-lacking pursuit by each individual of his self-interest;

(3) the sum total of each individual's private self-interests;

(4) the determination of what policy choices would maximize the welfare of the collective as a whole, rather than the welfare of particular individuals; the particular policy choices are to be determined through an assessment of a consensus of the community, following a process of open deliberation;

(5) if collective maximization of welfare is impossible because of inherent conflicts in individual interests and/or values, the choice of one set of those interests by those in power, combined with the simultaneous imposition of the label of "common good" on that set of interests; or

(6) if collective maximization of welfare is impossible because of inherent conflicts in individual interests and/or values, the decision to abide by the free and fair choice of the democratic process, following free and open debate.

Closer examination of option (1) reveals its inherently nonsensical nature: There is no society that does not include its individual members. Thus, a decision to pursue "the common good" must have as its goal the desire to benefit somebody. As Jon Elster has persuasively explained,

[W]e cannot coherently imagine a world in which everyone had exclusively altruistic motivations. The goal of the altruist is to provide others with an occasion for selfish pleasure. . . . If nobody had first-order, selfish pleasures, nobody could have higher-order, altruistic motives either. . . . The point is just a logical one. If some are to be altruistic, others must be selfish, at least some of the time.40

Recognition of the logical absurdity of option (1) as a definition of the concept of "the common good" then underscores the inherent differences that necessarily exist between that phrase and the concept of altruism. The pursuit of the common good cannot be purely altruistic, because such a process inevitably seeks to benefit at least some of

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40. Elster, supra note 39, at 45. Elster correctly notes that "[s]ome of the excesses of the Chinese cultural revolution illustrate the absurdity of universal altruism. All Chinese citizens were told to sacrifice their selfish interests for the interests of the people--as if the people were something over and above the totality of Chinese citizens." Id.
those who are both making and being affected by the relevant
decisions.  

Option (2) focuses on one conceivable version of the so-called
“prisoners’ dilemma.” Under that hypothetical dilemma, each of two
prisoners is asked to give evidence that will convict the other. If one
remains silent but the other gives evidence, the prisoner who remains
silent will receive a heavy jail term, and the prisoner who gives evi-
dence will be released. If, however, each gives evidence against the
other, they will both be convicted and sentenced to prison. If both
remain silent, there would be insufficient evidence to convict either of
them, and both would go free. However, they are not allowed to con-
sult with each other, so neither knows what strategy the other plans to
employ. Obviously, the welfare of both would be maximized if each
remained silent. Yet if both testify, the interests of each will be nega-
tively impacted. However, if one chooses to remain silent but the
other chooses to testify, the latter would be considerably better off
than the former. Clearly, the two could maximize each of their wel-
fares by joining forces and working together, were that possible.
Under option (2), then, the common good is defined as the recogni-
tion that under certain circumstances, the welfare of every member of
society may be maximized by resorting to joint efforts, rather than by
the isolationistic pursuit of individual self-interest.

An illustration of such reasoning appears in the United States Con-
stitution’s Privileges and Immunities Clause.  

Individual states are
prohibited from pursuing narrow self-interest by discriminating
against out-of-staters, despite the apparent creation of an immediate
competitive advantage, because to do so would inevitably induce re-
taliatory behavior on the part of other states and thereby undermine
all states’ welfare. As a result, the long-range interests of all the
states are advanced. Under option (2), it should be noted, the concept
of the common good still differs starkly from the concept of altruism:
Efforts of individuals are joined, not to benefit others who are deserv-
ing of charity but rather solely to benefit the individual participants
themselves.

41. Id.
42. U.S. CONST. art. IV, § 1, cl. 2.
43. The same logic arguably applies to the dormant commerce clause. See Sunstein, supra
note 19, at 216. However, I have long held the view that this concept is both contra and extra
textual, because it appears nowhere in the text of the Constitution and in fact undermines the
carefully structured federalistic balance embodied in the text. See Martin H. Redish & Shane V.
Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987
Duke L.J. 569, 571-72.
Option (3) describes the version of the common good associated with pluralistic adversary theory. In effect, under this option, there is no real common good. "From the interchange between self-interested voters and self-interested brokers emerge decisions that come as close as possible to a balanced aggregation of individual interests." This is the version of adversary theory that has long been the subject of attack by modern civic republicans, although in many ways, it is little more than a caricature of adversary theory as it exists in prevailing liberal democratic theory. As option (2) illustrates, even theories that begin with the premise of the furthering of individual self-interest wisely acknowledge that under certain circumstances, individual welfare may ultimately be maximized by eschewing the myopic pursuit of one's own narrow self-interest and recognizing how one's interests are intertwined with the interests of others. Such a version of the common good involves considerably more than a mechanistic summing of distinct individual interests. At most, a realistic version of this theory would recognize that in at least a variety of situations individuals are likely to pursue nothing more than their own self-interests, divorced from any concern for either the interests of others or of society as a whole.

Option (4) basically describes the concept of the common good as understood by modern civic republicans and communitarians. In important ways, this option is just as divorced from reality as option (3). True, this option does not suffer from the logical fallacy that plagues option (1), because it does not purport to view the common good as a concept wholly distinct from the interests of society's individual members. Nevertheless, as already noted, on a purely practical level, the idea that in a society as large and diverse as ours, it is possible to derive a societal consensus that amounts to a monolithic community interest is pure folly.

This insight leads us inexorably to option (5), which I consider to be a deconstructed version of option (4): Reliance on the language of the common good, consensus development, and deliberation is nothing

44. See Mansbridge, supra note 16, at 17.
45. Id.
46. See Sunstein, supra note 7, at 1592-97.
47. Mansbridge concedes that "[n]o political scientist . . . has adopted this model in its entirety. Contact with political reality makes it clear that self-interest provides too weak a support for the kinds of negotiations and development of skills that a functioning democracy requires." Mansbridge, supra note 16, at 340 n. 32. For works that come close, see generally Schumpeter, supra note 34; David Truman, The Governmental Process; Political Interests and Public Opinion (1959). Both emphasize the centrality of the bargaining process as a means of reconciling competing individual interests.
more than a strategically motivated mode of argumentation that seeks to preempt expression of a diversity of views on moral, political, or economic issues by artificially placing the mantel of "the common good" on what is nothing more than one side of those various arguments. Such a strategy adds an entirely new dimension to the process of democratic conflict and argumentation, for it enables its users to undermine their opponents' arguments, not merely by defeating the persuasiveness of their arguments in the minds of a majority of the electorate or its chosen representatives (two-dimensional argumentation) but also by effectively challenging the character and good faith of their opponents by accusing them of selfishness (three-dimensional argument). It is simply a more sophisticated version of the tactics employed by some elements of the political right during the 1940s and 50s: Defeat political arguments not only by responding solely on the merits but also by questioning the patriotism of those who take the opposite position.

The final option, when combined with option (2), basically describes the concept of the common good as understood in liberal democratic adversary theory. It recognizes that an individual is simultaneously an integral whole and a member of broader, often overlapping communities. The option further recognizes that not only are the two not mutually exclusive, they are in fact, generally intertwined in a symbiotic intersection. Where individuals are viewed as nothing more than mindless spokes in a communitarian wheel, the entire community suffers, because ultimately it must be acknowledged that the community is made up of its individual members. When they are viewed as part of a community, individuals are properly viewed not as isolated or atomistic entities but as socially interacting units. But to ignore the integral nature of the individual, even in this social context, threatens to disregard the essential premises of democratic theory.

Once it is recognized that an individual, even though a member of a community, remains an integral and mentally autonomous entity de-

48. See Mansbridge, supra note 38, at 10. (stating, For mainstream political scientists, pluralism, ethical relativism, trade-offs, and adjustments among competing selfish desires posed an ethically attractive, egalitarian alternative to a potentially totalitarian single view of the public interest . . . . For Marxists and others on the Left, talk of a public interest obscured underlying class, race, or gender conflict in a way that kept the less powerful from understanding or acting on their interests.) Ironically, in the latter part of the twentieth century left wing scholars, through the device of civic republicanism, appeared to adopt the rhetoric of public interest, universalism and practical reason as a means of insulating their own views on race, class or gender from normative attack. See supra note 17 and accompanying text.
serving of dignity and respect, it logically follows that the individual should be encouraged and expected to employ her personal resources to determine the choices and courses of action that will maximize the welfare of both her and her family. Where the individual prefers, she may base her choices on altruistic considerations, designed primarily to aid others in need of assistance. Where the individual so decides, she may also advocate a path that will benefit the greatest number within the community more than it benefits herself. The point is, simply, that under the terms of liberal democratic theory, this is a choice ceded to the individual members of society or, where appropriate, to the community as a whole through majoritarian processes. No force external to those processes has the legitimate authority, a priori, to make that decision for the community.

When viewed as a means of implementing the fundamental values of liberal democratic theory, adversary theory plays a central and legitimate role. Once we conclude that, as part of the political process, individuals possess a fundamental right to advance their own interests as they assess them, the precepts of adversary theory flow inexorably. An individual or grouping of individuals may legitimately stake out a particular set of interests they deem worthy of advancement because they believe advancement of those interests would maximize their own welfare, others’ welfare, or the welfare of society as a whole. However, liberal democratic theory simultaneously recognizes that individuals may properly differ as to the relevant interests to be fostered, and on occasion, it will be necessary to resolve those conflicts in a nonviolent manner by resorting to the democratic process.

Once these premises are adopted, the skepticism induced by the sad lessons of world history, as well as by the intuitions of economic theory, dictate recognition of the individual’s right to seek to protect those interests herself. Economic theory provides us with the principle of externalities, namely that where the impact of an action will not impact one’s own interests, the rational actor has no incentive to seek the effective and efficient performance of that action.49 Thus, if an individual were required to entrust the protection or advancement of her own interests to another, she could not be assured that those interests would be effectively pursued because ceding such an authority


The requesting party will conduct additional discovery as long as the cost to her falls short of the expected increase in the value of her legal claim . . . . As long as the complying party bears part of the cost of compliance, the requesting party has an incentive to make inefficient, abusive discovery requests.

Id.
would give rise to an externality. In any event, requiring the individual to entrust others with protection of her interests would undermine the developmental values that underlie liberal democratic theory.

D. Adversary Theory and Political Reality

When one moves from the normative to the empirical inquiry, the centrality of adversary theory to the American political process becomes even more clear. Initially, there can be little question that self-interest motivates substantial amounts of private political behavior. Indeed, news reports covering election campaigns proceed on the unstated understanding that people often vote their own self-interest. States that depend heavily on pollution-creating industry rarely support the election of rigid environmentalists; those with a good deal of money often oppose candidates who advocate widespread redistribution of wealth. Doctors have been known to organize against candidates who support socialized medicine. Farmers have traditionally supported candidates who favor farm subsidies. It should be emphasized that the list is not confined to those possessing economic power. Those on welfare generally do not support candidates who believe in reducing or abolishing welfare; women’s rights groups do not support candidates who favor repeal of Title VII gender discrimination legislation; African-Americans rarely support candidates who oppose civil rights legislation; and the Anti-Defamation League does not support candidates opposed to punishing hate crimes. Moreover, it is extremely rare for anyone to seriously question such political dynamics because they are simply recognized as ingrained in the American political process.

This does not mean, of course, that every political choice in America is slavishly made on the basis of narrow self-interest. It

50. It is true that scholars have raised serious questions concerning the reality of the assumptions of rational choice modeling. See infra notes 53-55 and accompanying text. It may well be the case that in certain instances, a private individual or public office holder would, in fact, seek to protect another’s private interests despite the lack of any direct benefit to themselves. However, in structuring the American system, the Framers clearly proceeded on worst case scenarios concerning human motivations and behavior, as the prophylactic concepts of separation of powers illustrates. See MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 99 (1995). It would be impossible to know, ex ante, in which situations the entrusted party would in fact act out of altruistic or benevolent motivations untied to self-beneficial consequences.

51. John Stuart Mill found the concept of a benevolent dictator to be oxymoronic, since the individual would be unable to develop his faculties absent the opportunity to control or influence life-affecting decisions. JOHN STUART MILL, BEYOND CONSIDERATIONS OF REPRESENTATIVE GOVERNMENT (1861). See also PETER BACHRACH, THE THEORY OF DEMOCRATIC ELITISM (1967) (asserting that democratic theory should be based in part on the principle that “the majority of individuals stand to gain in self-esteem and growth toward a fuller affirmation of their personalities by participating more actively in community decisions”).
merely means that promotion of self-interest has long been and currently remains a fundamental element of politics in America. Confusion concerning this empirical issue appears to have developed in the scholarly literature. Problems started with the inception, in the late 1950s, of the so-called "rational choice" school of political thought. On occasion, somewhat overenthusiastic scholars, such as Anthony Downs, made what might be characterized as unduly sweeping empirical assertions about the pervasiveness of self-interested motivations for human action.

More recently there developed what one scholar describes as "a mini-revolt, in almost all empirical branches of the profession of political science, against the self-interested model of the way a democratic polity actually works." To a certain extent, "rational choice" scholars responded by emphasizing the hypothetical nature of their modeling assumptions. But no one could reasonably suggest that self-

52. According to one scholar:

despite the descriptive weaknesses of the theory, which derive from ignoring or misunderstanding institutions designed to discover or create a common good, after World War II the profession of political science began to describe the democratic process primarily in adversary terms. The political scientists who studied pluralism and interest groups—who gets what, where, when, and how—typically both assumed a dominant role for self-interest and expected interests to conflict. . . . The intellectual insights of rational choice require modeling, and modeling requires simplification. The earliest entrepreneurs in this field, being economists, adopted the central economic simplification, namely, the notion that human beings have the single motive of self-interest.

Mansbridge, supra note 38, at 9-10.

53. See Anthony Downs, An Economic Theory of Democracy 29 (1957) (suggesting that "social functions are usually the by-products, and private ambitions the ends, of human action."). Id. (stating, "[W]e assume that every individual, though rational, is also selfish."). It should be noted, however, that Downs did not believe that in reality people are always selfish. Id. at 27 (stating, "[I]n reality, men are not always selfish, even in politics. They frequently do what appears to be individually irrational because they believe it is socially rational . . . . "). Id. Nevertheless, he further noted that "general theories of social action always rely heavily on the self-interest axiom." Id. at 27-28.


55. For example, famed rational choice scholar James Buchanan lamented the fact that those who believed in a world of benevolent public servants doing nothing but pursuing the public interest and those "who have modelled politicians and bureaucrats as self-interested maximizers" are both flawed. Mansbridge, supra note 38, at 21 (quoting, James M. Buchanan, Then and Now, 1961-1986: From Delusion to Dystopia 11, 11-12 (paper presented at the Institute for Human Studies)).

Both images are widely interpreted, by their own proponents, to be descriptions of a total reality of politics when, in fact, both images are partial. Each image pulls out, isolates, and accentuates a highly particularized element that is universal in all human behavior. To an extent, political agents, elected politicians and bureaucrats, as well as
interest plays no role whatsoever in the political process. The point, rather, is that the issue is considerably more complex than the hypothetical assumption of rational choice theory recognizes. Certainly, there are occasions where private individuals, organizations, or public officials act out of what they deem to be the public interest, even though the impact on their own self-interest would be either neutral or even negative. More often, these same political actors have convinced themselves that what would serve the public interest and what would serve their own interest are either identical or at least significantly overlap. On still other occasions, political actors will pursue their own self-interest or that of their constituents without regard to any assessment of a broader conception of public interest. Whatever the actual combination of motivations that activate political participants in the American political process, it is beyond question that the conception of civic republicans of a consensus-inducing deliberative process, designed to ascertain the common good by resort to the mysteries of practical reason, has as much connection to reality as does The Little Mermaid.

To suggest that adversary theory is both central to the attainment of the normative goals inherent in American democratic theory and a pervasive political reality is not to suggest that the theory is necessarily free from danger. To the contrary, from the nation's beginnings, the framers recognized the need to structure government in a manner that, at the very least, deterred or reduced the pathological tendencies of adversary theory. Thus, in famed Federalist No. 10, Madison warned of the dangers of faction and explained how the divisions of power contemplated by the Constitution combated them.

Id. at 235-38.


58. The Federalist, No. 10. It should be emphasized that while Madison recognized the need to control factions, at no point did he indicate a desire to do away with them. See Held, supra note 29, at 62-63 (quoting The Federalist, No. 10). To Madison, dissent, argument, clashes of judgement, conflicts of interest and the constant formation of rival and competing factions are inevitable. They are inevitable because their causes 'are sown in the nature of man' . . . . Reason and self-love are intimately connected . . . . Where civic virtue has been proclaimed, it has been a mask generally for voters, act in pursuit of what they genuinely consider to be the 'general interest.' But also, to an extent, these political participants act in pursuit of what they estimate to be their own pecuniary interest.
undermining a claim for the centrality of adversary theory, however, this evidence actually underscores the framers' recognition of both the inherent role played by adversary theory and the need to curb the potentially negative outgrowths of its prevalence.60

III. ADVERSARY THEORY AND THE CONSTITUTION

While adversary theory plays a central role in the history and philosophy of American political theory, its premises also pervade fundamental provisions of the United States Constitution. This fact should not be surprising because the Constitution represents an expression of fundamental societal values. Primarily, the values of adversary theory are embodied in two key constitutional guarantees of individual rights: The First Amendment's guarantee of freedom of expression61 and the Fifth Amendment's guarantee of procedural due process.62 Both are implicated, either directly or indirectly, in the controversy over the role of tobacco industry lawyers during the early years of tobacco litigation.63 Before we can fully comprehend their application

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ceaseless self-interested motion . . . . The task he set himself was to find ways of regulating 'the various and interfering interests' in such a way that they become involved in the 'necessary and ordinary operations of government.'

Id. See also MANSBRIDGE, supra note 16, at 16-17:

Although James Madison believed in the existence of a 'public good' and a 'true interest of [the] country,' he had adopted enough of the adversary logic to conclude that no government could eliminate the 'causes of faction'—self-love and self-interest combined with differing economic circumstances. The task he set the framers of the Constitution was not the abolition of self-interested behavior but the 'regulation of the various and interfering interests.'

Id.

60. As Professor Held has noted:

Madison's extended republic is a far cry from the classical ideals of civic life and the public realm. The theoretical focus is no longer on the rightful place of the active citizen in the life of the political community; it is, instead, on the legitimate pursuit by individuals of their interests on government as, above all, a means for the enhancement of those interests . . . . He conceived of the federal representative state as the key mechanism to aggregate individuals' interests and to protect their rights. HELD, supra note 29, at 65.

61. U.S. Const. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press."

62. U.S. Const. amend. V. See also U.S. Const. amend. XIV (applying due process prohibition to state governments). As interpreted by the twentieth century Supreme Court, the case-or-controversy requirement of Article III also embodies adversary theory. However, it is unambiguously the pluralistic version, because the Court has required a showing of "injury-in-fact" in order to establish standing. See, e.g., Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-76 (1982). Thus, it is only one's self-interest that one may constitutionally advocate within the federal judicial process. For criticism of this narrow approach to constitutional standing, see MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 87-109 (1991).

63. See infra notes 124-177 and accompanying text.
in that specific context, however, it is first necessary to explore the intersection of adversary theory with these two fundamental constitutional protections of individual rights on a more abstract level. This inquiry will establish that the central premises of liberal democratic adversary theory are inextricably intertwined with the values and doctrine of both provisions.

A. Freedom of Expression

1. Adversary Theory and the Rationale of Free Expression

Scholars have never achieved consensus on what value or values the First Amendment's guarantee of free expression is designed to foster. At the risk of oversimplification, it is possible to group theorists under two broad headings: Collectivist, democratic-process theorists, and individual autonomy or development theorists. The latter believe that the exclusive purpose of the First Amendment is to facilitate individual growth and development. The former assert, on the other hand, that the exclusive goal of free speech protection is not concern over the individual but rather facilitation of the democratic process as a whole by increasing the amount of information and opinion available to those who exercise the self-governing function within the democratic process. In many ways, however, the two categories overlap: The democratic process presupposes that the individual participants in that process possess free will. Otherwise, the very concept of self-rule is rendered incoherent. Automatons and robots do not magically become capable of meaningful participation in the democratic process, merely because they have been grouped together as part of a broader community. Thus, one cannot rationally believe in the importance of advancing the democratic process unless one recognizes the central role of the individual members of the community in that process.

Once one recognizes the central role of the individual in democratic-process theory, recognition of the value of individual growth and development cannot be far behind. Such individual development

64. See Alexander Meiklejohn, Political Freedom 12 (1960).
66. Redish, supra note 65, at 605-08.
67. Meiklejohn, supra note 64, at 51-71.
naturally will improve the individual's ability to make wise decisions as a participant in broader community decision making. As I have recently argued,

[It is possible to glean . . . a certain consensus baseline of free speech theory, without which the concept of free speech would be rendered either trivial or meaningless. Simply stated, that baseline is that the First Amendment both reflects and implements a belief in the ability of individuals to judge for themselves the wisdom or persuasiveness of expressed viewpoints advocating lawful conduct, free from paternalistic governmental intrusion or selective governmental interference. Censorship of private expression on the basis of a governmentally-determined perception of the common good simultaneously hinders peaceful societal change through citizen choice and stunts the individual's personal and intellectual growth.]

In short, this describes the principle of “epistemological humility,” which is so central to the logical and practical operation of the democratic process that government may not regulate expression on the basis of some predetermined perception of moral truth. The modern day United States Supreme Court has long adhered to this directive in its enforcement of the First Amendment by adoption of an unwavering constitutional prohibition on viewpoint discrimination.

Liberal democratic adversary theory complements the baseline premises of free speech theory. Just as free speech theory prohibits governmental imposition of a pall of intellectual or moral orthodoxy, liberal democratic adversary theory acknowledges the inevitability of conflict among individuals or groups concerning values and interests and seeks to reconcile those interests by means that give effect to the fundamental notions of self-rule.

2. Adversary Theory and Commercial Speech

In the political arena, no one appears to seriously question the role of the free speech guarantee in protecting expression directed toward the advancement of one’s self-interest. Welfare recipients have a full

68. REDISH, supra note 18, at 13.
69. See, e.g., Texas v. Johnson, 491 U.S. 397, 414 (1989) (stating, “[T]he bedrock principle underlying the First Amendment . . . is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (stating, “[O]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”).
71. See supra notes 18-19 and accompanying text.
First Amendment right to advocate an increase in their benefits, although such a result would benefit them economically. Farmers have a full First Amendment right to advocate an increase in farm supports. American auto workers have a full First Amendment right to urge citizens to oppose a decrease in tariffs on imported autos. Candidates for office have a full First Amendment right to promote their own election. Minorities have a full First Amendment right to urge adoption of civil rights legislation that will benefit them socially and economically. Gun owners may urge opposition to gun control legislation. In short, we assume that such strategically self-promotional activity falls within the First Amendment's scope. When such self-promotion comes in the form of so-called commercial speech, many believe that the presence of base economic motivations somehow disqualifies the expression from full First Amendment protection. Such an exception for commercial speech is logically indefensible. One might respond, however, that commercial speech deserves reduced protection, not because of the presence of an economic motivation, but rather because the subject of the relative merits of commercial products or services is simply not speech central to what the First Amendment is all about. This argument ignores political reality: For example, numerous political and scientific debates surround the consumption of commercial products, from tobacco to alcohol to the effects on cholesterol of beef and milk. The primary problem with this argument, however, is that the Supreme Court has not defined the less protected concept of commercial speech in terms of the subject matter of the expression. The Court, rather, defined the concept of commercial speech as speech that does no more than propose a commercial transaction.

Thus, speech about commercial products or services does, in fact, receive full First Amendment protection when it is not expressed as a means of promoting sale. For example, Consumer Reports Magazine's commentary about products receives full protection, as does Ralph Nader when he attacks the safety of the Chevrolet Corvair. It is only General Motors' attempts to advo-

72. See Ronald K.L. Collins & David M. Skover, Commerce and Communication, 71 Tex. L. Rev. 697, 745 (1993) (asserting the proposition that “[i]f commercial communication is safe, it is not because it actually furthers the First Amendment’s traditional values of rational decision-making and self-realization. Rather, it is because it has effectively co-opted the [Holmesian] marketplace metaphor.”)
73. Id. at 700-17.
75. Id. (describing “core notion of commercial speech” as “speech which does ‘no more than propose a commercial transaction.’”).
76. Id. at 68-75.
cate the safety of its cars through advertising that is to receive the reduced protection afforded commercial speech.\textsuperscript{78}

This is a most curious result. In effect, First Amendment doctrine has drawn a civic republican exception for commercial speech from the broader adversary-based model used for noncommercial speech.\textsuperscript{79} Yet to my knowledge, no civic republican exception is drawn for non-commercial speech designed to promote narrow self-interest. There are, basically, three conceivable explanations for this apparent anomaly:\textsuperscript{80} (1) the mistaken confusion of commercial speech with property rights-based economic due process, which largely disappeared in the New Deal period;\textsuperscript{81} (2) the drawing of an ideologically-motivated categorical exception for expression which is known, \textit{ex ante}, to tend to support capitalistic interests; or (3) the desire simply to curb free speech rights as much as is politically feasible. None of these reasons provides a principled basis for the sweeping and categorical exclusion of expression that effectively represents only one side of a debate.

3. Adversary Theory, Free Expression, and the Advocacy-Fraud Distinction

One could conceivably oppose full First Amendment protection for commercial advertising because the inherently self-interested nature of this form of communication necessarily dictates the presentation of what, at the very least, amounts to a misleadingly incomplete picture of the relevant arguments and information. In short, the argument is that commercial advertising is inherently misleading.

Such an argument effectively confuses advocacy with fraud, which is a confusion that appears to have been applied by First Amendment doctrine to no other category of expression outside of commercial speech. In no other area of public debate are participants required to provide a complete picture of the issue in question. Yet, in no other area is there a basis for an \textit{ex ante} presumption that contributors to public discussion will be more likely than commercial advertisers to present a complete and objective portrayal of a controversial issue.

\textsuperscript{78} For a detailed critique of this definition of commercial speech, see Redish, supra note 18, at 18-53.

\textsuperscript{79} Kent Greenawalt has argued that "[a]dvertising by businesses has little to do with the self-expressive reasons for free speech . . . ." \textsc{Kent Greenawalt, Speech, Crime, and the Uses of Language} 133 (1989). This is a common and puzzling misconception, however. The value of allowing individuals to attempt to persuade others as a means of advancing their own interests is central to American democratic theory, a fact recognized in the protection of non-commercial speech--as the numerous examples mentioned in text quite clearly illustrate.

\textsuperscript{80} \textit{But see infra} notes 82-102 and accompanying text (discussing a fourth possibility).

\textsuperscript{81} \textit{See} Nebbia v. New York, 291 U.S. 502, 523-30 (1934).
For example, the National Rifle Association is no more likely to include in its promotional literature a description of incidents of accidental gun-related deaths than gun control advocates are to describe the studies that indicate a positive correlation between gun ownership and a reduction in violent crime. No advocate in a political debate is less likely to attempt to shape a controversy in its favor through the selective use of facts than is a commercial advertiser. Under the framework contemplated by the First Amendment, speech is expected to be "uninhibited, robust, and wide open."\(^8\) Attainment of such a goal would be impossible if contributors to public discussion were required at the outset to assure themselves that they were providing an objective and complete picture.\(^8\) Moreover, such a requirement would undermine one of the main goals of liberal democracy: the ability of an individual to advocate on behalf of the advancement of his chosen interest, whether his own or that of another.\(^8\) To my knowledge, no scholar has ever seriously made such a suggestion.

In a perfect world, would society be better off if no one sought to slant public debate in an attempt to further a personal agenda? Perhaps. Whether or not that is the case, however, the reality is that with free and open debate will inevitably come the dangers of imperfect knowledge, unfairness, and on occasion, even harm. The First Amendment represents society's judgment that attempting to effect such a cure would be worse than the disease, even in the unlikely event that the problem could be solved as a practical matter.

The point to be emphasized is that while no one would likely give a second thought to the validity of such an argument in a noncommercial context, many argue that commercial advertisers are rendered uniquely evil by their base promotion of self-interest through slanted or selective advocacy. As already noted, the presence of a motivation of economic gain cannot distinguish expression in the commercial speech context, because much speech in the political arena is motivated out of the exact same concern. An alternative basis of distinction is what I have previously referred to as a "censorial innocence" rationale.\(^8\) Under this approach, commercial advocacy may be regulated because of its inherently slanted or incomplete nature, while noncommercial advocacy may not, because there exists a serious danger of governmental abuse in the regulation of noncommercial advocacy that properly gives rise to a skepticism of regulatory motivations.

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83. Id. at 271-73.
84. Id. at 271-83.
85. See Redish, supra note 18, at 50-51.
not present when commercial advocacy is suppressed. But public choice theory teaches that government often responds to the highest bidder. If the highest bidder wants government to harass a competitor, it is quite possible that government would take that action out of improper motives. Moreover, governmental regulators exist for the very purpose of regulating; it is impossible for them to treat issues of free speech objectively when free speech stands as an obstacle to regulation. Thus, there is no more legitimate basis on which to assume objectivity on the part of government when it regulates commercial speech than when it regulates other forms of advocacy.

In any event, an attempt to penalize or deter self-interested communication, in either the political or commercial spheres, could seriously threaten societal welfare. Under the externality concept of capitalistic economics, it is human nature not to undertake action that will not result in maximization of the subject’s individual welfare. While this may not be true in all instances, no one could seriously deny that many societal benefits have derived from the promotion of one’s own welfare. For example, the development of numerous lifesaving drugs is the proximate result of the profit incentive of drug manufacturers. Thus, absent self-interest, many participants in a debate have insufficient incentive to commit the requisite resources to the discovery and dissemination of information that may eventually prove extremely valuable to society as a whole. Were government allowed to suppress or deter self-interested expression, the resulting creation of externalities would almost certainly reduce the sum total of available—and often valuable—information and opinion.

One possible way to ameliorate the potential problems caused by the slanted nature of self-interested political or commercial advocacy is to promote full and open disclosure of the speaker and his preexist-

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86. Id.
87. See, e.g., Mark Kelman, On Democracy Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement, 74 VA. L. REV. 199, 205 (1988) (stating, the standard public choice models posit that politics can best be understood as a market in which officials seeking to maximize their own fortunes, 'sell' what is seen as the government's unique service, the capacity to steal from less politically potent citizens, to voters motivated by the desire to steal. Obviously, at base, such a claim is grounded in the idea that wealth-maximizing motives best account for both voter and official behavior.)
89. Id.; Posner, supra note 87, at 265-72.
90. See supra notes 49-51 and accompanying text.
ing interests. When a speaker has an obvious interest in acceptance of the positions that he advocates, the listener may appropriately discount the expression on that basis. It does not automatically follow, however, that for that reason, the speech is necessarily false or worthless. But when the listener is unaware either of the speaker’s identity or nature of the speaker’s interest, such discounting is not possible. Hence, recognition of both the value and inevitability of an adversary element in political and commercial debate may logically lead to placement of an emphasis on the need for speaker identification. This is so, despite the venerable tradition that anonymity and speaker privacy have had in free speech doctrine.91

The conclusion that self-interested advocacy is deserving of full First Amendment protection, despite its incomplete or slanted nature, does not necessarily imply that the same should be true of the dissemination of actual falsehoods. As Kent Greenawalt has noted, “[T]he law makes false statements illegal in various contexts.”92 For the most part, however, innocent falsehoods are not subjected to penalty, and in the context of the defamation of public officials or public figures, the Supreme Court has held that the First Amendment prohibits even negligent falsehoods. In New York Times Co. v. Sullivan,93 the Court held that defamatory statements concerning public officials could be punished, consistent with the First Amendment, only when made with knowledge of falsity or reckless disregard of the statement’s truth or falsity.94 In subsequent decisions, the Court has construed the “reckless disregard” standard to amount to knowledge of falsity.95 What the Court has never clarified, however, is whether non-defamatory, consciously false statements fall outside the scope of the First Amendment, at least outside the commercial context.96 For example, could a state constitutionally enact a law making it a crime to knowingly lie in the course of a political campaign?97 Conceivably, a court could dis-


92. Greenawalt, supra note 79, at 132.


94. Id. at 280.


96. The Court has held that any false or misleading statement, intentional or innocent, falls outside the scope of the First Amendment’s commercial speech protection. Central Hudson Gas & Elec. Corp. v. Public Service Comm’n, 447 U.S. 557, 566 (1980).

tistinguish the New York Times test's exclusion of consciously false expression from the First Amendment's protective scope on the grounds that it was imposed solely in the context of defamatory and, therefore, inherently harmful expression. Under this reasoning, non-defamatory conscious falsehoods would remain fully protected speech. On the other hand, one could reasonably argue that in no context are conscious falsehoods deserving of protection.

No matter how one resolves this debate in the political arena, consciously false expression in the commercial arena appears to constitute classic fraud, because the inevitable and likely intended consequence of such expression is expenditure of money in reasonable reliance on the assertion. Because no one has ever suggested that fraudulent statements are protected by the First Amendment, there can be little doubt that even the extension of full First Amendment protection to commercially motivated advocacy would properly be subjected to a New York Times-like exception for consciously or recklessly false commercial advocacy.

B. Procedural Due Process

Much like the First Amendment right of free expression, the Fifth Amendment right of procedural due process springs logically from our society's initial commitment to liberal democracy and its corollary, the dictate of adversary theory. Traditionally, due process has been rationalized by resort to two different value structures. On the one hand, the Supreme Court has largely rationalized procedural due process protection on the basis of a utilitarian analysis that balances the need for factual accuracy against considerations of efficiency and litigant interest. On the other hand, scholars have criticized the utilitarian model on the grounds that it fails to provide sufficient attention

98. Id. at 695.
99. Id. at 695-99.
100. Professor Greenawalt has argued that while "even false statements made knowingly may have some value as expression," in most regulatory contexts "[t]he expressive importance of self-conscious lies . . . is minimal and is far outweighed by the overwhelming social need to reduce falsehood." Greenawalt, supra note 79, at 132.
101. Id. at 133-34.
102. Id.
to the dignitary values associated: government's commitment to re-
spect the individual as an integral unit in society.105

When placed in the broader context of American democratic the-
ory, the dignitary model of due process can be seen as a manifestation
of both Kantian moral abstraction and Millian developmental instru-
mentalism.106 On the level of pure moral abstraction, the right to de-
fend oneself against potential injustice is arguably intertwined with
basic notions of human dignity. From a developmental perspective,
denyng the individual the opportunity to participate in decisions di-
rectly affecting his legally protected interests stunts the individual's
growth and development as an active and involved participant in the
democratic process. In a sense, the developmental rationale bears
similarities to the utilitarian analysis, because it focuses on the need
for personal involvement in adjudication as instrumental, rather than
fundamental as it is in Kantian analysis. However, the developmental
model also differs significantly from the utilitarian model because its
concern is solely with the impact of such involvement on the individ-
ual's growth as a human being, rather than with the ability of society
as a whole to effectively enforce its laws by means of accurate fact
finding.

One need not make a choice in the utilitarian-dignitary debate in
order to recognize the central role played by adversary theory in the
structure and doctrine of procedural due process. From the perspec-
tive of either utilitarian, Kantian, or developmental analysis, the value
of adversary theory is evident. From the utilitarian perspective, the
individual should be permitted to have a say in the adjudication of his
legally protected interests because the incentives created by the pres-
ence of litigant self-interest induce the investment of time, effort, and
resources to the ascertainment of evidence and argument. Absent an
interested individual's ability to contribute to the adjudication, an ex-
ternality would be created: Those invested with the task of adjudica-
tion would have sufficient incentive to perform such tasks with equal
effectiveness. Thus, the utilitarian goals of factual accuracy are fos-
tered by allowing private individuals or entities to shape and prepare
their own arguments and defenses in the course of adjudication. For
reasons already discussed, both Kantian and Millian theories also lead
logically to a conclusion in favor of a private individual's ability to
participate in the adjudicatory process as an advocate on her own
behalf.

105. See Redish & Marshall, supra note 103, at 484-91.
106. See supra note 32 and accompanying text.
Of course, there are potentially negative consequences to this approach. By focusing solely on pursuit of her own interests, the individual's presentation will invariably be selective and, therefore, slanted. Theoretically, at least, society could require that interested parties' efforts be performed on an entirely objective basis, rather than as advocates. But on a purely practical level, such a goal is unrealistic: The very self-interest that gives rise to the incentive to participate in the process in the first place renders such an objective approach untenable. Thus, if an interested individual or entity is to be involved in the adjudicatory process, much like the free expression context, it is all but inevitable that it will be as an advocate.

The dignitary model of due process similarly dictates that individuals or entities whose legally protected interests are on the line in an adjudication have a full opportunity to prepare their own arguments and evidence in order to assure that their interests are not infringed on false or unlawful grounds. Government denial of the opportunity to protect one's own interests from unlawful interference would affront the individual as a free and worthwhile integral whole. Under the dignitary model, it would be improper to demand that a private party employ its resources against its own interests. To require the individual to work against her self-interest would both humiliate and demoralize her.

That the opportunity to participate in the decision making process, rather than ensuring the accuracy of the ultimate decision, constitutes the central tenet of procedural due process is illustrated by the venerable doctrinal application of due process to the law of collateral estoppel. Collateral estoppel dictates that once a fact has been litigated fully and fairly, it may not be relitigated, even in a collateral proceeding.\textsuperscript{107} It is grounded in the desire to avoid both inefficiency and harassment.\textsuperscript{108} However, the doctrine has always been confined by the constraints of due process: No litigant may be bound by a factual determination unless he has had his day in court.\textsuperscript{109} The result may well be that two different fact finders will reach completely opposite conclusions concerning the exact same factual issue.

For example, imagine a car accident in which a driver and a passenger are injured by another driver. The injured driver sues the second

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\textsuperscript{107} See Restatement (Second) of Judgments §17(3)(1982) (stating, "[A] judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment.").
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\textsuperscript{108} Gerrard v. Larsen, 517 F.2d 1127, 1134 (8th Cir. 1975).
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driver for negligence, and the jury finds in the defendant's favor. Assuming the defendant raised no affirmative defenses and the question of defendant's negligence was the only issue subject to litigation, a jury's finding in favor of defendant necessarily implies a finding that defendant was not negligent. Now assume that the passenger files suit against the second driver, alleging negligence. The defendant second driver raises the defense of collateral estoppel, arguing that the first jury already determined that he was not negligent. Under the due process exception to collateral estoppel, however, the passenger cannot constitutionally be bound by the jury's finding in the first litigation because he did not have his own opportunity to participate in that adjudicatory process. If the jury in the second case then finds in the plaintiff's favor, the system would not only have tolerated but actually facilitated the making of a false or incorrect finding: One of the two jury decisions must be incorrect, yet both stand and concrete legal rights are determined on the basis of both decisions. By enabling the second jury to reach a result contrary to the first jury's, due process has placed primary focus on the right to participate in the adjudication of one's legally protected interests at the potential expense of factual accuracy. Thus, participation is the sine qua non of procedural due process.

IV. THE ADVERSARY SYSTEM AS AN OUTGROWTH OF CONSTITUTIONAL DEMOCRACY

The adversary system, much like the political system of which it is a part, is not perfect. The function of litigators as advocates admittedly invites at least a certain level of manipulation and half-truth, thereby threatening attainment of accurate fact finding. Moreover, because advocates quite naturally select the evidence they present on the basis of whether it will likely help attain victory, there inevitably will exist the danger that potentially probative evidence will never surface. The

110. The analysis in the text, it should be noted, assumes that the passenger is not deemed a necessary or indispensable party in the first litigation. See generally FED. R. CIV. P. 19.

111. Several courts have developed a theory of "virtual representation," under which a litigant may be bound by an earlier judicial determination if the losing litigant in the earlier action had such overlapping interests with the litigant in the later action that he can be said to have effectively represented the interests of that litigant. See Tyus v. Schoemehl, 93 F.3d 449, 454 (8th Cir. 1996). Because of the due process interests involved, this is potentially an extremely dangerous doctrine, easily susceptible to abuse. Even if accepted, however, the "virtual representation" doctrine would likely apply in only a relatively limited number of cases. Jack L. Johnson, Comment, Due or Voodoo Process: Virtual Representation Justification for the Preclusion of a Nonparty's Claim, 68 Tul. L. Rev. 1303, 1314 (1999).

system virtually invites strategic, and possibly even manipulative, behavior. In addition, despite the Supreme Court's protestations to the contrary, a litigant's success will turn, perhaps to an uncomfortable degree, on the skill of her advocate. Finally, some scholars have suggested that the adversary system aggravates preexisting animosities by portraying disputes in an inherently antagonistic framework.

To a certain extent, the attacks on the adversary system assume a caricature that no longer exists. Elaborate discovery, including automatic disclosure and aggressive pretrial intervention have wisely modified many of the extreme aspects of the adversary system without destroying its essential elements. Problems do remain, however. Despite the obvious flaws of the adversary system, one can only wonder with trepidation what the replacement adjudicatory system would look like. Any system that did not rely primarily on the litigants to gather and present evidence would necessarily have that function performed by disinterested government officials. The danger of such a system would be that "disinterested" could easily translate into "uninterested." To be sure, the continental adjudicatory model relies heavily on the efforts of such disinterested governmental agents who bear primary, though not exclusive, fact-gathering responsibility. Whether such a system actually produces more accurate and efficient results than ours may be debated; however, even its proponents concede that it would be extremely difficult, given the nature of our legal educational system, to find for our judicial system a sufficiently large cadre of qualified, responsible, and enthusiastic bureaucrats to serve not only as passive adjudicators but also as active fact-gatherers. We are left, then, with the very problem of externality that rationalizes the utilitarian basis of liberal democratic adversary

113. Conley v. Gibson, 355 U.S. 41, 48 (1957) (stating, "[T]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

114. See supra note 5 and accompanying text.


120. See generally Ronald J. Allen et al., Legal Institutions—The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship, 82 Nw. U. L. Rev. 705 (1988)(debating the accuracy and efficiency of the adjudicatory system as opposed to the advocacy system).

121. Langbein, supra note 119, at 848-55.
Interested litigants must bear significant responsibility for the gathering of evidence because they have the greatest incentive to do so in an effective and efficient manner.

The primary flaw in the scholarly assault on the adversary system is its failure to recognize the system's fundamental grounding in American political and constitutional theory. One cannot abandon the adversary system without striking at the heart of the nation's most cherished normative premises. Indeed, a true adversary system could not function in a totalitarian state because it would necessarily cede to the private citizen the power to protect his interests in ways fundamentally inconsistent with the governmental dominance inherent in totalitarianism. The use of adversary theory by the civil rights movement in the 1950s and 60s illustrates the point perfectly: Individuals were permitted to assert their rights in a judicial forum when those in power remained unresponsive to the political assertions of their interests.

As a matter of political theory, the adversary system reflects all of the values embodied in liberal democratic adversary theory. As a matter of constitutional theory, the adversary system reflects the intersection between the First Amendment's guarantee of free expression and the Fifth Amendment's guarantee of procedural due process, both of which flow logically from the premises of liberal democratic adversary theory. Both the need to respect the dignity of the individual and the desire to encourage human development through involvement in life-affecting decisions dictate the conclusion that the individual be permitted to employ advocates whose primary lawful allegiance is to that individual. This is true in the judicial arena, at least as much as it is in the political arena. To permit the individual to advocate on behalf of her chosen values or interests solely in the political process would dangerously truncate the reach of liberal democratic values. It is primarily in the judicial arena, not the political arena, that the individual may expect principled and reasoned decisions in accordance with the rule of law, relatively free from the pressures and prejudices of the political process. The concept of a constitutional democracy requires that the open combat of the political arena be tempered by just such considerations of legally and constitutionally dictated reason. Thus, recognition of the value and importance of individual advocacy on behalf of one's own interests logically must apply in both arenas.

122. See supra notes 49-51 and accompanying text.
V. Tobacco Litigation, Adversary Theory, and Constitutional Democracy

To this point, I have concluded that adversary theory is implicit in the commitment to liberal constitutional democracy and that the adversary system, at least in its most fundamental form, constitutes an essential outgrowth of that theory in the specific context of litigation. With this in mind, it is possible to sort out the legitimacy of the varying permutations and combinations of lawyer behavior on behalf of the tobacco industry by measuring them against that abstract normative framework. Under one version of the facts, in the early 1950s, tobacco industry lawyers recognized the potential threat of products liability suits against the industry once the epideemeological link between smoking and lung cancer began to surface and popular magazines started describing scientific studies demonstrating the development of tumors on the backs of mice when painted with heavy concentrates of the ingredients contained in tobacco. Their attention and efforts were devoted to the legal protection of their client if and when product liability suits were to be filed alleging that smoking had caused cancer or other serious illnesses.

A number of conceivable strategies were available. Some strategies involved direct preparation against suit. The first question any lawyer preparing for such litigation would have asked under the circumstances is whether the alleged linking of tobacco use and illness had a valid basis in science. At the time, it was by no means clear that the mouse painting experiments satisfied that requirement. After all, the tobacco was being used on different tissue in a different animal and was administered in completely different amounts and in a completely different manner than it was to humans. Moreover, to the extent there was a linkage, the mechanism explaining that linkage remained a mystery. The epideemiological evidence was damaging, but without more evidence, one might conceivably argue that the most this evidence established was

128. Id. at 161.
129. Glantz, supra note 126, at 114.
an association between the two, rather than a cause-and-effect relationship.\textsuperscript{130}

As advocates devoted to their clients, industry lawyers quite naturally would seek ways to undermine the scientific basis of the asserted connection and to obtain scientific evidence tending to undermine the linkage. Moreover, in their capacity as advocates, it would not be appropriate for these lawyers, at the outset of the process, to ask themselves whether or not they believed the asserted evidence supporting the linkage and to proceed entirely on the basis of that judgment.\textsuperscript{131}

That is not their function in the adversary system. Their clients have the due process and free speech rights to seek to advance and protect their own interests in a lawful manner.\textsuperscript{132} The attorneys, then, have the task of generating and reviewing evidence with an agenda in mind: to assist and protect their client. Thus, in their capacity as adversaries acting in anticipation of legal conflict, industry lawyers could appropriately choose to support only those research efforts that they reasonably believed might lead to scientific data or conclusions supporting their client’s position on the potentially outcome-determinative scientific issue. The fact that tobacco lawyers selectively supported research with this self-interested agenda in mind would have been wholly consistent with the tenets of the adversary system, adversary theory, and liberal democracy.

Such a conclusion may appear harsh, and there do exist competing legal dictates of tort law that arguably modify such totally one-sided strategic thinking.\textsuperscript{133} But it is important to place such adversary behavior within the context of the broader process. Industry lawyers would never have ultimate legal decision making power on the scientific issue. That decision would come either from a neutral adjudicator or a presumably equally neutral jury. Moreover, industry lawyers must have known that if and when such suits were brought, there would be competent attorneys on the other side who would act in an equally adversary manner. No one, I imagine, would suggest that plaintiffs’ lawyers planning tobacco litigation should have been expected to conduct their own research efforts in an entirely neutral manner or bring suit only after they had made their own full and fair inquiry into the validity of the scientific evidence supporting the link. Rather, plaintiffs’ lawyers would have been expected to act as advo-

\begin{itemize}
  \item \textsuperscript{130} Kluger, \textit{supra} note 124, at 133-34.
  \item \textsuperscript{132} U.S. \textit{Const.} amend. I, VI.
  \item \textsuperscript{133} See \textit{supra} notes 92-102 and accompanying text.
\end{itemize}
cates, seeking evidence that supported their clients’ position and seeking ways to undermine or question evidence supporting defendants’ position. Thus, industry lawyers’ strategic behavior in anticipation of litigation has to be viewed in the broader context of the system, which includes both an advocate on the other side and the ultimate presence of a neutral fact finder.

Surely, it would be nonsensical to suggest that industry lawyers were obligated to act in an entirely objective manner in their preparation for litigation while plaintiffs’ lawyers were free to act as strategic advocates. Hence, as long as one acknowledges the obvious fact that the precepts of the adversary system legally and morally controlled the behavior of the attorneys at the time, the mere fact that industry lawyers undertook their evidentiary inquiry with a selective slant does not render their behavior unethical.

Of course, on a purely abstract level of analysis, we could ask whether another system would have been preferable. Perhaps, we could demand that lawyers on both sides act in an entirely objective manner, or instead, have a governmental bureaucrat conduct the inquiry in a supposedly neutral manner. Neither of these alternatives, however, would have been either realistic or advisable. As to the former suggestion, for reasons already discussed, it would be impractical and would undermine democratic values to require adversaries to behave in an entirely objective manner.134 There are also serious risks involved in the second suggestion. Because of the lack of any direct benefit or incentive linked to their efforts, we cannot be assured that governmental bureaucrats would undertake the evidentiary inquiry in a thorough or enthusiastic manner.135 Moreover, as public choice theory tells us, governmental agents may often act out of surreptitious motivations of self-interest while purporting to behave solely in a public regarding manner.136 Hence, it is conceivable that bureaucratic objectivity would be nothing more than a cynical illusion. Finally, both alternatives violate the fundamental premises of liberal democratic adversary theory because they deny the private individual or entity the opportunity to participate in the defense of its own legally protected interests.137

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Though the dictates of adversary theory permit an advocate to shape his efforts in a manner designed solely to benefit his client, that theory does not necessarily dictate a Hobbesian state of nature in which there exists a war of all against all, and life is nasty, brutish, and short. The drafters of the Federal Rules of Civil Procedure in 1938, for example, made the opportunity to discover information from one's opponent one of the cornerstones of the notice pleading process.\textsuperscript{138} Moreover, consistent with the tenets of adversary theory, an advocate may be prohibited from affirmatively lying or misrepresenting evidence to a fact finder.\textsuperscript{139} Thus, if industry lawyers presented knowingly falsified evidence to a court, such as manipulated or fabricated scientific data, their behavior would be unethical, despite their role as advocates in an adversary process.\textsuperscript{140} Conscious falsehoods give adversary theory a bad name: They enable advocates to win, not through persuasion, but through fraud.

If adversary theory is to play its intended role in American political and constitutional theory, however, it is vitally important that one not confuse advocacy with fraud. As already demonstrated, it would be unwise and unrealistic to expect adversaries to present complete and objective arguments; they inevitably will seek to further their own interests by highlighting those arguments and evidentiary material that tend to favor their position while treating arguments and evidence against their position with resistance. In most political and virtually all legal contexts, there will be others on different sides doing the same thing on their own behalf. As long as the ultimate arbiter is aware of the presence of such self-interested motivations, he may appropriately discount the arguments accordingly. It does not necessarily follow, however, that for this reason all of the arguments or evidence will be inherently worthless. Conscious affirmative falsehoods, on the other hand, exceed the bounds of the contest. They give rise to decisions grounded in misinformation. More importantly, it would be impossible for the arbiter to know when to trust the presentations made before him. Unlike strategically selective presentations, where the arbiter may discount for self-interest, it is impossible for the arbiter to know when to completely disqualify evidence on grounds of falsity. To extend the exception for falsity to include all strategically selective presentations, however, would effectively destroy the essence of adversary theory: The exceptions would consume the rule.

\textsuperscript{139} FED. R. CIV. P. 11(b)(3).
\textsuperscript{140} FED. R. CIV. P. 11(c).
While acting in their capacity as advocates anticipating products liability litigation, industry lawyers could appropriately shape their efforts in a manner designed solely to advance their clients' interests. In their more general advisory capacity, they were obligated to make sure that their clients' behavior complied with governing substantive legal requirements. In the common law of tort, there generally exists the requirement that a manufacturer be aware of the scientific properties of its product: A manufacturer is not permitted to avoid liability for harm caused by its product simply by choosing not to know what its product does and does not do.\textsuperscript{141} Hence, as a matter of their substantive obligations, tobacco manufacturers would not be permitted to conduct such selective scientific inquiries.

As a strategic matter, however, the issue was considerably more complex than this simplistic analysis might suggest. By conducting or supporting unlimited scientific research, the companies would effectively have been placing themselves in a no-win situation with the buying public. On the one hand, if the research appeared to establish the absence of a linkage, public skepticism of the results of any research supported directly by the industry would have rendered the evidence of little use in convincing the public of the product's safety. On the other hand, if the results of the research tended to confirm the linkage, both as a legal and practical matter, the industry would have been saddled with those conclusions even if its leaders honestly doubted their scientific validity.

What the industry did to extract itself from this no-win dilemma, at least on the surface, reflected a form of true legal brilliance. It developed what was originally known as the Tobacco Industry Research Council, later changed to the Council for Tobacco Research.\textsuperscript{142} The Council, though fully supported by the industry, included a board of eminent scientists under the supervision of a prestigious scientist-director who served as an employee of the industry.\textsuperscript{143} The board was to review applications for grants from researchers concerning the causes of diseases said to be related to tobacco use.\textsuperscript{144} The industry itself, then, did not choose the research to be supported.\textsuperscript{145} If the results of the research supported the industry's position, the results would presumably have more credibility with a skeptical public than would the results of research conducted by the industry itself. If the

\begin{itemize}
\item \textsuperscript{141} Kisor v. Johns-Manville Corp., 783 F.2d 1337, 1342 (1986).
\item \textsuperscript{142} KLUGER, supra note 124, at 208.
\item \textsuperscript{143} GLANTZ, supra note 126, at 36-39.
\item \textsuperscript{144} Id. at 35-36.
\item \textsuperscript{145} Id. at 36.
\end{itemize}
results supported the asserted linkage of tobacco use and illness, the industry would remain free to challenge the validity of those results where it deemed it appropriate to do so. At the same time, the industry would be fulfilling its obligation under governing tort law to sponsor or conduct reasonable investigations concerning the scientific properties of its product.

There were, to be sure, serious risks in such a strategy. For one thing, the industry had to be extremely careful to avoid becoming involved in conspiracies in restraint of trade in violation of federal antitrust laws, a serious problem, which the industry had to face only a few short years before at the hands of the Justice Department. Thus, the board had to be restrained from approving research applications that might result in what, but for the joint effort, might have given rise to a commercially marketable advantage to the competitor that developed it, lest the industry's joint effort be deemed an anticompetitive conspiracy. Such a concern required industry lawyers to intervene in the scientific board's efforts, at least to the extent necessary to avoid this potentially serious legal problem. Yet, such involvement necessarily threatened the legitimacy sought to be attained by creating an independent board in the first place. Moreover, by supporting such independent research efforts, the industry risked having its own money used to build a scientific case against it. On balance, however, those in charge apparently believed that, under the difficult circumstances they faced, the assumption of such risks was necessary.

It is important to understand that the fact that the industry chose indirectly to support purely objective research through an independent body in no way implied that it had somehow forfeited its rights under the Due Process Clause to defend itself in court in a manner fully contemplated by adversary theory. Thus, the fact that industry lawyers, wholly apart from the work of the independent scientific board, chose to support research selectively on the basis of purely self-interested strategic considerations did not automatically undermine or contradict its other efforts.

It is conceivable that an industry could choose to establish such a complex system of research support as an elaborate ruse, designed solely to create a false impression of the enthusiastic support of objective research, when in reality that supposedly objective research was chosen much like the research supported in anticipation of litigation,

146. Id. at 284-87.
147. KLUGER, supra note 124, at 129.
148. Id. at 164-65.
solely on the basis of strategic considerations. Moreover, it is conceivable that an industry that purported to support fully independent research could have surreptitiously sought to influence the outcome of that research. Finally, it is conceivable that an industry could simply fabricate or falsely alter the results of its own or independently conducted research. If any such allegations were made against industry lawyers and proven in a court of law, then the tenets of adversary theory would not shield attorney behavior. Such actions would amount to fraud by the perpetration of conscious falsehoods, already shown to fall outside the scope of the proper scope of adversary theory.

Absent such proof, however, the structure adopted by the industry in the Council for Tobacco Research was fully consistent with the strategic pursuit of self-interest contemplated by adversary theory.

A third means by which the industry could conceivably have chosen to support research, in addition to the legitimate strategic support of research in anticipation of litigation and the indirect sponsorship of fully independent research, would be to utilize the contract research alternative. Under this model, an industry contracts with independent researchers to conduct predetermined scientific inquiries. It is used primarily when an industry desires to resolve a specific issue requiring an elaborate scientific inquiry for purposes other than litigation. Under these circumstances, the generally passive independent grant method of support will usually prove unsatisfactory because the industry is at the mercy of the researchers who submit proposals. Nor is in-house research likely to provide an effective alternative because of the elaborate requirements of the research involved. In such an event, however, the results of the research are properly attributed to the industry, as would the results of research conducted di-

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150. Id.

151. Some of the strategically motivated research came in the form of so-called “special projects,” which were projects generated and conducted by independent scientists that had been rejected by the board but found to be of scientific merit by the Council’s executive director. Where such projects were thought to be of potential legitimate strategic benefit to the industry, they were supported by the industry separately from the board’s actions. Much of the modern dispute has turned on the import of such special projects. However, any detailed discussion of the nature of these projects would require considerably more focus on the facts than I consider helpful or appropriate for what is primarily a theoretical analysis.


153. Id. at 17.

154. Id. at 16-17.

155. Id. at 17-18.

156. Id. at 16-17.
rectly by the industry itself.\textsuperscript{157} Thus, unlike the case of grant-funded independent and objective research, it is appropriate for the industry to assure itself of scientific quality and accuracy in the contractor's efforts. The mere fact that agents of the industry question the methodology or results of the independent contractor's efforts, then, does not automatically signal fraud, as it would if an industry were to attempt to influence the results or methodology of projects, which at the outset had been funded as fully independent research.

Once again, it is conceivable that industry lawyers or scientists could seek to modify the contract researcher's results or methodology in a fraudulent manner by seeking to falsely alter findings. Absent proof of such fraudulent behavior, however, the mere expression of interest in the correctness of the contract researcher's methods or conclusions does not, in and of itself, violate ethical limitations. All it necessarily establishes is an industry's attempt to protect its own interests, which is a perfectly permissible effort under the framework of adversary theory.\textsuperscript{158}

In addition to its elaborate network of research support, the tobacco industry had available the option of fighting the scientific battle in the court of public opinion. Thus, on occasion, the industry trade association would issue press releases, or a member would take out advertisements questioning the scientific validity of the studies suggesting a linkage between tobacco use and certain illnesses.\textsuperscript{159} To the extent such efforts provided only one side of the debate and, thus, omitted uncritical reference to evidence tending to establish such linkage, they would in no way be automatically rendered fraudulent, any more than a contributor to a public debate is deemed to commit fraud every time she provides only information and opinion favorable to her position.\textsuperscript{160} This is so, whether the speaker's position has been determined on the basis of altruism, idealism, or narrow economic self-interest. The First Amendment prohibits the penalization of such one-sided efforts, just as the Due Process Clause prohibits the requirement that a litigant be totally objective in its efforts to gather evidence.\textsuperscript{161} Both provisions derive from the premises of liberal democratic adversary theory, which recognize the fundamental right of a private citizen or entity to act as an advocate on behalf of its chosen interests. Thus, consistent with adversary theory as imple-
mented by the First Amendment right of free expression, the only constitutionally valid basis for penalization or prohibition of such advocacy efforts would be proof of affirmative conscious or reckless falsehoods.162

One might respond to my argument in the following manner: Perhaps in the early years, industry officials and lawyers did not know the falsity of denying a linkage between smoking and illness, but surely by the end of the period in question, years after the 1964 Surgeon General's Report linking smoking to illness, there could have been little doubt as to the scientific inaccuracy of their position.163 Hence, even under my standard of knowing or reckless falsity, the argument would proceed that at some point in the process lawyer behavior did become unethical. This argument turns on a factual issue on which I presently take no position. The important point to keep in mind, however, is that if the free and open inquiry contemplated by the First Amendment is to be meaningful, the mere fact that a private individual or entity maintains a view of the science different from government or the existing scientific community cannot, in and of itself, constitute proof of either knowledge, falsity, or recklessness. Neither government nor those who control the scientific community can impose on public debate a pall of intellectual orthodoxy.164 Thus, the mere fact that the Surgeon General found sufficient evidence of a linkage does not mean that everyone had to agree. In recent years, medical science has seen numerous theories accepted that only recently have been considered wrong or frivolous—from the connection between homosystene levels in the blood and heart attacks to the infection source for ulcers. If the scientists who advocated those views had been silenced because of the general lack of acceptance of their views, society would have been considerably worse off.165

If an industry or individual were to maintain a position contrary to the generally held view without the slightest shred of support, it is certainly possible that a fact finder could deem such behavior to be in reckless disregard of the truth.166 It is by no means clear, however, that this was the case in the smoking controversy. Even anti-smoking expert witnesses have conceded that the traditional textbook definition of causation requires the showing of three factors: production of

163. KLUGER, supra note 124, at 259.
164. U.S. CONST. amend. I.
the disease in laboratory animals, explanation of the causal mechanism, and an epidemiological connection.\textsuperscript{167} Whether the case against smoking ever satisfied the first two is the subject of debate. True, at some point, the epidemiological connection between smoking and lung cancer became so overwhelming that the scientific community generally deemed satisfaction of the other two traditional requirements unnecessary. At this point, certainly, that conclusion appears to be generally conceded. But in 1970, it was by no means clear that the argument that all three needed to be satisfied before a conclusion of causation could be made amounted to recklessness.\textsuperscript{168} Moreover, much of the industry’s effort in the later years concerned the linkage between smoking and other illnesses whose connection to smoking was more ambiguous than in the case of lung cancer.\textsuperscript{169}

It is true that at all times industry officials and lawyers were aware that it was to the industry’s economic benefit to have the asserted linkages rejected.\textsuperscript{170} But the primary point of my entire analysis is that under the tenets of adversary theory, self-promotional speech is not inherently improper.\textsuperscript{171} A self-interested speaker may or may not be telling conscious falsehoods. If he is telling falsehoods, his speech should generally not be protected. But the facts that the views expressed differ from widely held views or that the speaker stands to benefit from acceptance of the views being expressed cannot, in and of themselves, establish that fact. More importantly, whatever industry officials did or did not believe, lawyers representing the industry were in a different position because of their special role within the adversary framework. Whatever the lawyers did or did not believe about the asserted linkage as an ethical matter is largely irrelevant to the lawyer’s continued challenge to that claimed linkage; under the adversary framework, what the lawyers did or did not know may well be considerably more relevant.

If an individual lawyer were convinced that no credible challenge could be made to the asserted linkage between smoking and one or another illness, he could have recommended to the client that it abandon that argument and rely instead on other defenses, such as assumption of risk.\textsuperscript{172} If an individual lawyer were firmly convinced of the truth of the asserted linkage and found the assertion of any affirma-

\textsuperscript{167} MARINO, \textit{supra} note 152, at 21 n.54.
\textsuperscript{168} KLUGER, \textit{supra} note 124, at 414-15.
\textsuperscript{169} \textit{Id.} at 735-36.
\textsuperscript{170} GLANTZ, \textit{supra} note 126, at 40-46.
\textsuperscript{171} FREEDMAN, \textit{supra} note 134, at 9.
\textsuperscript{172} GLANTZ, \textit{supra} note 126, at 341; KLUGER, \textit{supra} note 124, at 560-61.
tive defense immoral or improper, she could simply have chosen to terminate her representation.\textsuperscript{173} The fact that a lawyer may find the evidence of the asserted linkage persuasive on a personal level, however, does not automatically sever his obligation to his client.\textsuperscript{174} The lawyer may nevertheless recognize the possibility that her personal judgment on the issue is inaccurate. A criminal defense attorney who finds the evidence against her client persuasive may ethically continue to defend that client.\textsuperscript{175} Because the lawyer’s role and allegiance are completely revealed, no one could reasonably claim to have been defrauded by a lawyer’s assertion of a position on behalf of a client about whom the lawyer may have doubts on a personal level. As long as the lawyer honestly believes that the argument she is making could reasonably be accepted by a fact finder or adjudicator, the lawyer’s personal views cannot preempt her moral and ethical obligations as an advocate on behalf of her client.\textsuperscript{176}

However, where lawyers have personal knowledge of undisputed facts that contradict the arguments that they are making on behalf of their client—whether that client is the tobacco industry, a criminal defendant, or anyone or anything else—then continued attempts to make those arguments do exceed the scope of the tenets of adversary theory. In such situations, the lawyers’ behavior would come within the conscious falsehood exception to the tenets of adversary theory.\textsuperscript{177}

VI. Conclusion

Some might understandably feel unease or frustration with much of my assessment of the behavior of tobacco industry lawyers during the early years. One might ask, why could not the tobacco industry have focused its efforts exclusively on the interests of smoker health, even at the total cost of the protection of its economic self-interest? On a purely moral level, such a critique is perfectly arguable, just as one may legitimately question an individual’s pursuit of any interest on normative grounds. It is vitally important to understand, however, that one may not automatically translate one’s substantive moral judgments into judgments about process, if the system of constitutional democracy is to survive. The point, in other words, is that one may not reserve the benefits and protections of the constitutional democratic process for those whose behavior one finds worthy of moral ap-

\textsuperscript{173} Model Rules of Prof'l Conduct R. 1.16 (2001).
\textsuperscript{175} Barnhizer, supra note 131, at 444.
\textsuperscript{176} Melnikoff, supra note 174, at 266-68.
\textsuperscript{177} See supra notes 139-140 and accompanying text.
proval. It is just such thinking that, over the years, has led to lynchings, which on one level are simply private decisions to circumvent the constitutional democratic process for individuals deemed—by those holding the rope—to be morally reprehensible. It has also led to the suppression of political advocacy found to be offensive by those in power. After all, the political leaflets and speeches condemned by government in the famed Supreme Court decisions of the World War I era178 certainly did not objectively survey all competing arguments. If expression may be condemned for such failures, then presumably even such core political advocacy loses its protection if those in power find such a one-sided form of political debate to be offensive or unacceptable.

One might respond that the tobacco industry cannot be compared to political idealists. Unlike those activists, the argument would proceed, the industry largely pursued its own narrow economic interests. But similar arguments for exemption are not made with regard to numerous forms of purely economically motivated political behavior in other contexts. In any event, the democratic process does not permit its benefits and protections to turn on such a morally selective basis. If those in power can choose to exempt the tobacco industry from the process-based protections of the Constitution on the grounds of its moral reprehensibility, then presumably when others come to power, they may properly choose to exempt all Communists or Socialists from these same protections on similar grounds. In short, under such a structure, the democratic process is transformed into nothing more than the manipulative tool of whoever happens to hold power. Ironically, such morally selective behavior is likely to result in the very Hobbesian war of all against all for which altruists and idealists are so ready to condemn purely economically motivated behavior. It is only through adherence to a value-neutral, principled commitment to the process concerns inherent in constitutional democracy that we can even hope to avoid the unpleasantness of such a result.