

Protecting Free Speech in a Post-*Sullivan* World

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TABLE OF CONTENTS

I.	INTRODUCTION.....	2
II.	<i>NEW YORK TIMES CO. V. SULLIVAN</i>	4
III.	THE PROGENY	12
IV.	THE WEAPONIZATION OF LIBEL LAWSUITS AND THE DRUMBEAT OF THREATS TO <i>SULLIVAN</i>	27
V.	PREEMPTION AND DEFAMATION.....	38
VI.	THE FREEDOM OF SPEECH AND PRESS ACT	44
VII.	CONCLUSION	48
VIII.	APPENDIX: TEXT OF THE FREEDOM OF SPEECH AND PRESS ACT	49

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I. INTRODUCTION

Thomas Cooper, who Thomas Jefferson classed as “the greatest man in America,” once said that “[t]he doctrine of libel is, in all countries, a doctrine of power.”¹ So it remains today. Today, the wealthy, famous, and otherwise powerful regularly resort to libel threats and libel lawsuits not to redress a cognizable injury to their reputation but instead to silence and punish their critics and make to-be critics think twice before speaking. Luckily, the U.S. Supreme Court has recognized in three decades of case law that the First Amendment displaces much of the common law of libel (and other speech-based torts), making it harder for tech billionaires, Hollywood elites, and political partisans to weaponize libel law.

Starting in 1964, at the height of the civil rights movement, the Supreme Court in *New York Times Co. v. Sullivan* said for the first time that libel lawsuits brought by public officials must be considered against the backdrop of our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” despite that such debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks.”² *Sullivan* transformed the common law by placing the burden under the First and Fourteenth Amendments on public officials to prove falsity and a heightened fault standard called “actual malice.”³ That standard requires a public official plaintiff to plead and prove that the defendant published the allegedly defamatory statement knowing that it was false or with a high degree of awareness of its probable falsity.⁴ The Court’s recognition in *Sullivan* was hailed as an occasion for “dancing in the streets.”⁵ It was “a great case” when it was decided and is, today, a landmark precedent.⁶

Sullivan and the cases that came after it, however, hang in the balance now more than ever before. We have not seen libel plaintiffs flock to courts in such numbers since the 1980s, “a time of growing libel litigation, of enormous judgments and enormous costs.”⁷ And, even despite *Sullivan*, several plaintiffs still manage to succeed. Short of a jury verdict in their favor, libel plaintiffs can measure their success in years-long defense costs that can easily exceed \$1-2 million depending on the case. For plaintiffs seeking retribution more than redress, putting a defendant through the time and trouble is well worth the squeeze.

While this might suggest that *Sullivan* should be shored up, or perhaps that the Supreme Court should recognize other protections under the First

1. James C. Humes, *The Nation’s First Civil Disobedient*, 58 AM. BAR ASS’N J. 259, 259 (1972).

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

3. *Id.* at 279-80.

4. *Id.*; see also *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

5. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (1964) (quoting Alexander Meiklejohn).

6. Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to “the Central Meaning of the First Amendment,”* 83 COLUM. L. REV. 603, 603 (1983).

7. *Id.*

Amendment, some on the Court have called for overruling *Sullivan*. Clarence Thomas was first: “The constitutional libel rules adopted by this Court in [*Sullivan*] and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law.”⁸ He has twice renewed this call.⁹ Nor is he alone. Neil Gorsuch, in 2021, joined him, suggesting that *Sullivan* might be the problem, not the solution.¹⁰ And although she has not made her position known recently, as a law professor in the 1990s Elena Kagan pondered whether the Court had “extended the *Sullivan* principle too far.”¹¹

Sullivan may not be reversed next term or five terms on. But having seen the scramble to protect bodily autonomy in the wake of the Court overturning *Roe v. Wade*, the time to protect landmarks like *Sullivan* is now.¹² Here, we argue that Congress should take up and pass a preemption statute. This proposed statute would set baseline national standards, some previously adopted by the Court as a constitutional matter and others only ever considered by it, that must be satisfied to maintain a defamation action based on interstate speech. By doing so, Congress could insulate the press and the public from fallout that will follow in the wake of overruling *Sullivan*. This approach has the added benefit of not establishing a national law of libel nor a new procedural scheme such as an anti-SLAPP, both of which are more ambitious proposals that we think have low likelihood of gaining traction in Congress no matter how appropriate such approaches might be.

On our way to proposing this statutory scheme, we first review *Sullivan* itself and the sociopolitical environment in which the Court decided that case before we turn to some of the cases that followed it. This review is necessary to understand the import of the statutory language we aim to propose. We next examine recent calls to revisit *Sullivan*. To explain why such rethinking is dangerous, we provide an overview of the increasing weaponization of the law of libel by all sorts of plaintiffs, proving that there is a real, emergent problem that Congress can address by adopting our proposal. We then discuss statutory preemption of the state law of libel, using Section 230 of the Communications Decency Act as a model. Finally, we propose statutory language to protect freedom of speech and of the press and discuss how we arrived at this language.

8. *McKee v. Cosby*, 139 S. Ct. 675, 678 (2019) (Thomas, J., concurring in denial of certiorari).

9. *Berisha v. Lawson*, 141 S. Ct. 2424, 2424-25 (2021) (Thomas, J., dissenting from denial of certiorari); *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453, 2454-55 (2022) (Thomas, J., dissenting from denial of certiorari).

10. *Berisha*, 141 S. Ct. at 2429 (Gorsuch, J., dissenting from denial of certiorari).

11. Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 *LAW & SOC. INQUIRY* 197, 205 (1993) (reviewing ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991)).

12. *See, e.g., Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2305 (2022).

II. *NEW YORK TIMES CO. V. SULLIVAN*

It was about a month after the Greensboro Four refused to leave the “Whites Only” lunch counter.¹³ On March 29, 1960, the *Times* ran an advertisement titled *Heed Their Rising Voices*.¹⁴ The ad, paid for by Committee to Defend Martin Luther King and the Struggle for Freedom in the South, was intended to throw a spotlight on young civil rights protesters “engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.”¹⁵ These demonstrations were met with “an unprecedented wave of terror” detailed in the ad “by those who would deny and negate that document.”¹⁶

That ad did not name a single police officer in Alabama, and the *Times* distributed just 394 daily copies of the newspaper in that state—a paltry amount relative to its circulation of 650,000 copies.¹⁷ Nevertheless, L.B. Sullivan, a member of the Commissioners of the City of Montgomery and in that role supervisor of the police, sued the *Times* over the ad, arguing that its references to “police” could be read to refer to him specifically.¹⁸ There was also a companion case, *Abernathy v. Sullivan*, that has receded from memory but proves that *Sullivan* was not merely a case about freedom of the press.¹⁹ Rather, it implicated freedom of speech for the individual too, as Sullivan also sued four black ministers, Ralph David Abernathy, S.S. Seay Sr., Fred L. Shuttlesworth, and J.E. Lowery, whose names appeared on the advertisement without their permission.²⁰

The ad was not without its issues. While it reported that protesters sang *My Country, 'Tis of Thee* on the state capitol steps, in fact they sang the national anthem.²¹ While it reported that the dining hall had been padlocked, in fact the university denied entry to certain students because they did not have dining tickets.²² Moreover, while it reported that the police ringed the campus, in fact they deployed near the campus.²³ While nine students had been expelled, it was not because they led a demonstration at the Capitol, but because they demanded to be served at a lunch counter.²⁴ And while the ad

13. Michael Ray et al., *Greensboro Sit-in*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Greensboro-sit-in> [<https://perma.cc/B4SF-XNDY>] (last visited Nov. 6, 2022).

14. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 257 (1964).

15. *Id.* at 256.

16. *Id.*

17. *Id.* at 260 n.3.

18. *Id.* at 258.

19. *See generally id.*

20. William E. Lee, *Citizen-Critics, Citizen Journalists, and the Perils of Defining the Press*, 48 GA. L. REV. 757, 758-59 (2014).

21. *Sullivan*, 376 U.S. at 258-59.

22. *Id.* at 259.

23. *Id.*

24. *Id.*

stated that Martin Luther King, Jr. had been arrested seven times, in fact he had only been arrested four times.²⁵

At trial, Sullivan put on evidence that he had not been involved in the misconduct as alleged in the ad.²⁶ Instead, he argued that much of the conduct pre-dated his time as commissioner of the police.²⁷ He made no effort to prove actual damages and instead relied on witness testimony from a former employer that had they believed the ad, they would have been less likely to associate with him.²⁸ The judge instructed the jury that the statements were libelous *per se* and not privileged.²⁹ He also told the jury that because the statements were *per se* libelous, Sullivan did not have to put on evidence of actual damage.³⁰ Falsity and malice, he told the jury, were also presumed.³¹ Finally, he told the jury that punitive damages need not have any relation to actual damages.³² The jury then found for Sullivan, awarding him \$500,000.³³ The Alabama Supreme Court affirmed.³⁴

On January 7, 1963, the Supreme Court granted certiorari, citing “the importance of the constitutional issues involved” as to both the *Times* and the individual defendants.³⁵ In a unanimous opinion, authored by Justice William Brennan, it reversed.³⁶

At first, the Court summarized the outlines of Alabama’s libel law. A statement was libelous *per se* where “the words ‘tend to injure a person . . . in his reputation’ or to ‘bring [him] into public contempt.’”³⁷ When it came to a public official, a finding that the statement “‘injure[d] him in his public office, or impute[d] misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust’” satisfied that standard.³⁸ Where the plaintiff was a public official, “his place in the governmental hierarchy” was “sufficient evidence” that “statements that reflect” on government reflect on those in charge of it.³⁹ Thereafter, the defendant was left with no defense unless he could show that the charge is “true in all [its] particulars.”⁴⁰ Moreover, absent a showing of truth, “general damages are presumed, and may be awarded without proof of pecuniary injury.”⁴¹ To get punitive

25. *Id.*

26. *Id.*

27. *Sullivan*, 376 U.S. at 259.

28. *Id.* at 260.

29. *Id.* at 262.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Sullivan*, 376 U.S. at 262.

34. *Id.* at 256.

35. *Id.* at 264; *see also* *N.Y. Times Co. v. Sullivan*, 371 U.S. 946, 946 (1963).

36. *Sullivan*, 376 U.S. at 264.

37. *Id.* at 267.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

damages, however, the plaintiff “apparently” had to show malice.⁴² Neither “good motives” nor “belief in truth” negated a finding of malice.⁴³

Turning to whether the Constitution had anything to say about this state of affairs, the Court said it was required to consider Sullivan’s case “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁴⁴ The Sedition Act of 1789, the Court wrote, “first crystallized a national awareness of the *central meaning* of the First Amendment.”⁴⁵ That statute prohibited publishing “any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame.”⁴⁶ Violators risked a fine of \$5,000 and up to five years in jail.⁴⁷ Unlike at common law, the statute permitted defendants a defense of truth and, nominally, placed in the hands of the jury both law and fact.⁴⁸

According to the Court, the statute had been forced through the Federalist-controlled Congress keen on keeping John Adams in power, the Court noted that it “was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison” in the Virginia and Kentucky resolutions.⁴⁹ As adopted by the Virginia General Assembly, the Virginia resolution said that the Sedition Act authorized the national government to exercise “a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments.”⁵⁰ The power authorized by the Act “ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people.”⁵¹

The Court then observed that Madison, who drafted the First Amendment, had viewed the Sedition Act as unconstitutional and harmful to a republican government.⁵² In that government, Madison had said, “The people, not the government, possess the absolute sovereignty.”⁵³ The colonists distrusted “power itself at all levels,” but especially “concentrated power.”⁵⁴ Importantly, the government established by the Founders was

42. *Sullivan*, 376 U.S. at 264.

43. *Id.*

44. *Id.* at 270 (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

45. *Id.* at 273 (emphasis added).

46. *Id.* at 273-74.

47. *Id.* at 273.

48. *Sullivan*, 376 U.S. at 274.

49. *Id.*

50. *Id.* at 274 (quoting James Madison, *Madison’s Report on the Virginia Resolutions*, in 4 ELLIOT’S DEBATES: THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 554 (Jonathan Elliot ed., 1876) [hereinafter *Madison’s Report*]).

51. *Id.* (quoting *Madison’s Report*, *supra* 50, at 554).

52. *Id.* at 274-76; see also Matthew L. Schafer, *In Defense: New York Times v. Sullivan*, 82 LA. L. REV. 81, 91, 137 (2021).

53. *Sullivan*, 376 U.S. at 274 (quoting *Madison’s Report*, *supra* 50, at 569).

54. *Sullivan*, 376 U.S. at 274.

“‘altogether different’ from its British form, under which the Crown was sovereign.”⁵⁵ It was, thus, “necessary” in America to have “a different degree of freedom . . . of the press.”⁵⁶ As Madison had said on the floor of Congress years earlier, “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.”⁵⁷

Historically, the Court concluded that the People in fact exercised that power. Madison had written, “In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law.”⁵⁸ In this country, he added, “On this footing the freedom of the press has stood; on this foundation it yet stands.”⁵⁹ Thus, it was “manifestly impossible,” consistent with the Constitution, “to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures.”⁶⁰ From this, the Court found that “[t]he right of free public discussion of the stewardship of public officials was, thus, in Madison’s view, a fundamental principle of the American form of government.”⁶¹

Although the Sedition Act expired on its own after Jefferson took office so its constitutionality had never been considered by the Court, the Court wrote that “the attack upon its validity has carried the day in the court of history.”⁶² Jefferson pardoned those convicted, finding that the Act was “a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.”⁶³ The fines issued under it were repaid and, as time wore on, one politician observed that “its invalidity was a matter ‘which no one now doubts.’”⁶⁴ It was no surprise that other justices had also drawn into question the validity of the act, including Oliver Wendell Holmes, Louis Brandeis, Robert Jackson, and William O. Douglas.⁶⁵

The ad in Sullivan’s case, targeted as it was at the government, “would seem clearly to qualify for the constitutional protection” in light of this history.⁶⁶ The only question, the Court explained, was whether that protection

55. *Id.* at 274 (quoting *Madison’s Report, supra* 50, at 569).

56. *Id.* at 275 (quoting *Madison’s Report, supra* 50, at 570).

57. *Id.* (quoting 4 ANNALS OF CONG. 934 (1855)).

58. *Id.* (quoting *Madison’s Report, supra* 50, at 570).

59. *Id.* (quoting *Madison’s Report, supra* 50, at 570).

60. *Sullivan*, 376 U.S. at 275 n.15 (quoting *Madison’s Report, supra* 50, at 575) (“The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.”).

61. *Id.*

62. *Id.* at 276.

63. *Id.* (quoting Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 4 THE WORKS OF THOMAS JEFFERSON 555, 555-56 (H.A. Washington ed., 1884)).

64. *Id.* (quoting S. REP. NO. 122, at 3 (1836)).

65. *Id.* (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 288-89 (1952); WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 47 (1958)).

66. *Sullivan*, 376 U.S. at 271.

was “forfeit[ed]” because of the “falsity of some of its factual statements and by its alleged defamation of respondent.”⁶⁷ It found that it was not.⁶⁸

As to falsity, the Court said that it had “consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker.”⁶⁹ As Madison also had written, “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.”⁷⁰ Consistent with this, the Court observed that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”⁷¹ In the end, cases meant to “impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors.”⁷²

The Court then found that the First and Fourteenth Amendments required “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice.’”⁷³ Actual malice, it wrote, equated to “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.”⁷⁴ In other words, public officials would have to prove that the defendant published a calculated falsehood in order to recover damages.

The Kansas Supreme Court adopted a “like rule” in 1908 in *Coleman v. MacLennan*.⁷⁵ There, a politician sued a newspaper that charged him with mismanagement.⁷⁶ In adopting that rule, the Kansas court noted that it “is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.”⁷⁷ The importance of those kinds of discussions to democracy “more than counterbalance the inconvenience of private persons whose conduct may be involved.”⁷⁸ In such a system, “occasional injury to the reputations of individuals must yield to the public welfare.”⁷⁹

There was also a symmetry to the rule, as it was “analogous to the protection accorded a public official when he is sued for libel by a private citizen.”⁸⁰ All States at that time accorded privileges to statements made by

67. *Id.*

68. *Id.* at 271-73.

69. *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

70. *Id.* (quoting James Madison, quoting *Madison's Report*, *supra* 50, at 571).

71. *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

72. *Sullivan*, 376 U.S. at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)).

73. *Id.* at 279-80.

74. *Id.* at 280.

75. *Id.* (citing *Coleman v. MacLennan*, 98 P. 281, 281-82 (Kan. 1908)).

76. *Id.*

77. *Id.* at 281 (quoting *Coleman*, 98 P. at 286).

78. *Sullivan*, 376 U.S. at 281 (quoting *Coleman*, 98 P. at 286).

79. *Id.* (quoting *Coleman*, 98 P. at 286).

80. *Id.* at 282.

public officials in their duties “unless actual malice can be proved.”⁸¹ Otherwise, “the threat of damage suits would . . . ‘inhibit the fearless, vigorous, and effective administration of policies of government’ and ‘dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.’”⁸² Mirroring that, the Court found that a similar privilege should apply to “the citizen-critic of government,” because it was “*as much his duty to criticize as it is the official’s duty to administer.*”⁸³ In a republican government, “It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.”⁸⁴

Having adopted the actual malice rule, the Court then applied it, anticipating that Sullivan would seek a new trial that would be as unfair as the last.⁸⁵ As to the individual defendants, the question was easy, as Sullivan introduced “no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard.”⁸⁶ As to the *Times*, the question required more thought, but ultimately, the answer was the same. First, testimony demonstrated that the *Times* believed the ad to be true.⁸⁷ Second, the failure to retract was not evidence of actual malice because the *Times* did not even believe the ad was about Sullivan.⁸⁸ Third, the allegation that clips in the *Times*’ archives refuted facts in the ad thereby demonstrating a calculated falsehood was also insufficient because those at the *Times* responsible for the ad were unaware of those clips.⁸⁹

The verdict was “constitutionally defective” in another way: “it was incapable of supporting the jury’s finding that the allegedly libelous statements were made ‘of and concerning’” Sullivan.⁹⁰ First, the ad never mentioned Sullivan by name or position.⁹¹ Several statements alleged to be defamatory did not even relate to the police, let alone Sullivan.⁹² As to the statements that police ringed the campus or that Dr. King had been arrested seven times, the Court found that “[a]lthough the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual.”⁹³ None of the witness testimony stated any reason to believe Sullivan was involved beyond the mere association with the police.⁹⁴ Were that alone sufficient to render the statements actionable, it would violate the rule that “prosecutions for libel on

81. *Id.*

82. *Id.* (quoting *Barr v. Matteo*, 360 U.S. 564, 571 (1959)).

83. *Id.* (emphasis added).

84. *Sullivan*, 376 U.S. at 282-83.

85. *See id.* at 284-85.

86. *Id.* at 286.

87. *Id.*

88. *Id.*

89. *Id.* at 287.

90. *Sullivan*, 376 U.S. at 288.

91. *Id.*

92. *Id.*

93. *Id.* at 289.

94. *Id.*

government” have no “place in the American system of jurisprudence.”⁹⁵ Permitting recovery “would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.”⁹⁶

Although *Sullivan* was unanimous, three Justices believed that the Court should provide even stronger protections to defamation defendants. Justice Hugo Black, joined by Justice William Douglas, wrote that the First Amendment provides the press with “an absolute immunity for criticism of the way public officials do their public duty.”⁹⁷ Likewise, Justice Arthur Goldberg, also joined by Douglas, wrote that “the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.”⁹⁸ These three believed that even public officials who could establish actual malice should be unable to sue for defamation.

In the end, *Sullivan* embraced the argument of philosopher Alexander Meiklejohn that the First Amendment is necessary to foster self-governance.⁹⁹ Indeed, a year after he wrote *Sullivan*, Justice Brennan delivered a lecture at Brown University in which he explicitly linked *Sullivan* to Meiklejohn’s philosophy: “The first amendment question was whether its protections nevertheless limit a state’s power to apply traditional libel law principles, since the statements were made in criticism of the official conduct of a public servant.”¹⁰⁰ “In other words, the case presented a classic example of an activity that Dr. Meiklejohn called an activity of ‘governing importance’ within the powers reserved to the people and made invulnerable to sanctions imposed by their agency-governments.”¹⁰¹

Of course, *Sullivan*, despite being a unanimous opinion, was never preordained. Thirty years after it was decided, Anthony Lewis, who wrote a biography of *Sullivan* in his book *Make No Law*, posed the contrary result: “Suppose that Southern judges and juries had had the last word, that the press had no higher recourse in the American system.”¹⁰² The proposition requires little imagination. By using libel law as a political weapon, the Southern judicial system could have controlled the narrative and suppressed the rising civil rights movement.

Before trial, the *Times* even struggled to find an Alabama lawyer to represent it in the face of outrage “whipped up” against the *Times* by the political establishment in Alabama.¹⁰³ When the *Times* New York lawyer

95. *Id.* at 291 (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)).

96. *Sullivan*, 376 U.S. at 292.

97. *Id.* at 295 (Black, J., concurring).

98. *Id.* at 298 (Goldberg, J., concurring).

99. William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14 (1965).

100. *Id.*

101. *Id.*

102. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 36 (1991).

103. *Id.* at 24.

traveled to Alabama in preparation for the case, he stayed at a hotel under an assumed name.¹⁰⁴ Once the case got to trial, it was assigned to Judge Walter Jones, a “devotee of the Confederacy and the Southern way of life.”¹⁰⁵ Jones would later say that the case would be tried not under the Fourteenth Amendment but according to “white man’s justice.”¹⁰⁶ He empaneled an all-white jury.¹⁰⁷ And while the transcript of the trial referred to white lawyers with the honorific “Mr.,” for the Black lawyers, the transcript read only “Lawyer Crawford” or “Lawyer Seay” as they were, according to racist custom, undeserving of the “Mr.”¹⁰⁸

For the political establishment in Alabama, Sullivan’s lawsuit, and those that followed, were wildly successful.¹⁰⁹ As Lewis recounted, the day after the jury verdict in *Sullivan*, the *Alabama Journal* published an editorial arguing that the verdict would “have the effect of causing reckless publishers of the North . . . to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns.”¹¹⁰ *Sullivan* had “changed the rules”: “The Times was summoned more than a thousand miles to Montgomery to answer for its offense. . . . The only way to prevent such long distance summons is to print the truth.”¹¹¹

As Lewis observed though, after *Sullivan*, printing the truth was far from an easy thing to do: “The rules applied by Judge Jones made it forbiddingly difficult to write anything about the realities of Southern racism in the 1960’s without risking heavy damages for libel.”¹¹² That was, of course, the whole point. Sullivan, and other public officials, “were out to transform the traditional libel action, designed to repair the reputation of a private party, into a state political weapon to intimidate the press.”¹¹³ The purpose was “to discourage not false but true accounts of life under a system of white supremacy,” making it impossible to write about lynching, segregation, and the rest of the South’s cruel history.¹¹⁴

At the time, the \$500,000 verdict against the *Times* was the largest ever libel judgment in Alabama,¹¹⁵ and more would come in the tag-along suits, totaling \$3 million.¹¹⁶ There was a question if the *Times* could survive litigation over the ad, to say nothing of the other lawsuits then pending across the South brought by public officials against Northern agitators.¹¹⁷ As Lewis explained, “By the time the Supreme Court decided the *Sullivan* case, in 1964, Southern officials had brought nearly \$300 million in libel actions against the

104. *Id.*

105. *Id.* at 25.

106. *Id.* at 26.

107. *Id.* at 27.

108. LEWIS, *supra* note 101, at 27.

109. *Id.* at 34.

110. *Id.*

111. *Id.*

112. *Id.* at 34.

113. *Id.* at 35.

114. LEWIS, *supra* note 101, at 35.

115. *Id.*

116. *Id.*

117. *Id.*

press.”¹¹⁸ Libel lawsuits had become the weapon of choice to “repress[] the movement for civil rights.”¹¹⁹

III. THE PROGENY

The same year the Court decided *Sullivan*, Harry Kalven, Jr. wrote: “It is not easy to predict what the Court will see in the [*Sullivan*] opinion as the years roll by.”¹²⁰ But, he added, “the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming.”¹²¹ He was right; from 1964 to the early 1990s, the Court continued to tinker with the balance between the sanctity with which the law treated one’s reputation and the constitutional rights of freedom of speech and of the press, sometimes suggesting that it would tilt that balance in favor of reputation and sometimes tilting it in favor of speech. *Sullivan*’s progeny is well documented extensively elsewhere and is only repeated in brief here.¹²²

Garrison v. Louisiana. Just months after the Court decided *Sullivan*, it considered the constitutionality of Louisiana’s criminal libel law. In *Garrison v. Louisiana*, Jim Garrison, the district attorney of Orleans Parish, made several disparaging statements about criminal court judges in the Parish.¹²³ In substance, he accused those judges of “inefficiency, laziness, and excessive vacations.”¹²⁴ As a result, the State charged him with criminal defamation, and a judge convicted him.¹²⁵

The Court first considered whether its decision in *Sullivan*, a civil case, should be extended to the criminal context. In finding that it should, the Court explained that there was “no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations.”¹²⁶ In fact, the Court wrote, by the first half of the nineteenth century, civil libel actions had already begun to replace the use of criminal libel laws.¹²⁷ In other words, they served the same purpose—to suppress unpopular speech.

It then considered whether the common law defense of truth and good motives could be incorporated into the First Amendment as a constitutional protection in criminal cases. The question was relevant as the Louisiana statute at issue allowed a conviction based on a true statement where that statement was made with ill-will.¹²⁸ The Court found that the common law

118. *Id.* at 36.

119. *Id.* at 35.

120. Kalven, *supra* note 5, at 221.

121. *Id.*

122. See LEE LEVINE & STEPHEN WERMIEL, *THE PROGENY: JUSTICE WILLIAM J. BRENNAN’S FIGHT TO PRESERVE THE LEGACY OF NEW YORK TIMES V. SULLIVAN* (2014), for the comprehensive history of *Sullivan*’s progeny.

123. *Garrison v. Louisiana*, 379 U.S. 64, 65 (1964).

124. *Id.* at 66.

125. *Id.* at 65.

126. *Id.* at 67.

127. *Id.* at 68-69.

128. *Id.* at 71-72.

defense was insufficient, holding that the requirement that a defendant show truth *and* good motives was too burdensome.¹²⁹ Instead, it explained, “where the criticism is public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth” irrespective of motives.¹³⁰

Finally, even as to false statements, the Court found that *Sullivan* prevented the imposition of criminal liability so long as those statements were not calculated falsehoods. As the Court put it, “even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood” consistent with *Sullivan*.¹³¹ Indeed, “[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government.”¹³²

Curtis Publishing Co. v. Butts; Associated Press v. Walker. Both *Sullivan* and *Garrison* had the analog to the Sedition Act as both cases reflected liability for speech—either civil or criminal—for criticizing public officials in performance of their public functions. *Curtis Publishing Co. v. Butts* and the companion case, *Associated Press v. Walker*, would mark the first major expansion of *Sullivan*—and they would do so without a majority opinion.¹³³

These cases forced the Court to consider the foretold conflict recognized by Kalven as to the application of *Sullivan* to “persons who are not public officials, but who are ‘public figures’ and involved in issues in which the public has a justified and important interest.”¹³⁴ *Sullivan*, Justice John Marshall Harlan noted, had “expressly reserved” what the “sweep” of its logic may be as to this question.¹³⁵ The question now had to be answered, however, because of a “sharp division” among lower courts as to the import of *Sullivan* outside the context of public official plaintiffs.¹³⁶

Wally Butts was the athletic director of the University of Georgia, and in that role, had been accused of trying to fix football games.¹³⁷ While Georgia was a state school, the Georgia Athletic Association, a private entity, employed Butts.¹³⁸ Butts was “well-known” at the time and had been the football coach for Georgia.¹³⁹ He sued the newspaper that had accused him of fixing the games, and before the Court had decided *Sullivan*, a jury awarded him nearly half a million dollars.¹⁴⁰ The Fifth Circuit affirmed, although one

129. *Garrison*, 379 U.S. at 72-73.

130. *Id.*

131. *Id.* at 73.

132. *Id.* at 74-75.

133. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967) (plurality opinion).

134. *Id.* at 134.

135. *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 n.23 (1964)).

136. *Id.* (citing *Clark v. Pearson*, 248 F. Supp. 188, 194 (D.D.C. 1965) (stating that *Sullivan* only applied to “officials in the high echelons”)). See *id.* at 134 n.1 for the Court’s list of lower court decisions that contributed to the division.

137. *Id.*

138. *Id.*

139. *Butts*, 388 U.S. at 134 (plurality opinion).

140. *Id.* at 138.

judge, consistent with *Sullivan* and *Garrison*, would have reversed as the instruction may have “allow[ed] recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than the intent to inflict harm through falsehood.”¹⁴¹

Edwin Walker was a racist who had “a long . . . career in the United States Army before resigning to engage in political activity.”¹⁴² When the *Associated Press* published a dispatch accusing him of encouraging violent opposition to the desegregation at the University of Mississippi, Walker was no longer in the Army but maintained a political following as a private person.¹⁴³ Walker sued in Texas (of all places), and the jury awarded him \$800,000.¹⁴⁴ The trial judge vacated the punitive damages award, which reduced the verdict by \$300,000 on the grounds that Walker failed to establish actual malice.¹⁴⁵ He refused to vacate the balance, asserting that “[t]ruth alone” was a sufficient defense and there was no compelling public policy reason to extend *Sullivan*.¹⁴⁶ On appeal, the Texas Court of Civil Appeals affirmed, and the Supreme Court of Texas denied further review.¹⁴⁷

While Harlan announced the judgment of the Court, it was Chief Justice Earl Warren’s opinion for himself that controlled. Parting with Harlan and three other Justices, Warren found that public figures, like public officials, must also plead and prove that a libel defendant acted with actual malice. Separately joined by Justices Black, Douglas, Brennan, and Byron White, Warren said that while he agreed with the result in Harlan’s opinion, he disagreed with its failure to extend *Sullivan* to public figures.¹⁴⁸ Warren looked at the case through a pragmatic lens: public figures’ “views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of ‘public officials’ with respect to the same issues and events.”¹⁴⁹

Differentiating between public officials and public figures in American society had “no basis in law, logic, or First Amendment policy,” Warren wrote.¹⁵⁰ Lines between “governmental and private sectors [were] blurred” in 1960s America.¹⁵¹ Policy determinations that had historically been wholly government were now “channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government.”¹⁵² Since the 1930s, there had been “a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual,

141. *Id.* at 139-40.

142. *Id.* at 140.

143. *Id.*

144. *Id.* at 141.

145. *Butts*, 388 U.S. at 141-42 (plurality opinion).

146. *Id.* at 142.

147. *Id.*

148. *Id.* at 162 (Warren, C.J., concurring).

149. *Id.*

150. *Id.* at 163.

151. *Butts*, 388 U.S. at 163 (Warren, C.J., concurring).

152. *Id.*

governmental, and business worlds.”¹⁵³ All the while, power had become “much more organized” in the “private sector.”¹⁵⁴

A similar blurring between public officials and public figures attended this transformation. Many “who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”¹⁵⁵ While they were not born of the political process, they were *a part of* that process.¹⁵⁶ As a result, the citizenry had “a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’”¹⁵⁷ In a way, that public figures “are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.”¹⁵⁸ Thus, Warren found that “public men,” generally, must prove actual malice.

St. Amant v. Thompson. In *St. Amant v. Thompson*, the Supreme Court again reviewed an opinion by the Louisiana Supreme Court. This time, it was a civil case related to a statement made during a speech by a candidate for public office.¹⁵⁹ The issue, though, was narrow: whether the state court had appropriately applied the test for actual malice.¹⁶⁰ While the state high court had found sufficient evidence that the defendant made the statement with “reckless disregard” as to its truth, the Court reversed, finding that the state court had treated the inquiry as an objective one rather than subjective one.¹⁶¹ As the Court explained, “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.”¹⁶² Instead, the Court said that there “must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”¹⁶³

Rosenbloom v. Metromedia, Inc. *Rosenbloom* was a defamation lawsuit based on news reporting of the arrest of a nudist magazine purveyor for distributing obscene materials.¹⁶⁴ All agreed that “the police campaign to enforce the obscenity laws was an issue of public interest” and that the magazine purveyor was neither a public official nor public figure.¹⁶⁵ The only question was whether, as a private individual, the plaintiff nevertheless had

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Butts*, 388 U.S. at 164 (Warren, C.J., concurring).

158. *Id.*

159. *St. Amant v. Thompson*, 390 U.S. 727, 728 (1968).

160. *Id.*

161. *Id.* at 730.

162. *Id.* at 731.

163. *Id.*

164. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 33-34 (1971) (plurality opinion), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

165. *Id.* at 40.

to plead and prove actual malice as the statement was about his “involvement in an event of public or general interest.”¹⁶⁶ Affirming the Third Circuit, which found that actual malice must be shown, Brennan announced the judgment of the Court, but he lacked a majority.

According to Brennan, “Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government.”¹⁶⁷ Instead, “[o]ur efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense.”¹⁶⁸ As a result, he argued that the First Amendment “if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”¹⁶⁹

Sullivan and those cases that followed, however, had focused only on the status of plaintiff and not the underlying controversy. This created an “artificiality” in the public’s interest in any given case between “‘public’ and ‘private’ individuals or institutions.”¹⁷⁰ A matter of public interest though did not become less so simply because a private figure was involved.¹⁷¹ On the contrary, the “public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.”¹⁷² The case before the Court demonstrated as much: whether the plaintiff was a private figure was irrelevant to the public’s weightier interest in ensuring that criminal conduct was pursued appropriately.¹⁷³ This was, Brennan argued, the import of the Court’s prior decisions, even though they spoke in terms of a plaintiff’s status as a public or private individual.¹⁷⁴

While Brennan’s opinion was joined by Chief Justice Warren and Justice Harry Blackmun, others concurred only in judgment. Black concurred, consistent with his long-held belief that “the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false.”¹⁷⁵ White also concurred only in judgment. For White, his colleagues were trying to do much in a case that required only a little. *Sullivan*, he wrote, “made clear that discussion of the official actions of public servants such as the police is constitutionally privileged.”¹⁷⁶ Because official conduct is often targeted at private figures, *Sullivan* necessarily allowed for the intrusion upon the privacy or reputations of “private citizens against whom official action is directed.”¹⁷⁷

166. *Id.* at 31-32.

167. *Id.* at 41.

168. *Id.*

169. *Id.*

170. *Rosenbloom*, 403 U.S. at 41 (plurality opinion).

171. *Id.* at 43.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 57 (Black, J., concurring).

176. *Rosenbloom*, 403 U.S. at 61 (White, J., concurring).

177. *Id.*

It gave “the press the right not only to censure and criticize officials but also to praise them and the concomitant right to censure and criticize their adversaries,” like the magazine purveyor.¹⁷⁸ Thus, he would have recognized “a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view.”¹⁷⁹

Justices John Marshall Harlan II, Thurgood Marshall, and Potter Stewart dissented. While they recognized that the case implicated the First and Fourteenth Amendments, they thought that Brennan’s opinion would constitutionalize too much of the state law of libel. Instead, Harlan would have held “unconstitutional, in a private libel case, jury authority to award punitive damages,” which he said was “unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.”¹⁸⁰ Marshall and Stewart would have taken a narrower view on permissible liability, arguing that damages should be limited to actual losses and otherwise leaving standards of liability to the states so long as strict liability was not imposed.¹⁸¹

Gertz v. Robert Welch, Inc. *Gertz*, like *Rosenbloom*, presented the question of “whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.”¹⁸² Richard Nuccio, a Chicago police officer, shot and killed Ronald Nelson.¹⁸³ Nelson’s family retained Elmer Gertz to represent them in litigation against Nuccio.¹⁸⁴

Around the same time, the far-right John Birch Society was publishing articles warning of a propaganda war against law enforcement.¹⁸⁵ As part of that effort, it published an article, “FRAME-UP: Richard Nuccio And The War On Police.”¹⁸⁶ That article reported that testimony at Nuccio’s criminal trial was false and part of the “Communist campaign against the police.”¹⁸⁷ Although Gertz had little involvement in the criminal trial, the article fingered him as the mastermind of the “frame-up,” reported that he had a criminal file so big it would take ““a big, Irish cop to lift,”” and said he was an official of the “Marxist League for Industrial Democracy.”¹⁸⁸

Gertz sued the John Birch Society.¹⁸⁹ On a motion for summary judgment, the defendant invoked *Sullivan*, arguing that Gertz was either a

178. *Id.*

179. *Id.* at 62.

180. *Id.* at 77 (Harlan, J., dissenting).

181. *Id.* at 86 (Marshall, J., dissenting).

182. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974).

183. *Id.* at 325.

184. *Id.*

185. *Id.*

186. *Id.* at 325-26.

187. *Id.* at 326.

188. *Gertz*, 418 U.S. at 326.

189. *Id.* at 325, 327.

public official or a public figure, but the court concluded that he was not.¹⁹⁰ At trial, the jury awarded Gertz \$50,000.¹⁹¹ The court, however, had a change of heart post-verdict and found that *Sullivan* did apply and that Gertz had to establish actual malice.¹⁹² It did so not because Gertz was a public figure but because *Sullivan* reached “discussion of any public issue without regard to the status of a person defamed therein.”¹⁹³ The Seventh Circuit affirmed based on Brennan’s intervening plurality decision in *Rosenbloom*.¹⁹⁴

The Supreme Court reversed and rejected *Rosenbloom*. Justice Lewis Powell, writing for the Court, began by recognizing the Court’s struggle to “define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.”¹⁹⁵ After a long review of *Sullivan* and its progeny, the Court began on “common ground.”¹⁹⁶ While it questioned the constitutional value of false statements, it explained that such statements are “inevitable in free debate.”¹⁹⁷ Punishing such errors risked “inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”¹⁹⁸ Thus, in *Sullivan* and elsewhere, the Court had held that the First Amendment requires “we protect some falsehood in order to protect speech that matters.”¹⁹⁹

On the other side of the ledger was the state interest in compensating citizens whose reputations had been unwarrantedly sullied. An individual’s right to his or her reputation “reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”²⁰⁰ Thus, “some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.”²⁰¹

Rather than pick a side between these two competing interests, the Court sought a middle ground. The media, it wrote, “[is] entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them,” but “[n]o such assumption is justified with respect to a private individual.”²⁰² Because a private figure has not “relinquished” her interest in her reputation to the public because of her conduct, she “has a more

190. *Id.*

191. *Id.* at 328-29.

192. *Id.* at 329.

193. *Id.*

194. *Gertz*, 418 U.S. at 329.

195. *Id.* at 325.

196. *Id.* at 339.

197. *Id.* at 340.

198. *Id.*

199. *Id.* at 341.

200. *Gertz*, 418 U.S. at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

201. *Id.* at 342 (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 152 (1967) (plurality opinion)).

202. *Id.* at 345.

compelling call on the courts for redress of injury inflicted by defamatory falsehood.”²⁰³

Still, First Amendment concerns required some limitations. The Court held that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability.”²⁰⁴ Thus, it allowed private figures to recover under whatever fault standard is set by a state but also gave media defendants some breathing space by not allowing recovery under a strict liability standard. The Court’s conclusion was not based on the “belief that the considerations which prompted the adoption of the” actual malice rule in *Sullivan* and *Curtis Publishing Co.* “are wholly inapplicable to the context of private individuals.”²⁰⁵ Rather, it was the strength and legitimacy of the States’ countervailing interest in protecting private figures that required a more nuanced approach.²⁰⁶

That interest, however, did not extend to providing for presumed or punitive damages.²⁰⁷ The need to limit presumed damages was necessary because libel is an “oddity of tort law” that allowed for recovery of damages “without any proof that such harm actually occurred.”²⁰⁸ The risk of rogue juries assessing catastrophic damages “unnecessarily compound[ed] the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.”²⁰⁹ As importantly, allowing juries uncontrolled discretion made it likely that they would “punish unpopular opinion rather than to compensate individuals for injury sustained.”²¹⁰ And, the States had “no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.”²¹¹ The Court then held that “defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth” could only recover actual damages.²¹²

Although Blackmun had joined the plurality opinion in *Rosenbloom*, he concurred in *Gertz*.²¹³ Despite the “illogical” retreat from *Rosenbloom*, Blackmun joined in *Gertz* for two reasons.²¹⁴ First, he was satisfied that the limits on presumed and punitive damages “eliminate[d] significant and powerful motives for self-censorship that otherwise are present in the traditional libel action.”²¹⁵ Second, he thought it vital to provide certainty in the law: “I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that

203. *Id.*

204. *Id.* at 347.

205. *Id.*

206. *Gertz*, 418 U.S. at 347.

207. *Id.* at 348-49.

208. *Id.* at 349.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Gertz*, 418 U.S. at 349.

213. *Id.* at 353 (Blackmun, J., concurring).

214. *Id.*

215. *Id.* at 354.

eliminates the unsureness engendered by *Rosenbloom*'s diversity."²¹⁶ Had his vote not been needed, he would have followed *Rosenbloom*.²¹⁷

Douglas wrote again to express his and Black's view that the Court should get out of the business of defining boundaries to First Amendment freedoms where the text of that Amendment allowed for none.²¹⁸ He noted that the First Amendment barred Congress from passing any civil libel law, as Thomas Jefferson had observed in 1798.²¹⁹ Nor had Congress ever done so.²²⁰ While Congress had passed the Sedition Act, as the Court observed in *Sullivan*, the "general consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First Amendment."²²¹ His point was simple: if Congress lacked authority to pass either civil or criminal libel laws under the First Amendment, the States lacked any authority to do so under the Fourteenth.²²²

Maintaining his unbending position that the First Amendment did not allow any exceptions, Douglas said that the sanction of jury damages in civil libel cases "impinge[d] upon free and open discussion."²²³ This was especially the case because speech that "arouses little emotion is little in need of protection," while speech that is "marked by highly charged emotions" may become "a virtual roll of the dice separating them from liability for often massive claims of damage."²²⁴ Whether it be negligence or actual malice, Douglas feared that the Court's ever "proliferating standards in the area of libel" were likely to increase self-censorship.²²⁵

Brennan dissented.²²⁶ True, he explained, the majority held that the First Amendment did act as a limit even on libel actions brought by private figures involved in a matter of public interest.²²⁷ This reflected *Sullivan*'s observation that "debate on *public issues* should be uninhibited, robust, and wide-open."²²⁸ But to the extent it failed to apply the actual malice standard, it erred. Rather, Brennan would have held, under the standard proposed by the Court in *Rosenbloom*, that Gertz had to prove actual malice.²²⁹ Public interest, Brennan wrote, may "at times be influenced by the notoriety of the individuals

216. *Id.*

217. *Id.*

218. *Gertz*, 418 U.S. at 355-56 (Douglas, J., dissenting).

219. *Id.* at 356 (citing Thomas Jefferson, Drafts of the Kentucky Resolutions of 1798, in 8 THE WORKS OF THOMAS JEFFERSON 458, 464-65 (Paul Leicester Ford ed., 1904)).

220. *Id.*

221. *Id.* at 356-57.

222. *Id.* at 357 ("With the First Amendment made applicable to the States through the Fourteenth, I do not see how States have any more ability to 'accommodate' freedoms of speech or of the press than does Congress.").

223. *Id.* at 359.

224. *Gertz*, 418 U.S. at 359-60 (Douglas, J., dissenting).

225. *Id.* at 360.

226. *Id.* at 361 (Brennan, J., dissenting) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

227. *Id.* at 361-62.

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

229. *Id.* at 361

involved.”²³⁰ At other times, the person involved will have little, if anything, to do with the public’s interest in the underlying event.

Although the Court recognized this, it rejected providing “the same level of constitutional protection that has been afforded the media in the context of defamation of public persons.”²³¹ It did so based on the private individual’s lack of access to the media to correct the record and that such individuals had not assumed the risks involved with private life.²³² Brennan rejected these distinctions. *Sullivan* did not posit the actual malice rule because public officials had “any less interest in protecting [their] reputation than an individual in private life.”²³³ Some public officials had very little, if any, access to media channels above that of a private individual.²³⁴ Additionally, that public officials may have assumed the risk of a defamation charge by entering public service “bears little relationship either to the values protected by the First Amendment or to the nature of our society.”²³⁵ Social life, Brennan said, “exposes all of us to some degree of public view,” and “[v]oluntarily or not, we are all “public” men to some degree.”²³⁶

Instead of breathing space, Brennan wrote, the Court’s holding would promote self-censorship. A negligence standard in private figure libel cases would provide little guidance for the media, leaving them “carefully to weigh a myriad of uncertain factors before publication.”²³⁷ Negligence in the context of the news media was a rudderless concept and would leave them to guess “how a jury might assess the reasonableness of steps taken by it to verify the accuracy” of a report’s representations.²³⁸ Worse yet, juries that are not sympathetic to the news media or to the politics of a particular report may use the negligence standard to exact damages based on the content of the speech rather than the conduct of the publisher.²³⁹

Sullivan avoided all these problems, and, Brennan wrote, the majority’s doubt in requiring judges to decide whether issues were *public* issues was misplaced.²⁴⁰ While the task may not “be easy,” it did not ask judges to perform any duty that was outside of “their traditional functions.”²⁴¹ Judges had already applied *Rosenbloom* without difficulty and, similarly, undertaken the public figure analysis in *Curtis Publishing Co.*, both of which required tackling the question of whether something was a public issue.²⁴² That the “public interest was necessarily broad,” alleviated the chances of ambiguous

230. *Gertz*, 418 U.S. at 362.

231. *Id.*

232. *Id.* at 362-63.

233. *Id.* (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46-47 (1971) (plurality opinion), *abrogated by Gertz*, 418 U.S. 323).

234. *Id.*

235. *Id.* at 364 (Brennan, J., dissenting) (quoting *Rosenbloom*, 403 U.S. at 47 (plurality opinion)).

236. *Gertz*, 418 U.S. at 364 (quoting *Rosenbloom*, 403 U.S. at 48 (plurality opinion)).

237. *Id.* at 365-66.

238. *Id.* at 366.

239. *Id.* at 367.

240. *Id.* at 368-69.

241. *Id.* at 369

242. *Gertz*, 418 U.S. at 369. (Brennan, J., dissenting).

line drawing both for judges and for the news media trying to assess potential liability.²⁴³ Because Gertz failed to show actual malice, Brennan would have affirmed the decision below.²⁴⁴

Last came White's dissenting opinion drawing into question the Court's extension of *Sullivan*.²⁴⁵ For two hundred years, he began, "the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures."²⁴⁶ Traditional rules were lenient: a private citizen need only prove a false and defamatory publication, and general damages were presumed.²⁴⁷ This law had "remained untouched by the First Amendment" until the Court's opinion in *Sullivan*.²⁴⁸ As White saw it, *Gertz* was an unfortunate extension of that case.

By requiring a showing of some level of fault and limiting damages even in cases related to private figures, the Court had just "federalized major aspects of libel laws."²⁴⁹ In doing so, it held "unconstitutional in important respects the prevailing defamation law in all or most of the 50 States."²⁵⁰ While White did not believe the decision was "illegitimate or beyond the bounds of judicial review," he did believe it was "an ill-considered exercise of the power entrusted to this Court," and he worried about the "wholesale" "scuttling" of state libel law and the Court's "deprecating the reputation interest of ordinary citizens."²⁵¹

White split much of the substance of his dissent into two parts. First, he focused on the state of the common law of libel before *Sullivan*. When the Restatement of Torts was published in 1938, it represented the accepted view that "publication in written form of defamatory material . . . subjected the publisher to liability although no special harm to reputation was actually proved."²⁵² The exceptions were limited to truth being a defense and some statements being privileged.²⁵³ But, "[a]t the very least," these rules "allowed the recovery of nominal damages for any defamatory publication actionable *per se* and thus performed 'a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false.'"²⁵⁴

Once liability was shown, damages owed for libel or slander *per se* were either the harm to the reputation as shown by a plaintiff, or when a plaintiff failed to make such a showing, the harm that one could expect from

243. *Id.*

244. *Id.*

245. *Id.* at 369, 377 (White, J., dissenting). Burger also dissented, largely without substance. *Id.* at 354 (Burger, C.J., dissenting).

246. *Id.* at 369-70, 377 (White, J., dissenting).

247. *Gertz*, 418 U.S. at 370 (White, J., dissenting).

248. *Id.* at 370.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 371 (citing RESTATEMENT OF TORTS § 569 (AM. L. INST. 1938)).

253. *Gertz*, 418 U.S. at 371 (White, J., dissenting) (quoting RESTATEMENT OF TORTS § 569 (AM. L. INST. 1938)).

254. *Id.* at 372 (quoting RESTATEMENT OF TORTS § 569 cmt. b (AM. L. INST. 1938)).

such a defamatory charge.²⁵⁵ These general damages for loss of reputation were “the heart of the libel-and-slander-per-se damage scheme.”²⁵⁶ They existed because, at least when it came to cases of *per se* defamation, the law assumed “the content of the publication itself was so likely to cause injury.”²⁵⁷ *Gertz*, however, marked a drastic departure from this system by prohibiting a plaintiff from “rest[ing] his case with proof of a libel defamatory on its face.”²⁵⁸

White believed that these “radical changes in the law” and the “severe invasions of the prerogatives of the States” should “at least be shown to be required by the First Amendment or necessitated by our present circumstances.”²⁵⁹ But the majority showed neither. *Sullivan* and its progeny had “worked major changes in defamation law,” but neither “foreclose[d] in all circumstances recovery by the ordinary citizen on traditional standards of liability, and until today, a majority of the Court had not supported the proposition that, given liability, a court or jury may not award general damages in a reasonable amount without further proof of injury.”²⁶⁰

In the second half of his dissent, White addressed the question of whether the First Amendment required the result in *Gertz*. He began by stating that there was no historical support that the First Amendment limited libel actions in the District of Columbia or U.S. territories.²⁶¹ Moreover, “10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free expression, and 13 of the 14 nevertheless provided for the prosecution of [criminal] libels.”²⁶² Before the Revolution, the common law of libel was adopted in the Colonies.²⁶³ Far from a free press being embraced in early America, he said it was “sharply curtailed.”²⁶⁴

Based on this, White found that there was “[s]cant, if any, evidence . . . that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers.”²⁶⁵ Instead, “the common-law rules that subjected the libeler to responsibility for the private injury” were not “abolished by the protection extended to the press in our constitutions.”²⁶⁶ In fact, the Founders,

255. *Id.*

256. *Id.* at 372-73.

257. *Id.* at 373.

258. *Id.* at 375.

259. *Gertz*, 418 U.S. at 376-77 (White, J., dissenting)

260. *Id.*

261. *See id.* at 380.

262. *Id.*

263. *Id.* at 381 (citing Jerome Lawrence Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 373 (1969)).

264. *Id.*

265. *Gertz*, 418 U.S. at 381 (White, J., dissenting).

266. *Id.* (quoting 2 T.M. COOLEY & WALTER CARRINGTON, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 883 (8th ed. 1927)).

he said, viewed freedom of press as meaning only freedom from prior censorship.²⁶⁷ These views reflected modern scholars', he added.²⁶⁸

White also weaponized the ambiguity of the historical record around the Bill of Rights, asserting that the Bill of Rights was "unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee."²⁶⁹ At best, "Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard."²⁷⁰ Jefferson endorsed James Madison's proposed clause protecting the freedom of speech, but offered instead that the "people shall not be deprived of their right to speak, to write, or *otherwise* to publish anything but false facts affecting injuriously the life, liberty, or reputation of others."²⁷¹

Moreover, the Court had recently reiterated the view "that defamatory utterances were wholly unprotected by the First Amendment."²⁷² In *Near v. Minnesota ex rel. Olson*, the Court wrote "that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions."²⁷³ And, in *Chaplinsky v. New Hampshire*, the Court declared, that libelous speech was one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."²⁷⁴

The *Sullivan* Court, however, "could not accept the generality of this historic view," finding that "the First Amendment was intended to forbid actions for seditious libel and that defamation actions by public officials were therefore not subject to the traditional law of libel."²⁷⁵ *Sullivan*, White argued, "reflected one side of the dispute that raged at the turn of the nineteenth century [over the Sedition Act] and also mirrored the views of some later scholars."²⁷⁶ White then made his dispute with *Gertz* plain, while endorsing *Sullivan*: "[t]he central meaning of [*Sullivan*], and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the

267. *Id.* at 381 (citing LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 247-48 (1960)); Jerome Lawrence Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 376 (1969); John E. Hallen, Comment, *Fair Comment*, 8 TEX. L. REV. 41, 56 (1929); 4 WILLIAM BLACKSTONE, COMMENTARIES *150-53).

268. *Gertz*, 418 U.S. at 381 (White, J., dissenting) (citing ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 21 (1965); Robert A. Leflar, *The Free-ness of Free Speech*, 15 VAND. L. REV. 1073, 1080-81 (1962)).

269. *Id.* at 383.

270. *Id.* (citing Jerome Lawrence Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 377 (1969)).

271. *Id.* at 384 (White, J., dissenting) (quoting FRANK LUTHER MOTT, JEFFERSON & THE PRESS 14 (1943)).

272. *Id.* at 384-85.

273. *Id.* at 385 (quoting *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714 (1931)).

274. *Gertz*, 418 U.S. at 385 (White, J., dissenting) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

275. *Id.* at 386.

276. *Id.* at 386-87 (citing LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 247-48 (1960)).

State.”²⁷⁷ But, White said, neither *Sullivan* “nor its progeny suggest that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted.”²⁷⁸

Philadelphia Newspapers, Inc. v. Hepps. In 1986, the Court considered whether private figure libel plaintiffs had to plead and prove falsity in order to recover.²⁷⁹ There, the *Philadelphia Inquirer* had published several articles suggesting that a chain of stores had ties to the mob and power to influence government officials and proceedings.²⁸⁰ Maurice Hepps, the owner of the chain and a private figure, sued, alleging that the articles defamed him.²⁸¹ The trial court found that Pennsylvania’s statutory scheme, which placed the burden of proving the truth of the disputed statements on the defendant, violated the First Amendment.²⁸² Therefore, the burden to prove falsity lay with the plaintiff.²⁸³ During trial, the trial judge declined to grant a requested jury instruction that the jury could infer a negative inference from the appellants’ failure to disclose sources, and the jury subsequently found for the *Inquirer*.²⁸⁴ The Pennsylvania Supreme Court reversed, concluding that *Gertz* “simply requir[ed] the plaintiff to show fault,” not falsity.²⁸⁵

The U.S. Supreme Court disagreed. Despite the plaintiff being a private figure, the Court found that the Constitution required him to show falsity because the case concerned a matter of public interest. As Justice Sandra Day O’Connor explained for the majority, “We believe that the common law’s rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.”²⁸⁶ The reason? “[P]lacement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result.”²⁸⁷ This “chilling effect,” O’Connor wrote, was “antithetical to the First Amendment’s protection of true speech on matters of public concern.”²⁸⁸

Milkovich v. Lorain Journal Co. In 1990, the Court considered whether the First Amendment shielded statements of opinion from defamation liability.²⁸⁹ The underlying dispute related to a local newspaper editorial about a high school wrestling coach, Michael Milkovich, who argued that he was defamed by an implication in the editorial that he perjured

277. *Id.* (emphasis added).

278. *Id.*

279. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 769 (1986).

280. *Id.*

281. *Id.* at 770.

282. *Id.*

283. *Id.*

284. *Id.* at 770-71.

285. *Hepps*, 475 U.S. at 771.

286. *Id.* at 776.

287. *Id.* at 777.

288. *Id.*

289. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 17 (1990).

himself.²⁹⁰ After a protracted legal battle, the Ohio Supreme Court, in a related case, found that the challenged defamatory statement was a matter of opinion.²⁹¹ As a result, the Ohio court of appeals affirmed judgment for the defendants, and Milkovich sought review by the Supreme Court.²⁹²

The Court granted review “to consider the important questions raised by the Ohio courts’ recognition of a constitutionally required ‘opinion’ exception to the application of its defamation laws.”²⁹³ While the Court declined to adopt some of the broader interpretations of the opinion doctrine developed below in that case (and later reaffirmed on independent state law grounds), it emphasized its holding in *Hepps*: that a defamation plaintiff could only recover if he or she carried his or her burden of proving that the allegedly defamatory statement was a false statement of fact.²⁹⁴ According to the Court, “we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law.”²⁹⁵

Masson v. New Yorker Magazine. At issue in *Masson* was an article written by Janet Malcolm about a schism among intellectuals at the Sigmund Freud Archives.²⁹⁶ Malcom interviewed one professor, Jeffrey Masson, who had had a falling out with the Archives and a fact-checker followed up with Masson after Malcom prepared the article.²⁹⁷ According to Masson, he expressed shock at several errors in the article and, specifically, had questions about certain quotations that Malcom attributed to him.²⁹⁸ After the *New Yorker* published Malcolm’s article and after she later flipped the article into a book, Masson sued for libel, alleging that the misquotations suggested he was a sex-crazed academic.²⁹⁹

After the district court granted summary judgment finding the statements to be substantially true and the Ninth Circuit affirmed, the Supreme Court reversed. It found that “[m]inor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’”³⁰⁰ Put differently, “the statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’”³⁰¹ For that reason, even the deliberate falsification of words in a quotation would not result in a finding of falsity “unless the alteration results in a material change in the meaning conveyed by the statement.”³⁰²

290. *Id.* at 7.

291. *Id.* at 8-9.

292. *Id.* at 9-10.

293. *Id.* at 10.

294. *Id.* at 19.

295. *Milkovich*, 497 U.S. at 19.

296. *See generally* *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496 (1991).

297. *Id.* at 501.

298. *Id.*

299. *Id.* at 502-03.

300. *Id.* at 517.

301. *Id.*

302. *Masson*, 501 U.S. at 517.

The nearly three decades of precedent, from *Sullivan* to *Masson*, establishes firm, constitutional protections for defendants in defamation cases that allow speakers to pursue topics of public concern by lessening the chilling effect of future libel lawsuits. While the States are free to provide additional safeguards through their constitutions, statutes, or common law, the Supreme Court has established minimum requirements that plaintiffs must satisfy before succeeding in defamation lawsuits under the First and Fourteenth Amendments. Nevertheless, we see in this history disagreements in how best to address the conflict between the law of libel and the First Amendment. Some Justices focused on fault, others on other elements of the claim like the “of and concerning” inquiry and falsity, and still others on limitations of damages. As will be shown, our proposal takes the best of these ideas across majority, concurring, and dissenting opinions to address the weaponization of libel lawsuits and continuing threats to *Sullivan*.

IV. THE WEAPONIZATION OF LIBEL LAWSUITS AND THE DRUMBEAT OF THREATS TO *SULLIVAN*

Ten years ago, the law of libel was a sleepy area of the law—not so much today. While judgments about causation are difficult, the recent glut of libel lawsuits filed against news organizations picked up as former President Donald Trump ran for office in 2016. Trump had long resorted to libel lawsuits and threats, including suing an author whose book he said defamed him by describing him as a millionaire rather than a billionaire.³⁰³ While on the campaign trail in February 2016, Trump announced that he would “open up our libel laws.”³⁰⁴ He added, “So when *The New York Times* writes a hit piece which is a total disgrace or when *The Washington Post*, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they’re totally protected.”³⁰⁵

Trump renewed these calls on the eve of the release of Bob Woodward’s book *Fear: Trump in the White House*, complaining that “someone can write an article or book, totally make up stories and form a picture of a person that is literally the exact opposite of the fact, and get away

303. Eriq Gardner, *Donald Trump Loses Libel Lawsuit over Being Called a ‘Millionaire,’* HOLLYWOOD REP. (Sept. 8, 2011, 2:23 PM), <https://www.hollywoodreporter.com/business/business-news/donald-trump-loses-libel-lawsuit-232923> [<https://perma.cc/2AZ6-TXWT>].

304. Daniel Politi, *Donald Trump Vows to Curb Press Freedom Through Harsher Libel Laws*, SLATE (Feb. 27, 2016, 10:24 AM), <https://slate.com/news-and-politics/2016/02/donald-trump-vows-to-curb-press-freedom-through-libel-laws.html> [<https://perma.cc/P3W2-FRXX>].

305. Hadas Gold, *Donald Trump: We’re Going to ‘Open up’ Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866> [<https://perma.cc/5TXE-69BD>].

with it without retribution or cost.”³⁰⁶ Then, in an interview with the *Times*, he said, “We are going to take a strong look at our country’s libel laws so that when somebody says something false and defamatory about someone, that person will have meaningful recourse in our courts.”³⁰⁷ Current libel law, he added, was “a sham and a disgrace and do not represent American values or American fairness.”³⁰⁸

Many were quick to point out that the President has no power to change the law of libel, which is first a feature of state law.³⁰⁹ But his comments appear to have politicized and publicized the law of libel. Throughout his presidency, many, including his own campaign, increasingly resorted to defamation lawsuits and threats. By early 2020, the Trump campaign filed four lawsuits against *The New York Times*, *The Washington Post*, CNN, and an unlucky local Wisconsin television station that ran a political ad attacking Trump’s coronavirus response.³¹⁰ As Neal Katyal and Joshua Geltzer observed in *The Atlantic* after the campaign sued the three national news organizations but before they turned their eye on Northern Wisconsin’s WJFW-TV, “[E]ven if these lawsuits are unlikely to succeed, they can nevertheless do great harm” through self-censorship, especially by “local media outlets—whether newspapers, radio stations, TV news programs, or websites—that already are struggling to stay afloat.”³¹¹

Devin Nunes, the former Congressman, has filed defamation lawsuit after defamation lawsuit against his critics, including the Rachel Maddow Show, *The Washington Post*, Twitter, CNN, *Esquire Magazine*, and a fake cow’s Twitter account.³¹² Among other things, these complaints alleged that defendants had “impugn[ed] [Nunes’] reputation and undermine[d] his

306. Matthew Weaver & Joanna Walters, *Trump Dismisses Bob Woodward’s Book: ‘Lies and Phony Sources,’* GUARDIAN (Sept. 5, 2018, 10:18 AM), <https://www.theguardian.com/us-news/2018/sep/05/donald-trump-dismisses-bob-woodward-book-fear> [<https://perma.cc/SK3B-Y3GV>].

307. Michael M. Grynbaum, *Trump Renews Pledge to ‘Take a Strong Look’ at Libel Laws,* N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html> [<https://perma.cc/86AY-YTHU>].

308. *Id.*

309. *Id.*

310. Joshua A. Geltzer & Neal K. Katyal, *The True Danger of the Trump Campaign’s Defamation Lawsuits,* ATLANTIC (Mar. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/true-danger-trump-campaigns-libel-lawsuits/607753> [<https://perma.cc/2J6X-FRPK>]; Matt Shuham, *Trump Campaign Sues Small Wisconsin TV Station over Critical Super PAC Ad,* TALKING POINTS MEMO (Apr. 13, 2020, 2:45 PM), <https://talkingpointsmemo.com/news/trump-campaign-sues-small-wisconsin-tv-station-over-critical-super-pac-ad> [<https://perma.cc/7AFG-AZXS>].

311. Geltzer & Katyal, *supra* note 310.

312. Katie Irby, *Devin Nunes Sues Washington Post. It’s His 7th Lawsuit in 12 Months,* FRESNO BEE (Mar. 2, 2020), <https://www.fresnobee.com/news/local/article240797241.html> [<https://perma.cc/WCR3-JRLA>].

relationship with the president.”³¹³ Joe Arapaio, the former Maricopa County Sheriff, sued CNN, *Huffington Post*, and *Rolling Stone*, alleging that inaccurate reporting ruined his chances at a 2020 run for Senate.³¹⁴ And before that, he sued the *Times* for the same reasons.³¹⁵ At that time, his lawyer called Michelle Cottle, a *Times* reporter individually named, a “hate-filled reporter” who worked for a “venomous leftist publication.”³¹⁶

In 2017, after the publication of an editorial that some read as implying that Sarah Palin motivated the assassination attempt on Gabby Giffords, Palin sued the *Times*.³¹⁷ Palin argued that the editorial could be read as referring to her (although it did not name her) and further that it defamed her by implying that she had motivated the shooter (she had released a map with stylized cross-hairs over congressional districts).³¹⁸ After the *Times* won a motion to dismiss, the Second Circuit reversed, allowing the case to go into discovery.³¹⁹ At trial, both the judge and the jury sided with the *Times*.³²⁰ The result came after Palin’s testimony seemed less focused on the editorial at issue and more on

313. *Id.*; see also Dominick Mastrangelo, *Nunes Sues MSNBC, Alleging Rachel Maddow Defamed Him*, HILL (Aug. 4, 2021, 8:30 AM), <https://thehill.com/homenews/media/566250-nunes-sues-msnbc-alleging-rachel-maddow-defamed-him> [<https://perma.cc/Y5KW-6JVP>]; Kate Irby, *Devin Nunes’ Lawyer Facing Prospect of Sanctions After Two Recent, Rare Court Warnings*, FRESNO BEE (May 4, 2020), <https://www.fresnobee.com/news/local/article241064301.html> [<https://perma.cc/7RQ6-3PWT>].

314. Eriq Gardner, *CNN, HuffPost and Rolling Stone Beat Joe Arpaio Libel Lawsuit*, HOLLYWOOD REP. (Oct. 31, 2019, 1:13 PM), <https://www.hollywoodreporter.com/thr-esq/cnn-huffpo-rolling-stone-beat-joe-arpaio-libel-lawsuit-1251504> [<https://perma.cc/J2K9-FRPE>].

315. Jamie Ross, *Arpaio Slaps NY Times with Libel Suit over Op-Ed*, COURTHOUSE NEWS SERV. (Oct. 17, 2018), <https://www.courthousenews.com/arpaio-slaps-ny-times-with-libel-suit-over-op-ed> [<https://perma.cc/VJ2G-XBVZ>].

316. *Id.*

317. See, e.g., Marc Tracy, *Sarah Palin’s Defamation Suit Against New York Times Is Reinstated*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/business/sarah-palin-lawsuit-new-york-times.html> [<https://perma.cc/RRC5-785E>].

318. Oliver Darcy, *Why the Sarah Palin v. New York Times Trial Will Be an ‘Excruciating Experience’ for the Paper*, CNN (Feb. 8, 2022, 11:27 AM), <https://www.cnn.com/2022/01/22/media/sarah-palin-new-york-times-trial/index.html> [<https://perma.cc/F4LL-WS92>].

319. *Palin v. New York Times Co.*, 940 F.3d 804 (2d Cir. 2019).

320. Caleb Pershan, *The New York Times Wins Case Against Sarah Palin. Twice.*, COLUM. JOURNALISM REV. (Feb. 15, 2022), <https://www.cjr.org/analysis/the-new-york-times-wins-case-against-sarah-palin-twice.php> [<https://perma.cc/KB6N-SDLG>].

general grievances against the *Times* about the “lies” it published about her.³²¹ We could go on.³²²

Sullivan has also been targeted out of court. In 2022, it was revealed that Florida Governor Ron DeSantis’ office sought to pass a bill that would have made it easier to bring defamation cases. As the *Orlando Sentinel* reported, the bill would have challenged “decades-old First Amendment protections for the news media and [made] it easier for high-profile people to win defamation lawsuits.”³²³ Its goal, a briefing document said, was “to end federal standards established in the *Times* ruling and make defamation purely a matter of state law.”³²⁴ Also in 2022, Kyle Rittenhouse, who became a far-right media darling after he was acquitted on charges relating to the deaths of two people in Wisconsin during unrest in 2020, said he would begin selling a video game to raise “funds to sue the left-wing media organizations for defamation.”³²⁵

The resort to libel lawsuits is not only coming from the right. One prominent example is the decade-long battle by climate scientist Michael Mann against the conservative *National Review* and the Competitive Enterprise Institute, among others.³²⁶ While the lawsuit is technically about a criticism of the bona fides of Mann’s data, it has transformed into something of a Scopes Trial for climate change. As the *National Review* wrote of the

321. David Folkenflik, *Sarah Palin Testifies She Felt Powerless to Fight ‘New York Times’ over Editorial*, NPR (Feb. 10, 2022, 7:00 PM), <https://www.npr.org/2022/02/10/1079861851/nyt-sarah-palin-testifies-defamation-case> [<https://perma.cc/H43Z-LTFM>].

322. See generally, e.g., Ted Johnson, *Judge Tosses Out Project Veritas’ Defamation Lawsuit Against CNN*, DEADLINE (Mar. 18, 2022, 9:31 AM) <https://deadline.com/2022/03/cnn-project-veritas-defamation-lawsuit-1234981852> [<https://perma.cc/5V4R-R7BN>]; Ted Johnson, *Judge Sides with ABC, CBS, New York Times and Other Outlets in Libel Cases Filed by Nick Sandmann over Lincoln Memorial Incident*, DEADLINE (July 27, 2022, 11:47 AM), <https://deadline.com/2022/07/nick-sandmann-loses-libel-suit-new-york-times-1235079085> [<https://perma.cc/Q9UC-QJ5D>]; Eriq Gardner, *Mike Lindell Experiences Rejection in Libel Suit over Hollywood Romance*, HOLLYWOOD REP. (Dec. 10, 2021, 1:14 PM), <https://www.hollywoodreporter.com/news/general-news/mike-lindell-libel-suit-1235061017> [<https://perma.cc/V6Q4-FEB3>]; Michael M. Grynbaum, *Lt. Gov. Justin Fairfax of Virginia Sues CBS for Defamation, Seeking \$400 Million*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/business/media/justin-fairfax-virginia-cbs-defamation.html> [<https://perma.cc/YN78-ZZME>]; Eriq Gardner, *Gizmodo Beats Jason Miller Defamation Lawsuit over “Abortion Pill” Story*, HOLLYWOOD REP. (Aug. 28, 2019, 5:56 AM), <https://www.hollywoodreporter.com/business/business-news/gizmodo-beats-jason-miller-defamation-lawsuit-abortion-pill-story-1235101> [<https://perma.cc/2JYP-B4H7>].

323. Skyler Swisher, *Desantis’ Office Considered a Bill to Target Libel Laws, Records Show*, ORLANDO SENTINEL (May 17, 2022, 6:45 PM), <https://www.orlandosentinel.com/politics/os-ne-libel-law-draft-bill-20220517-ujyksk3uzzb5rl5y4y6puik3ha-story.html> [<https://perma.cc/8JR3-TDWF>].

324. *Id.*

325. Mikhail Klimentov, *Kyle Rittenhouse Announces Video Game to Fund Media Defamation Suits*, WASH. POST (June 23, 2022, 2:20 PM), <https://www.washingtonpost.com/video-games/2022/06/23/kyle-rittenhouse-video-game-defamation/> [<https://perma.cc/74MC-ZX8Y>].

326. Marianne Lavelle, *Nine Years After Filing a Lawsuit, Climate Scientist Michael Mann Wants a Court to Affirm the Truth of His Science*, INSIDE CLIMATE NEWS (Feb. 7, 2021), <https://insideclimatenews.org/news/07022021/michael-mann-defamation-lawsuit-competitive-enterprise-institute-national-review> [<https://perma.cc/734E-9WDJ>].

litigation, “this is not how we should want to settle political or scientific questions in American life.”³²⁷ When the lawsuit reached the Supreme Court on an interlocutory basis, the Court refused to hear it but Justice Samuel Alito dissented, writing, “[R]equiring a free speech claimant to undergo a trial after a ruling that may be constitutionally flawed is no small burden. . . . Those prospects may deter the uninhibited expression of views that would contribute to healthy public debate.”³²⁸

In fact, some of the biggest libel judgments may come against conservative media for their reporting and commentary about the 2020 election and the “big lie.” Dominion Voting Systems sued Fox News and various principals for \$1.6 billion, alleging that its claims that Dominion voting machines were a conduit for election fraud were false and defamatory.³²⁹ Another voting machine company, Smartmatic, also sued Fox News over similar claims for \$2.7 billion.³³⁰ Others, including Rudy Giuliani, Sydney Powell, and My Pillow CEO Mike Lindell were also targeted with libel lawsuits as a result of their crusade against and related commentary about non-existent fraud in the 2020 election.³³¹ Election workers also sued One America News Network for libel after the network alleged they were involved in election fraud—a lawsuit which the network eventually settled.³³²

The rich and powerful, domestic and international, also often sue, hoping to discourage critical speech. Oleg Deripaska, the Russian oligarch, sued the *Associated Press* over reporting he viewed as improperly connecting him to Russian meddling in the 2016 election.³³³ Along the same lines, Russian tech entrepreneur Aleksej Gubarev, to which a passing reference was made in the “Steele Dossier,” sued *BuzzFeed News* over its publication of the

327. *Michael Mann’s Lawsuit Stumbles On*, NAT’L REV. (July 30, 2021, 2:53 PM), <https://www.nationalreview.com/2021/07/michael-manns-lawsuit-stumbles-on> [<https://perma.cc/N83F-8VTF>].

328. *Nat’l Rev., Inc. v. Mann*, 140 S. Ct. 344, 348 (2019).

329. Jan Wolfe, *Trial Date Set in Defamation Suit Against Fox News over U.S. Election Claims*, REUTERS (Apr. 13, 2022, 4:51 PM), <https://www.reuters.com/world/us/trial-date-set-defamation-suit-against-fox-news-over-us-election-claims-2022-04-12> [<https://perma.cc/KQT6-68RG>].

330. Jonah E. Bromwich & Ben Smith, *Fox News Is Sued by Election Technology Company for over \$2.7 Billion*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/business/media/smartmatic-fox-news-lawsuit.html> [<https://perma.cc/WUY4-CKEH>].

331. Ali Swenson, *No Ruling Yet in Dominion Lawsuits Against Powell and Giuliani*, ASSOCIATED PRESS (May 11, 2022), <https://apnews.com/article/fact-check-dominion-lawsuits-giuliani-powell-577808419035> [<https://perma.cc/AD2U-9DMZ>]; Maya Yang, *MyPillow CEO Sued for Defamation by Former Dominion Voting Employee*, GUARDIAN (Apr. 6, 2022, 4:25 PM), <https://www.theguardian.com/us-news/2022/apr/06/mypillow-ceo-mike-lindell-sued-defamation-former-dominion-employee> [<https://perma.cc/9492-HKHX>].

332. Jonathan Allen, *Two Atlanta Poll Workers Settle Defamation Lawsuit Against One America*, REUTERS (Apr. 21, 2022, 8:45 PM), <https://www.reuters.com/world/us/two-atlanta-poll-workers-settle-defamation-lawsuit-against-one-america-2022-04-21> [<https://perma.cc/B8BU-BRS2>].

333. Britain Eakin, *Russian Oligarch Loses Defamation Suit Against AP*, COURTHOUSE NEWS SERV. (Oct. 18, 2017), <https://www.courthousenews.com/russian-oligarch-loses-defamation-suit-ap> [<https://perma.cc/582F-CCKH>]; see generally *Deripaska v. Associated Press*, 282 F. Supp. 3d 133 (D.D.C. 2017).

same document.³³⁴ Russian oligarchs Mikhail Fridman, Petr Aven, and German Khan also filed suit over the dossier, this time against the intelligence firm Fusion GPS and its founder.³³⁵ That lawsuit became untenable after the Russian Federation waged an illegal war on Ukraine and the international community imposed sanctions on Russian businesses and oligarchs.³³⁶

Celebrities are repeat defamation parties too, sometimes bringing suits against the media, other times against each other. Johnny Depp and Amber Heard famously sued each other both in England (where Heard won) and in the United States (where Heard lost in large part).³³⁷ A cave diver who rose to prominence after a youth Thai soccer team became trapped in a cave sued Elon Musk after he called him the “pedo guy.”³³⁸ Dr. Luke sued Kesha after she made allegations of sexual assault against him.³³⁹

Often, though, the media was the defendant when it came to celebrity #MeToo allegations. *BuzzFeed News* caught a lawsuit (in Ireland, likely to avoid U.S. law like *Sullivan*) after Tony Robbins, the famed self-help guru, took umbrage at the news outlet’s reporting on alleged sexual misconduct.³⁴⁰ Roy Moore sued Sacha Baron Cohen and Showtime after he appeared in a spoof skit that touched on sexual misconduct allegations against Moore—a spoof that included, according to the Second Circuit, “the obviously farcical pedophile-detecting ‘device,’ which no reasonable person could believe to be an actual, functioning piece of technology.”³⁴¹

Academics sue too. In 2020, Lawrence Lessig, the well-known liberal Harvard professor and former presidential candidate, sued the *Times* over a disagreement as to the import of a blog post he wrote regarding Jeffrey

334. Jaelyn Peiser, *BuzzFeed Wins Defamation Lawsuit Filed by Executive Named in Trump Dossier*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/business/media/buzzfeed-dossier-lawsuit-trump-steele-russia.html> [<https://perma.cc/C86H-NMTK>].

335. Eric Tucker, *Oligarchs Drop Defamation Lawsuit over Trump-Russia Dossier*, ABC NEWS (Mar. 18, 2022, 5:17 PM), <https://abcnews.go.com/Politics/wireStory/oligarchs-drop-defamation-lawsuit-trump-russia-dossier-83536037> [<https://perma.cc/YSU9-KAHK>].

336. *Id.*

337. Jeremy W. Peters, *Depp Trial Exposes Risks to Media in Airing #MeToo Accusations*, N.Y. TIMES (June 3, 2022), <https://www.nytimes.com/2022/06/03/business/media/depp-heard-journalism-metoo.html> [<https://perma.cc/F9P2-HEEW>].

338. *Elon Musk Wins Defamation Case over ‘Pedo Guy’ Tweet About Caver*, BBC (Dec. 6, 2019), <https://www.bbc.com/news/world-us-canada-50695593> [<https://perma.cc/A6K3-G28T>].

339. Althea Legaspi, *Kesha Loses in Appeal of Dr. Luke Defamation Ruling*, ROLLING STONE (Apr. 22, 2021), <https://www.rollingstone.com/music/music-news/dr-luke-scores-big-win-kesha-defamation-dispute-949226> [<https://perma.cc/E92H-E46F>].

340. Tamar Lapin, *Tony Robbins Sues BuzzFeed for Defamation over Sexual Misconduct Reports*, N.Y. POST (Nov. 26, 2019, 8:44 PM), <https://nypost.com/2019/11/26/tony-robbins-sues-buzzfeed-for-defamation-over-sexual-misconduct-reports> [<https://perma.cc/6944-M8DU>].

341. *Moore v. Baron Cohen*, No. 21-1702-CV, 2022 WL 2525722, at *3 (2d Cir. July 7, 2022).

Epstein's donations to academic institutions.³⁴² Carlo Croce, a cancer researcher who has had several articles retracted, sued another academic and the *Times* over statements published by the *Times*.³⁴³ Alan Dershowitz, the Harvard Law School emeritus professor, sued Netflix and CNN, as he lamented being "canceled" after becoming one of Trump's chief legal defenders.³⁴⁴ Another Harvard Law professor sued *New York Magazine* after it published a devastating profile about how he was apparently conned by two individuals.³⁴⁵ One New York University professor even sued his colleagues "after they complained to administrators about his encouraging students to question whether masks actually prevent COVID-19 from spreading."³⁴⁶

Even criminal libel law is showing a resurgence. In 2022, a federal judge halted an investigation into a political ad by the North Carolina Attorney General initiated by a political opponent.³⁴⁷ That same year, police arrested a critic of a local police department for criminal libel, but the investigation was abandoned and a federal court later let a federal lawsuit brought by the critic go forward.³⁴⁸ Stories like these are easy to find. In 2019, New Hampshire police arrested a Facebook warrior critical of the police.³⁴⁹ The same year, a police officer had his ex-wife arrested under Georgia's

342. See Jasper G. Goodman, *Harvard Law School Professor Lawrence Lessig Sues the New York Times for Defamation*, HARV. CRIMSON (Jan. 16, 2020), <https://www.thecrimson.com/article/2020/1/16/lessig-nyt-lawsuit> [<https://perma.cc/EU32-8XHA>].

343. Richard Van Noorden, *Exclusive: Investigators Found Plagiarism and Data Falsification in Work from Prominent Cancer Lab*, NATURE (July 20, 2022), <https://www.nature.com/articles/d41586-022-02002-5> [<https://perma.cc/5K6K-UNFC>].

344. Winston Cho, *Netflix, Alan Dershowitz Drop Claims over Jeffrey Epstein Docuseries*, HOLLYWOOD REP. (Mar. 23, 2022, 2:02 PM), <https://www.hollywoodreporter.com/business/business-news/netflix-alan-dershowitz-drop-claims-over-jeffrey-epstein-docuseries-1235117657> [<https://perma.cc/QBR9-QEWA>]; Eriq Gardner, *CNN Can't Dodge Alan Dershowitz Libel Suit*, HOLLYWOOD REP. (May 25, 2021, 12:58 PM), <https://www.hollywoodreporter.com/tv/tv-news/cnn-cant-dodge-alan-dershowitz-libel-suit-1234958859> [<https://perma.cc/R3WH-6JZT>].

345. See Debra Cassens Weiss, *Harvard Law Prof Claims Reporter Sexually Harassed Him, Twisted Facts in 'Gullible Man' Story*, A.B.A. J. (Aug. 11, 2020, 1:51 PM), <https://www.abajournal.com/news/article/harvard-law-prof-claims-reporter-sexually-harassed-him-twisted-facts-in-gullible-man-story> [<https://perma.cc/U5L6-N629>].

346. Noah Manskar, *NYU Professor Sues Colleagues amid COVID-19 Mask Controversy*, N.Y. POST (Dec. 2, 2020, 4:24 PM), <https://nypost.com/2020/12/02/nyu-prof-mark-crispin-miller-sues-colleagues-amid-mask-flap> [<https://perma.cc/H5BQ-VRXM>].

347. Elura Nanos, *Federal Judge Blocks Criminal Libel Investigation of N.C. AG's Campaign Ad, Agrees Law Likely Violates First Amendment*, LAW & CRIME (July 26, 2022, 1:15 PM), <https://lawandcrime.com/first-amendment/federal-judge-blocks-criminal-libel-investigation-of-n-c-ags-campaign-ad-agrees-law-likely-violates-first-amendment> [<https://perma.cc/3N7R-6UTN>].

348. Eugene Volokh, *Criminal Libel Arrest for Criticism of Police Officer Was Unconstitutional*, REASON (May 14, 2022, 11:30 AM), <https://reason.com/volokh/2022/05/14/criminal-libel-arrest-for-criticism-of-police-officer-was-unconstitutional> [<https://perma.cc/ENB6-6XCZ>].

349. Adam Liptak, *He Disparaged the Police on Facebook. So They Arrested Him*, N.Y. TIMES (Jan. 7, 2019), <https://www.nytimes.com/2019/01/07/us/politics/criminal-libel-laws-lawsuit.html> [<https://perma.cc/W7D2-FBDE>].

criminal libel law after she criticized his parenting on Facebook.³⁵⁰ As the journalist covering the case observed, criminal libel laws today “are almost always used by government employees to silence critics.”³⁵¹ And in 2022, Washington State adopted a new statute that allows judges to issue orders of protection that “effectively criminalize[s] future libels” and acts as a “mini-criminal-libel law.”³⁵²

This is not the first time the United States has found itself “in the midst of a rejuvenation of the law of libel.”³⁵³ Recognizing the scope of the problem in the 1980s, Professor Rodney Smolla explained that “defendants span a spectrum of size, wealth, power, and respectability, ranging from the mainstream orthodoxy of the national-news giants, to local news outlets, to the more sensational press.”³⁵⁴ Potential plaintiffs were similarly varied, including President Jimmy Carter who obtained an apology from the *Washington Post* after it published a column suggesting that the Carter Administration had bugged the Blair House, where incoming President Ronald Reagan was staying.³⁵⁵ Many of these plaintiffs had also “previously profited from media attention” and included people “deeply involved in the political process,” as well as entertainers and writers, among others.³⁵⁶

Writing in the same decade, Professor Richard Epstein questioned whether *Sullivan* had really solved anything and called the law of libel “more controversial today” than it was during the 1970s.³⁵⁷ He added, “It is a commonplace observation that the concern, not to say anxiety, about the threat that defamation actions hold out to freedom of speech and the press has grown mightily, especially in the last decade.”³⁵⁸ Had *Sullivan* been right, one would have expected defamation lawsuits to recede. The trend, however, was “the reverse, for without question the law of defamation is far more controversial today than it was a decade ago, even though there has been little significant change in the framework of the substantive law.”³⁵⁹

Anthony Lewis sensed something afoot too. “Although [the U.S. press] is the freest in the world, and freer now than it ever has been, it often cries

350. Tim Cushing, *Georgia Woman Takes Home \$100,000 Settlement After Bogus Criminal Defamation Arrest By Her Ex-Husband (and Current Deputy)*, TECHDIRT (Oct. 30, 2019, 3:23 AM), <https://www.techdirt.com/2019/10/30/georgia-woman-takes-home-100000-settlement-after-bogus-criminal-defamation-arrest-her-ex-husband-current-deputy/> [<https://perma.cc/99C3-LE2R>].

351. *Id.*

352. Eugene Volokh, *Criminal Libel Law, Partly Coming Back in Washington State in Harassment Order Cases*, REASON (June 20, 2022, 12:01 PM), <https://reason.com/volokh/2022/06/20/criminal-libel-law-partly-coming-back-in-washington-state-in-harassment-order-cases/> [<https://perma.cc/AY3J-PNXX>].

353. Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1 (1983).

354. *Id.* at 2.

355. *Id.* at 2-3.

356. *Id.* at 2.

357. Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 783 (1986).

358. *Id.*

359. *Id.*

that doom is at hand,” he wrote in 1983.³⁶⁰ While he was skeptical of claims by the press, he said that he “must admit that there is something to the concern.”³⁶¹ Libel, he wrote in advocating that the First Amendment should be reinterpreted as banning libel lawsuits brought against “critics of official conduct,” “is not the only form of litigation afflicted in this country today by endless discovery, high costs, extravagant jury verdicts.”³⁶² Still, he argued, it did “not follow that the critics of official conduct must wait for general reforms in our law to get relief from burdens that induce self-censorship.”³⁶³ Instead, he urged the Court to act to “find a new remedy.”³⁶⁴

Many of the same concerns felt in the 1980s are felt today. Libel is now, as it was then, one of the most controversial corners of the law. And, just as in the 1980s, *Sullivan* has not stemmed the rising tide of the suits, nor the rising costs of that litigation. As the Media Law Resource Center observed in the most comprehensive report on *Sullivan* to date, “After a slowdown in the late 2000s and early 2010s, there seems to have been a resurgence” in libel lawsuits “in more recent years after the political climate grew hot during the Trump era.”³⁶⁵ This is not to say that *Sullivan* was wrong, although it might raise the question of whether it went far enough. Despite the glut of libel lawsuits (or because of it), Lee Levine, one of the country’s preeminent First Amendment lawyers, said that *Sullivan* remained “a ‘landmark’ decision that has indeed ‘shaped our history’ and defined us as a nation.”³⁶⁶

The weaponization of libel lawsuits is particularly concerning amidst the increasing drumbeat of calls for the Supreme Court to revisit *Sullivan*. The demands to reconsider the actual malice standard intensified in February 2019, when Justice Clarence Thomas wrote a concurrence to a certiorari denial in *McKee v. Cosby*, a defamation case. Although Thomas agreed with his colleagues that the Supreme Court should not review the “factbound question” of whether the plaintiff was properly classified as a limited-purpose public figure, he wrote that it “should reconsider the precedents that require courts to ask it in the first place.”³⁶⁷

Thomas argued that *Sullivan* and its progeny “were policy-driven decisions masquerading as constitutional law” and that the First Amendment, when it was drafted, was not understood to require actual malice in defamation cases.³⁶⁸ Thomas’s concurrence suggested not only that *Sullivan* should be revisited, but that the First Amendment does not provide any protection to libel defendants. “Historical practice further suggests that

360. Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to ‘the Central Meaning of the First Amendment,’* 84 COLUM. L. REV. 603, 603 (1983).

361. *Id.*

362. *Id.* at 621, 624.

363. *Id.* at 624.

364. *Id.*

365. *Introduction to MEDIA L. RES. CTR., NEW YORK TIMES V. SULLIVAN: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT 1, 7* (2022), <https://live-medialaw.pantheonsite.io/wp-content/uploads/2022/03/nytsullivanwhitepaper-1.pdf> [<https://perma.cc/47JV-LELG>].

366. *Id.*

367. *McKee v. Cosby*, 139 S. Ct. 675, 675-76 (2019) (Thomas, J., concurring in denial of certiorari).

368. *Id.* at 676

protections for free speech and a free press—whether embodied in state constitutions, the First Amendment, or the Fourteenth Amendment—did not abrogate the common law of libel,” he wrote.³⁶⁹ Yet even under his originalist framework, Thomas ignored more than a century of common law protections from libel lawsuits.³⁷⁰

Two years later, in a dissent from the denial of certiorari in *Berisha v. Lawson*, Thomas once again argued that the Court should revisit *Sullivan*.³⁷¹ He focused not only on what he believed was the lack of historical support for the actual malice rule, but also on the modern, practical impacts of constitutional protections for defamation defendants.³⁷² Among the cases that Thomas cited was an online conspiracy theory in 2016 that alleged Democrats had operated a child sex trafficking ring at a Washington, D.C. pizza restaurant, causing an armed gunman to visit the shop.³⁷³ “Our reconsideration is all the more needed because of the doctrine’s real-world effects,” Thomas wrote. “Public figure or private, lies impose real harm.”³⁷⁴

Yet Thomas failed to explain how eliminating the actual malice rule would meaningfully reduce the proliferation of conspiracies such as PizzaGate, which were distributed by scores of often anonymous online bulletin board posters. The subjects of the pizza conspiracy included Hillary Clinton and her campaign chair, John Podesta, and it is questionable whether they would have the interest in suing anonymous online posters and drawing even more attention to their ridiculous claims.³⁷⁵

In *Berisha*, Thomas was not alone in his calls to rethink *Sullivan*. Justice Neil Gorsuch questioned whether *Sullivan* has led to less responsible journalism. “It seems that publishing without investigation, fact-checking, or editing has become the optimal legal strategy,” Gorsuch wrote. “Under the actual malice regime as it has evolved, ‘ignorance is bliss.’ Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most

369. *Id.* at 681.

370. See Matthew L. Schafer, *A Response to Justice Thomas*, in *NEW YORK TIMES V. SULLIVAN: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT* 9, 77-78 (2022), <https://live-medialaw.pantheonsite.io/wp-content/uploads/2022/03/nytsullivanwhitepaper-1.pdf> [<https://perma.cc/47JV-LELG>] (“On the contrary, history amply supports what the Court did in *Sullivan*. Far from being out of step with history, *Sullivan* is the obvious next step in what was then more than 150 years of tussling between libel and freedom of the press. Republicanism, freedom of the press, actual malice, the role of public officials and public figures – it is all in these dusty pages. It was all there long before L.B. Sullivan sued the *New York Times*.”).

371. See generally *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting from denial of certiorari). By way of disclosure, one of the article authors, Matthew Schafer, was in-house counsel to Simon & Schuster in the case.

372. *Id.* at 2425.

373. *Id.*

374. *Id.*

375. Gregor Aisch, Jon Huang, & Cecilia Kang, *Dissecting the #PizzaGate Conspiracy Theories*, *N.Y. TIMES* (Dec. 10, 2016), <https://www.nytimes.com/interactive/2016/12/10/business/media/pizzagate.html> [<https://perma.cc/ZC2F-M9QD>].

sensational information as efficiently as possible without any particular concern for truth.”³⁷⁶ These claims, though, lacked evidentiary basis and failed to establish a connection between *Sullivan* and the lack of rigorous journalism. As Levine wrote of the law review article on which Gorsuch based his dissent, it “reads (to paraphrase then-Justice Rehnquist) ‘much like a treatise about cooking by someone who has never cooked before, and has no intention of starting now.’”³⁷⁷

Finally, Thomas once again called for the reconsideration of *Sullivan* in a June 2022 denial of certiorari in *Coral Ridge Ministries Media v. Southern Poverty Law Center*.³⁷⁸ Curiously, while the case was rescheduled for consideration for many weeks, Thomas wrote alone, largely regurgitating prior arguments in a short opinion.³⁷⁹ No other Justice wrote, raising the question of whether another Justice was writing something that he or she ultimately decided not to publish.

Some lower court judges have echoed the calls of Thomas and Gorsuch, including judges on the Florida Court of Appeals³⁸⁰ and Michigan Court of Appeals.³⁸¹ Among the most vociferous criticisms of *Sullivan* came from D.C. Circuit Judge Laurence Silberman. In a 2021 partial dissent, Silberman urged the Supreme Court to overturn *Sullivan*.³⁸² Rather than focusing only on an originalist critique or the harms of online conspiracy theories, Silberman linked *Sullivan* with what he viewed as the liberal bias of the media and technology companies. “The First Amendment guarantees a free press to foster a vibrant trade in ideas,” Silberman wrote. “But a biased press can distort the marketplace. And when the media has proven its willingness—if not eagerness—to so distort, it is a profound mistake to stand by unjustified legal rules that serve only to enhance the press’ power.”³⁸³

While recent criticisms have come mainly from conservative judges, liberals are not entirely happy with *Sullivan* either. In 1993, when she was a law professor at the University of Chicago, Justice Elena Kagan wrote a book review in which she highlighted both successes and weaknesses of the landmark case.³⁸⁴ “The obvious dark side of the *Sullivan* standard is that it

376. *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari) (internal citations omitted).

377. Lee Levine, *Afterward to MEDIA L. RES. CTR., NEW YORK TIMES V. SULLIVAN: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT* 193, 194 (2022) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 269 (1986) (Rehnquist, J., dissenting)), <https://live-medialaw.pantheonsite.io/wp-content/uploads/2022/03/nytsullivanwhitepaper-1.pdf> [<https://perma.cc/47JV-LELG>].

378. *See generally* *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453 (2022) (Thomas, J., dissenting from denial of certiorari).

379. Schafer, *supra* note 52, at 86.

380. *Mastandrea v. Snow*, 333 So. 3d 326, 328 (Fla. Dist. Ct. App. 2022) (Thomas, J., concurring).

381. *Reighard v. ESPN, Inc.*, No. 355053, 2022 WL 1513112, at *19 (Mich. Ct. App. May 12, 2022) (Boonstra, P.J., concurring).

382. *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231, 243 (D.C. Cir.) (Silberman, J., dissenting in part), *cert. denied*, 211 L. Ed. 2d 252, 142 S. Ct. 427 (2021).

383. *Id.* at 256.

384. *See generally* Kagan, *supra* note 11.

allows grievous reputational injury to occur without monetary compensation or without any other effective remedy,” Kagan wrote.³⁸⁵

Perhaps Kagan has changed her mind nearly three decades later, and none of the other Justices will join the calls of Thomas and Gorsuch to revisit *Sullivan*. But as seen in June 2022, when the Supreme Court overturned *Roe v. Wade*, even the most fundamental constitutional liberties are at risk of being overturned at the whim of five justices who disagree with the precedent.³⁸⁶ Even if Thomas and Gorsuch do not currently have three other votes to overturn *Sullivan*, there is no guarantee that this will always be the case. Nor is there any guarantee that they will be unable to marshal two more votes to at least force reconsideration of *Sullivan*—even if they are ultimately unsuccessful in overturning it.

Rather than stand by and watch decades of vital First Amendment precedent suddenly disappear one day in June, Congress can take steps now to codify *Sullivan* and its progeny and, where necessary, strengthen them to stem the rising tide of politically-motivated defamation lawsuits. It could do so as a matter of federal statutory law by preempting state laws that are inconsistent with the principles laid out in those decisions. As such, we next discuss preemption law as it relates to defamation and then propose our statutory language to address threats to *Sullivan*.

V. PREEMPTION AND DEFAMATION

Although state common law and statutes govern the substantive standards of defamation litigation, federal statutes could partly or entirely preempt state defamation rules,³⁸⁷ just as the Supreme Court’s interpretation of the First Amendment has shaped the contours of state defamation law over the past half century. In other words, Congress could set the minimum protections for defendants in defamation lawsuits. By doing so, it can insulate the press and the public from wild swings in the law of libel should *Sullivan* be overruled, including, especially, the partisan weaponization of libel to punish disfavored speakers.

We recognize that preemption of state common law is a heavy-handed step that requires precise statutory drafting. As the Supreme Court wrote, “because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action.”³⁸⁸ Still, our approach is not without precedent. For years, going back at least to the late nineteenth century, commentators have argued for a

385. *Id.* at 205.

386. *Dobbs v. Jackson Women’s Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

387. See generally JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A PRIMER (2019).

388. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

national libel law.³⁸⁹ The idea remains popular today, with some arguing for a national libel law based on the Restatement.³⁹⁰ Other proposals, including a 1980s “study bill” from then-Congressman Chuck Schumer, have sought more limited reforms by, for example, substituting money damages for declaratory relief.³⁹¹ Ultimately, Schumer’s bill was left to die on the vine.

Our proposal occupies the middle ground. In making it, we look to somewhat recent history. Indeed, were our proposal adopted, it would not be the first time that Congress has sought to preempt state defamation law. Section 230 of the Communications Decency Act, passed as part of the Telecommunications Act of 1996, has preempted many defamation lawsuits against online service providers by partly preempting the common law libel doctrine of republication.³⁹² The preemption provision of the Freedom of Speech and Press Act is based on Section 230’s preemption section.

Congress passed Section 230 in response to concerns over an interpretation of the common law defamation rules in New York, as applied to commercial online services.³⁹³ In 1991, a New York federal judge granted summary judgment for CompuServe in a libel case, reasoning that like newsstands, bookstores, and other distributors, it was liable only if it knew or had reason to know of the defamatory content.³⁹⁴ “CompuServe has no more editorial control over such a publication than does a public library, book store [sic], or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so,” the judge wrote.³⁹⁵

But in 1995, a New York state court refused to apply the same “distributor” liability standard to Prodigy in a defamation lawsuit seeking \$200 million in damages arising from a user’s post on a financial discussion board.³⁹⁶ Because Prodigy’s moderation practices were more extensive than those of CompuServe, the judge ruled, it exercised sufficient “editorial control” to face the same liability for all user content as the subscribers who posted it.³⁹⁷ “Prodigy’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice,” the judge wrote.³⁹⁸

389. Walter Williams, President, Nat’l Ed. Assoc., Annual Address Before the Tenth Convention of the National Editorial Association (July 2, 1894), in 1 *THE FIRST DECENNIUM OF THE NATIONAL EDITORIAL ASSOCIATION OF THE UNITED STATES* 534, 544 (B.B. Herbert ed., 1896) (“The movement for a national libel law merits consideration. Such a law, rightly framed, would not only close Federal courts to many vexatious suits, but would form the basis for State legislation of a like character.”).

390. Alexandra M. Gutierrez, Comment, *The Case for a Federal Defamation Regime*, 131 *YALE L.J.F.* 19, 44-47 (2021) (discussing preemption).

391. H.R. 2846, 99th Cong. (1985).

392. See JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET*, 4 (2019).

393. *Id.*

394. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

395. *Id.* at 140.

396. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *2 (N.Y. Sup. Ct. May 24, 1995).

397. *Id.* at *13.

398. *Id.*

The two New York rulings meant that online service providers could reduce their potential liability for user content by taking a hands-off approach to moderation. This was of particular concern in 1995, as internet connections began to proliferate in homes, schools, and libraries, and legislators and media outlets panicked over the possibility of children accessing pornography on computers.³⁹⁹ Why have a rule that discourages online services from blocking inappropriate content?

Two congressmen quickly came up with a solution. Within weeks of the ruling against Prodigy, Chris Cox and Ron Wyden introduced the Internet Freedom and Family Empowerment Act, which would later be known as Section 230.⁴⁰⁰ During the brief floor discussion of the proposal in 1995, Cox said that “the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.”⁴⁰¹ Much of the discussion on the House floor focused on the need for companies to provide users with tools to block harmful content and the dangers of the government stepping in to censor. As introduced, Section 230(d) of the bill stated that the Federal Communications Commission has no authority “with respect to economic or content regulation of the Internet or other interactive computer services.”⁴⁰²

Section 230(c)(1), which received little discussion at the time, states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁴⁰³ These twenty-six words eliminate the quirk in the common law that caused the New York court to classify Prodigy as a “publisher” because it exercised too much “editorial control.” Under Section 230, a platform is not treated as a publisher of third-party content regardless of whether and how it moderates content.⁴⁰⁴

As Cox and Wyden first introduced the bill, it did not address the extent to which it preempts state law. In August 1995, the House attached Section 230 to its version of a massive overhaul of U.S. telecommunications law.⁴⁰⁵ In its version of the telecommunications bill, the Senate tried to address minors’ access to online pornography in a very different way: its Communications Decency Act imposed criminal penalties for the transmission of indecent material.⁴⁰⁶

399. See KOSSEFF, *supra* note 401, at 61-62.

400. *Id.* at 64.

401. 104 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox).

402. H.R. 1978 (104th Cong.).

403. 47 U.S.C. § 230(c)(1). The statute also prevents interactive computer service providers and users from being liable for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected,” and providing the technical means to do so. 47 U.S.C. § 230(c)(2).

404. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.”).

405. See Kosseff, *supra* note 401 at 70.

406. *Id.* at 57-78.

In the conference committee, both Section 230 and the Communications Decency Act were merged into the same section of the final telecommunications law.⁴⁰⁷ But Section 230 underwent some last-minute changes in the conference committee. Most of the changes were minor, but the conferees deleted the restrictions on the FCC's authority (perhaps to avoid conflict with the Senate's indecency provisions).⁴⁰⁸ The conferees added another sentence, in Section 230(e)(3), that has proven to be key to preemption of defamation and other state claims: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."⁴⁰⁹ That sentence was added directly after a line that had been in the earlier version: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section."⁴¹⁰ The deletion of the FCC provision and the addition of the preemption language made clear that Section 230 was not merely about anti-regulation, but that it was intended to limit litigation against platforms arising from user-generated content.

The scope of Section 230's preemptive effect became clear throughout 1996 and 1997, as *Zeran v. America Online* was litigated. *Zeran* arose from hoax AOL bulletin board posts from an anonymous user, purporting to sell t-shirts with crude jokes about the recent Oklahoma City bombing.⁴¹¹ The posts included the plaintiff's first name and phone number. Despite the plaintiff's repeated calls to AOL to inform them that he had nothing to do with the posts, the company failed to prevent additional posts.⁴¹² The plaintiff sued AOL for negligently distributing defamatory posts.⁴¹³

Zeran was the first federal district and appellate court interpretation of Section 230 and is best known for broadly interpreting Section 230(c)(1) to preclude not only publisher liability but also distributor liability (which is imposed if the defendant knows or has reason to know of the content at issue). In other words, even if an online platform receives a complaint about defamatory or otherwise harmful user content and fails to remove it, the platform still is not liable for that content.⁴¹⁴

The other important—though less obvious—holding of *Zeran* is the preemptive effect of Section 230 on state laws.⁴¹⁵ When District Court Judge T.S. Ellis granted summary judgment for AOL in March 1997, he engaged in an extensive analysis that ultimately concluded that Section 230(e)(3) preempted state tort claims, including negligence.

407. Jeff Kosseff, *What's in a Name? Quite a Bit, if You're Talking About Section 230*, LAWFARE (Dec. 19, 2019, 1:28 PM), <https://www.lawfareblog.com/whats-name-quite-bit-if-youre-talking-about-section-230> [<https://perma.cc/RTN5-GLWD>].

408. *Id.*

409. 47 U.S.C. § 230(e)(3).

410. *Id.*

411. *Zeran*, 129 F.3d at 329.

412. *Id.*

413. *Id.*

414. *Id.* at 330.

415. *Id.* at 334.

Preemption takes two forms: express or implied.⁴¹⁶ Ellis first determined that Section 230 did not expressly preempt all state tort claims. To arrive at that conclusion, Ellis pointed to the express preemption provision of the Employee Retirement Income Security Act, which states that “provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title,” and defines “state law” as “all laws, decision, rules, regulations, or other State action having the effect of law, of any State.”⁴¹⁷ ERISA’s preemption provision excludes certain categories of state laws, such as banking, which Ellis took to mean that ERISA “explicitly defines the extent to which Congress intended federal preemption of state law.”⁴¹⁸

In contrast, all of Section 230(e)(3), Ellis noted, states: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”⁴¹⁹ The two sentences read together, he wrote, “reflects Congress’ clear and unambiguous intent to retain state law remedies except in the event of a conflict between those remedies and the CDA.”⁴²⁰

Because Section 230 did not expressly preempt state law claims, the statute would block Zeran’s claims only if Ellis found “field” or “conflict” preemption.⁴²¹ Field preemption “occurs when federal law occupies a ‘field’ of regulation ‘so comprehensively that it has left no room for supplementary state legislation.’”⁴²² Ellis concluded that, by passing Section 230, Congress had no intention to occupy the entire field of internet regulation, “but rather to eliminate obstacles to the private development of blocking and filtering technologies capable of restricting inappropriate online content.”⁴²³

Conflict preemption occurs when “Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.”⁴²⁴ Ellis found that Section 230 preempted Zeran’s claim against AOL because it conflicted with Section 230.⁴²⁵ Because he concluded that distributor liability is a type of publisher liability, Ellis reasoned that “Zeran’s attempt to impose distributor liability on AOL is, in effect, an attempt to have AOL treated as the publisher of the defamatory material. This treatment is contrary to §

416. See SYKES & VANATKO, *supra* note 396, at 2.

417. *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1130 (E.D. Va. 1997) (quoting 29 U.S.C. § 1144(c)(1)), *aff’d*, 129 F.3d 327 (4th Cir. 1997).

418. *Id.*

419. 47 U.S.C. § 230(e)(3).

420. *Zeran*, 958 F. Supp. at 1131.

421. *Id.*; *Murphy v. NCAA*, 138 S. Ct. 1461, 1479-80 (2018).

422. *Id.* at 1480 (quoting *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 140 (1986)).

423. *Zeran*, 958 F. Supp. at 1131.

424. *Murphy*, 138 S. Ct. at 1480.

425. *Zeran*, 958 F. Supp. at 1132.

230(c)(1) of the CDA and, thus, Zeran's claim for negligent distribution of the notice is preempted."⁴²⁶

Alternatively, Ellis also concluded that Section 230 preempted Zeran's tort claim because it conflicted with Section 230's purposes "to encourage the development of technologies, procedures and techniques by which objectionable material could be blocked or deleted either by the interactive computer service provider itself or by the families and schools receiving information via the Internet."⁴²⁷

The Fourth Circuit's affirmance of Judge Ellis gave less attention to the doctrine of preemption, writing that "Congress' command is explicitly stated. Its exercise of its commerce power is clear and counteracts the caution counseled by the interpretive canon favoring retention of common law principles."⁴²⁸ While the Fourth Circuit did not elaborate on this conclusion, it at least suggested that the court views Section 230(e)(3) as an express preemption provision.

Since then, courts have generally accepted that Section 230 preempts state common law and statutory claims, but they rarely delve deeply into preemption doctrine. In 2001, one of the first Section 230 cases after *Zeran*, the Florida Supreme Court, in ruling that Section 230 preempted a different negligence lawsuit against AOL, adopted the *Zeran* district court's reasoning that conflict preemption applied.⁴²⁹ And in 2013, a federal judge in Tennessee concluded that Section 230 triggered both express preemption and conflict preemption.⁴³⁰ While courts and commentators often disagree about whether Section 230 applies to particular types of claims, the disputes typically focus on whether the online platform materially contributed to the content at issue,⁴³¹ or whether the claim actually treats the platform as a publisher or speaker of third-party content.⁴³² There is no disagreement, however, about whether Section 230 can preempt state law.

In short, Section 230's history over the past quarter century instructs us that Congress has great leeway to preempt state defamation claims. Congress has the power, as granted in the Supremacy Clause and interstate Commerce Clause, to abrogate the ability of state courts to impose consequences for allegedly defamatory statements. To be sure, Congress's power is not absolute; it would impose these limits on defamation cases under the Commerce Clause. Theoretically, Congress might have trouble preempting a purely intrastate defamation claim. But to the extent that an allegedly libelous statement is circulated across state lines via the internet or any other medium,

426. *Id.* at 1133.

427. *Id.* at 1134.

428. *Zeran*, 129 F.3d at 334.

429. *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1016 (Fla. 2001).

430. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 823-24 (M.D. Tenn. 2013).

431. *See, e.g., Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc).

432. *See, e.g., Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1087 (9th Cir. 2021).

there is a very strong argument that any resulting dispute affects interstate commerce and is subject to congressional regulation.⁴³³

VI. THE FREEDOM OF SPEECH AND PRESS ACT

Now that we have reviewed the history of *Sullivan* and the Court's subsequent cases, as well as the rising tide of defamation lawsuits and how Congress might use its Commerce Clause powers to preempt libel law, we can propose an appropriate statutory fix to insulate the principles that *Sullivan* sought to protect. Alexander Meiklejohn's belief that speech and press protections are necessary for self-governance set the stage for *Sullivan*. The need for democracy-promoting speech safeguards has not dissipated in the past half-century. If anything, the rising tide of authoritarianism makes these protections more vital than ever. If the Supreme Court were to overturn *Sullivan*, it would be all the more difficult for the media and other speakers to investigate and criticize those in power.

Our proposal uses preemption to codify not only *Sullivan*'s protections, but the subsequent Supreme Court opinions that built on *Sullivan*. If the Supreme Court overturns *Sullivan*, the fate of these other precedents also is at stake, as they rely heavily on the 1964 opinion. The proposal, thus, recognizes that, were Congress to move to protect *Sullivan*, Congress should also take the opportunity to expand the protections that *Sullivan* and its progeny provide by incorporating other limitations that individual justices have advocated for in those cases—even if they ultimately did not obtain a majority for those positions. Indeed, our review of the rise of defamation cases demonstrates that many challenges face publishers despite *Sullivan*'s protections.

The full text of the proposal is in Appendix A. This Section summarizes the key provisions and points to parallels in the Court's First Amendment jurisprudence that inspired some of the proposal's provisions. The proposal, as explained in Section 1, is titled the "Freedom of Speech and Press Act."

Section 2 provides congressional findings that summarize the purpose of the statute. The section, based on the SPEECH Act of 2010 that passed by unanimous consent,⁴³⁴ makes clear that the purpose is to codify the protections of *Sullivan* and its progeny. For instance, Section (2)(b) recognizes the nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks,"⁴³⁵ language directly from the *Sullivan* opinion. Section 2 also explains how the

433. See *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006) ("[W]e conclude that because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to user, the data has traveled in interstate commerce."); *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce."); see also Gutierrez, *supra* note 384, at 44-47 (discussing preemption).

434. SPEECH Act of 2010, Pub. L. No. 111-223, 124 Stat. 2380.

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

threat of weaponized defamation lawsuits, particularly those brought by public officials and figures like those previously reviewed, can “inhibit other expression that might otherwise have been spoken, written, or published but for the fear of the lawsuit.” The findings section is intended to leave no doubt among judges that the Freedom of Speech and Press Act is intended to codify *Sullivan* and its progeny and provide nationwide minimum protections for defamation defendants.

The Act also recognizes that some state jurisdictions might be less protective of speakers, which in the case of overruling *Sullivan*, might lead to drastically different rules state to state. Indeed, while Thomas has argued that the “States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm,” the sociopolitical history of *Sullivan* itself reveals precisely the opposite.⁴³⁶ Alabama used libel law, unrestricted by the First Amendment, not to redress harm to reputation but to wage political warfare against unpopular speech and unpopular speakers. With other states, like Florida, presently moving to challenge *Sullivan* by laws drawing its approach into doubt, the recognition that some states are likely to use defamation law as a political cudgel is important.

Section 3 establishes the minimum level of fault that a plaintiff must establish before imposing liability for defamation. The bill’s fault standard improves upon *Gertz*’s public figure/private figure distinction, which has long received criticism for its unpredictability.⁴³⁷ Rather than forcing speakers to guess in advance whether a subject might be viewed as a public or private figure, the bill adopts the more predictable *Rosenbloom* plurality view on whether the underlying matter is of public concern.⁴³⁸ (A similar focus was adopted by the Court in *Hepps* to determine when a plaintiff must bear the burden of proving falsity; despite criticism over the malleability of a public concern standard in *Rosenbloom*, courts have shown that they are perfectly capable of applying this standard.⁴³⁹) The bill broadly defines “public concern” as “any subject other than a purely private concern, including all matters of political, social, or other concern to the community,” further alleviating any such difficulties in determining the contours of a matter of public concern.

Under the proposed statutory text, if the defamation lawsuit relates to a matter of public concern, the plaintiff must meet the actual malice standard of *Sullivan*, as interpreted in *St. Amant*: pleading and ultimately proving by clear

436. *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in denial of certiorari).

437. See, e.g., Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. ILL. U.L. REV. 141, 173 (1995) (“While the failure to delineate clear, rigid rules provides a needed degree of flexibility in many areas of the law, the inability of the media to accurately predict whether a statement will receive First Amendment protection prior to publication results in the suppression of information, a result that the *New York Times* Court sought to prevent.”).

438. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality opinion), *abrogated* by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

439. *Id.* at 79 (Marshall, J., dissenting).

and convincing evidence that the statement was made with knowledge of its falsity or that the defendant had a high degree of awareness of probable falsity.⁴⁴⁰ If a lawsuit does not relate to a matter of public concern, at minimum a plaintiff must prove fault by a preponderance of evidence, a standard much like what *Gertz* required of private figure plaintiffs.⁴⁴¹ Codifying the two levels of fault based on public concern as opposed to the plaintiff's status as a public official or figure has support in recent precedent. In 2020, New York amended its anti-SLAPP law to require plaintiffs to demonstrate actual malice in defamation cases connected to "an issue of public interest."⁴⁴²

Section 4 ensures that states do not place the burden on defendants to prove the truth. *Sullivan*, followed by *Gertz* and *Hepps*, substantially changed earlier defamation law regimes by placing the burden of proving falsity on the plaintiffs.⁴⁴³ The bill prevents state defamation laws from reverting to the pre-*Sullivan* standards placing the burden of proving truth on the defendant by requiring plaintiffs in lawsuits regarding matters of public concern to establish falsity by clear and convincing evidence. For other cases, the plaintiffs still have the burden of establishing falsity by a preponderance of the evidence.

The burden of proof is more than a legal technicality; in many defamation lawsuits, it could be dispositive. Consider a hypothetical defamation lawsuit that a city council member files against a citizen who posted on Facebook that she observed the council member taking cash from a local developer. If the defendant has the burden of proving that the statement was true, she might have a tough time establishing that the politician did, indeed, take the cash (unless she had a photograph, witnesses, bank statements, or other corroborating evidence). But if the plaintiff has the burden of proving falsity, the council member will face a heavy lift to establish that no cash changed hands.

Section 4 also incorporates the *Milkovich* standard and ensures that no state can impose liability for the expression of pure opinion, which the statute broadly defines as "any expression of opinion not subject to objective proof relating to matters of personal taste, aesthetics, criticism, religious beliefs, moral convictions, political views, or social theories." The provision only allows liability if the opinion alleges undisclosed defamatory facts as its basis, a standard that aligns with *Milkovich*.⁴⁴⁴ This would prevent, for instance, the city council member suing the Facebook critic for posting that he is "the most awful person ever elected to city council." As defined in the statute, such a statement is a matter of pure opinion.

440. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

441. *Gertz*, 418 U.S. at 347.

442. S. 52A, 2019-2020 Leg., Reg. Sess. (N.Y. 2020) (enacted).

443. Floyd Abrams, *Preface to MEDIA L. RES. CTR., NEW YORK TIMES V. SULLIVAN: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT*, at iv (2022), <https://live-medialaw.pantheonsite.io/wp-content/uploads/2022/03/nysullivanwhitepaper-1.pdf> [<https://perma.cc/47JV-LELG>].

444. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20-21 (1990).

Section 5 sets limits on damages to avoid the chilling effect on speech that has concerned the Court since 1964.⁴⁴⁵ The Section again adopts the *Hepps* focus on matters of public concern, while also recognizing the concerns about special and punitive damages that the Court recognized in *Gertz*.⁴⁴⁶ The bill also reflects the concerns about the chilling effect of punitive and presumed damages that Marshall recognized in his *Rosenbloom* dissent: “The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments.”⁴⁴⁷

To address this issue, the bill would first require a showing by clear and convincing evidence of special damages in defamation suits arising from matters of public concern. Thus, plaintiffs must demonstrate provable pecuniary losses traceable to the alleged defamation. It would also cap punitive damages in those cases at three times the total compensatory damages. And, it would do away with presumed damages in such cases. This would make the threat of damages that animated the majority opinion in *Gertz* less likely to chill speech by limiting the quantum of them and making them also more difficult to prove.

For lawsuits arising from matters that are not of public concern, punitive and presumed damages would only be available with a showing, by clear and convincing evidence, that the statement was made with actual malice as defined by *Sullivan* and *St. Amant*. The bill aims to strike a balance by allowing defendants to recover damages—and even punitive damages in some cases—but capping those awards to ensure that they are tied more closely to the harms that the plaintiffs suffered and not merely to the desire of a judge or jury to punish the defendant.

Section 6 prevents the United States from returning to the days of seditious libel prosecutions by prohibiting criminal liability for defamatory statements. This is more than a theoretical concern; about half the states have laws on the books that allow for imprisonment, fines, or other criminal liability for defamatory statements.⁴⁴⁸ Amid growing concern about the rising tides of authoritarianism in the United States, it is vital that Congress prevent a state legislature and governor from reinvigorating their criminal libel laws to punish dissenters. And while the Court in *Garrison* applied *Sullivan*’s actual malice rule as a limit on criminal libel law,⁴⁴⁹ as our review of the recent weaponization of libel law has shown, that limitation provides little protection from a law enforcement investigation that is without, in the first instance, judicial intervention. We thus take the absolutist position advanced by Black and Douglas in *Garrison*: “[T]he First Amendment, made applicable to the States by the Fourteenth, protects every person from having a State or the Federal Government fine, imprison or assess damages against him when he

445. *Sullivan*, 376 U.S. at 300 (Goldberg, J., concurring).

446. *Gertz*, 418 U.S. at 347.

447. *Rosenbloom*, 403 U.S. at 84 (Marshall, J., dissenting).

448. See *Map of States with Criminal Laws Against Defamation*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/free-speech/map-states-criminal-laws-against-defamation> [<https://perma.cc/DXS5-ASWW>] (last visited Nov. 7, 2022).

449. *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964).

has been guilty of no conduct, other than expressing an opinion, even though others may believe that his views are unwholesome, unpatriotic, stupid or dangerous”⁴⁵⁰

Section 7 establishes the preemptive effect of the Freedom of Speech and Press Act, adopting language directly from Section 230(e)(3), modified only slightly. The established—and unquestioned—caselaw regarding Section 230’s preemption of state laws provides a solid basis for similar preemption of state defamation laws that do not meet the minimum requirements of this bill.⁴⁵¹ This preemption would create a floor for free speech protections, and states still would be free to provide even greater protections for defamation defendants. For instance, a state might choose to require plaintiffs to establish clear and convincing evidence of actual malice in all defamation claims, no matter if they involve matters of public concern. Likewise, a state could adopt the position that Black, Douglas, and Goldberg took in *Sullivan* and bar all defamation claims by public officials,⁴⁵² even if they established actual malice by clear and convincing evidence.

VII. CONCLUSION

In an ideal world, it would be unnecessary to codify and bolster a half-century of First Amendment precedent into a federal statute. But we are not in an ideal world. We are in a world in which the Supreme Court will radically change precedent in the name of originalism or textualism or pragmatism or whatever other theory suits its goals. We are in a world in which at least two Supreme Court Justices have called for their colleagues to reconsider *Sullivan*.⁴⁵³ We are in a world in which politicians and powerful corporations weaponize libel laws to stifle criticism.

Overturing *Sullivan* would do more than eliminate the actual malice requirement for public official plaintiffs. It would undercut all First Amendment protections in defamation cases. It would open the door for state legislators and judges to enact oppressive punishments for those who had the gall to criticize the powerful, much like Alabama did in the 1960s. Without First Amendment protections, legislators and judges could give the subjects of criticism the ability to drive critics into bankruptcy, even with a terribly weak case. There would be no limits to the States’ use of civil and criminal defamation laws as a tool to silence the opposition. Democracy would be worse for it.

But Congress could prevent such harms and provide journalists, social media posters, and all other speakers the assurances they need to speak freely. When the Supreme Court overturned *Roe v. Wade* in 2022, Justice Brett Kavanaugh wrote a concurrence that suggested legislators at either the state or federal level can determine what protections for abortion are available to the public. “The Constitution is neutral and leaves the issue for the people and

450. *Id.* at 79 (Black, J., concurring).

451. See KOSSEFF, *supra* note 401, at 3.

452. See, e.g., *Sullivan*, 376 U.S. at 300 (Goldberg, J., concurring).

453. See *supra* Part III.

their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.”⁴⁵⁴ Just as Congress could codify *Roe*, it also could codify *Sullivan* and the other First Amendment defamation cases.

Although we believe that the First Amendment does, in fact, limit defamation liability, it is possible that five Justices will disagree. If that happens, a law such as the Freedom of Speech and Press Act would preserve the legal protections that have defined modern speech and journalism. And, it would protect freedom of speech and the press for future generations to come.

VIII. APPENDIX: TEXT OF THE FREEDOM OF SPEECH AND PRESS ACT

An Act

To provide national protections for freedom of speech and press.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. SHORT TITLE

This Act may be cited as the “Freedom of Speech and Press Act.”

Section 2. FINDINGS

Congress finds the following:

(a) The freedom of speech and of the press is enshrined in the First Amendment to the Constitution and is necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy.

(b) Our nation has a profound national commitment to the principle that debate on matters of public concern should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.

(c) Some persons are obstructing the free speech and free press rights of United States citizens and frustrating this commitment through the weaponization of defamation by seeking out state jurisdictions that do not provide the full extent of free-speech, free-press protections owed to United States citizens, and suing in those jurisdictions.

(d) These retaliatory lawsuits not only suppress the free speech and press rights of the defendants in the lawsuit, but inhibit other expression that

454. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring).

might otherwise have been spoken, written, or published but for the fear of a lawsuit.

(e) The internet and the mass distribution of media interstate, including through, among other channels, broadcast, cable, and satellite services, also create the danger that one State's unduly restrictive defamation law will affect freedom of speech and press worldwide on matters of public concern.

(f) This country's debate on matters of public concern will be fostered by adopting national standards and requirements relating to the law of defamation, as defined herein.

Section 3. FAULT REQUIRED

(a) In any defamation lawsuit relating to a matter of public concern, no State shall impose liability absent a plaintiff pleading and ultimately proving by clear and convincing evidence that the statement was made with knowledge of its falsity or that the defendant had a high degree of awareness of probable falsity.

(b) In any defamation lawsuit that does not relate to a matter of public concern, no State shall impose liability without a plaintiff pleading and ultimately proving by a preponderance of evidence a defendant's fault.

Section 4. FALSITY REQUIRED

(a) In any defamation lawsuit relating to a matter of public concern, no State shall impose liability absent a plaintiff pleading and ultimately proving by clear and convincing evidence that the challenged statement is materially false.

(b) In any defamation lawsuit not relating to a matter of public concern, no state shall impose liability absent a plaintiff pleading and ultimately proving by a preponderance of the evidence that the challenged statement is materially false.

(c) An opinion can be actionable only if it implies undisclosed defamatory facts as a basis of the opinion or, alternatively, is based on disclosed but false facts. In any defamation lawsuit, no state shall impose liability for a pure opinion nor for an opinion based on disclosed, substantially true facts.

Section 5. LIMITATIONS ON DAMAGES

(a) In any defamation lawsuit relating to a matter of public concern, no State shall impose liability absent a plaintiff pleading and ultimately proving by clear and convincing evidence special damages caused by the allegedly defamatory statement.

(b) In any defamation lawsuit relating to a matter of public concern, no State shall provide for an award of punitive damages that exceeds three times the total compensatory damages awarded.

(c) In any defamation lawsuit relating to a matter of public concern, no State shall provide for an award of presumed damages.

(d) In any defamation lawsuit not relating to a matter of public concern, no State shall provide for an award of punitive damages absent a plaintiff pleading and ultimately proving by clear and convincing evidence that the statement was made with knowledge of its falsity or that the defendant had a high degree of awareness of probable falsity.

(e) In any defamation lawsuit not relating to a matter of public concern, no State shall provide for an award of presumed damages absent a plaintiff pleading and ultimately proving by clear and convincing evidence that the statement was made with knowledge of its falsity or that the defendant had a high degree of awareness of probable falsity.

Section 6. PROHIBITION ON CRIMINAL LIBEL

No State shall impose criminal liability based solely on the dissemination of an allegedly false and defamatory statement or statements.

Section 7. EFFECT ON OTHER LAWS

(a) NO EFFECT ON INTELLECTUAL PROPERTY LAW – Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(b) STATE LAW – Nothing in this law shall be construed to prevent any State from enforcing any State law that is consistent with or provides protections for freedom of speech and of the press in excess of those provided by this law. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this law.

Section 8. DEFINITIONS

(a) The term “defamation” means any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person.

(b) “Materially false” shall mean a statement that would have a different effect on the mind of the reader, listener, viewer, or other recipient from that which the pleaded truth would have produced.

(c) “Public concern” shall be construed broadly, and shall mean any subject other than a purely private concern, including all matters of political, social, or other concern to the community.

(d) “Pure opinion” shall be construed broadly, and shall mean any expression of opinion not subject to objective proof relating to matters of personal taste, aesthetics, criticism, religious beliefs, moral convictions, political views, or social theories. Pure opinion includes resort to rhetorical hyperbole, satire, parody, and other forms of criticism that a reasonable reader would understand as not intending to convey actual facts.

