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Revisiting Rosenbloom: Can A Return to the "Matter of Public Concern" Standard in Defamation Cases Quiet Sullivan's Skeptics?

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ABSTRACT

As a vocal minority increasingly airs their displeasure with the actual malice rule the U.S. Supreme Court established in New York Times v. Sullivan, media defense attorneys find themselves searching for way to pushback against the possible erosion of a key First Amendment protection for free speech. This article calls for a reconsideration of the "matter of public concern" standard that a plurality of the Court promulgated in Rosenbloom v. Metromedia. The article outlines the chief concerns brought by those who wish to reconsider the requirement that public officials and public figures prove reckless disregard for the truth to recover in defamation cases. Upon closer inspection, many of these concerns reflect a frustration with increasing criticism of public officials as well as procedural changes in addition to the actual malice standard that have made it more difficult for litigants to successfully sue for defamation. It argues the Rosenbloom standard strikes the proper balance between the protection for individual reputation and the ability to engage in meaningful public deliberation in a democratic society.

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I. INTRODUCTION

In June 2022 when the U.S. Supreme Court announced its decision in *Dobbs v. Jackson Women's Health Organization,*[1] the media defense bar let out a collective gasp.[2] At first blush, an abortion rights case has little to do with freedom of the press. But a closer examination of Justice Samuel Alito's majority opinion revealed the very real danger that the Supreme Court might consider overruling its longstanding decision in *New York Times v. Sullivan,* the ruling that First Amendment scholar Alexander Mieklejohn pronounced as "an occasion for dancing in the streets."[3] Court watchers, attorneys and legal scholars alike have criticized numerous aspects of Alito's opinion, with many asserting that Alito played fast and loose with the historical facts regarding abortion in the United States.[4]

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[1] 142 S. Ct. 2228, 2284 (2022).

[2] As recently as 2019, acclaimed media lawyer Lee Levine and law Professor Stephen Wermiel brushed aside the idea that the actual malice standard would ever fall: "Justice Clarence Thomas's broadside against *New York Times v. Sullivan* would most likely not have fazed Justice William J. Brennan Jr., the author of that landmark decision." *See* Lee Levine & Stephen Wermiel, *What Would Justice Brennan Say to Justice Thomas?*, 34 J. MEDIA, INFO. & COMMC'N L. 1, 1 (2019) [hereinafter Levine & Wermiel, *Justice Brennan*]. Levine and Wermiel went on to describe Justice Brennan's likely refutation: "Were he still alive, there are many points Brennan could make in response to Thomas's assertion that *Sullivan* ought to be reconsidered and overruled. These include the overwhelming academic consensus applauding the decision both at the time and thereafter; the impressive body of precedent it has spawned in the now 55 years since it was decided; the proper role of original intent in free speech analysis; the history of seditious libel in the United States and its dispositive significance in divining that intent in *Sullivan*; the case's role in defining "the central meaning of the First Amendment" that has guided the Court's First Amendment jurisprudence for more than half a century; and the limited nature of the past criticisms of *Sullivan* on which Thomas purports to rely, much of which he wrenches from the context in which they were actually made." *Id.*

[3] 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 (quoting Alexander Meiklejohn) (internal quotation marks omitted).

[4] *See, e.g.*, Brook Thomas, *What Alito Got Wrong Comparing His Opinion in* Dobbs *to* Brown v. Board of Education, SLATE (July 5, 2022, 12:51 PM), https://slate.com/news-and-politics/2022/07/alito-roe-v-wade-abortion-ban-school-segregation-brown-v-board-of-education.html [https://perma.cc/PBD7-XZXA] (arguing, among other things, that the *Brown* Court viewed the Constitution as a living document); Michael C. Dorf, Dobbs *Double-Cross: How Justice Alito Misused Pro Choice Scholars' Work*, JUSTIA (July 6, 2022), https://verdict.justia.com/2022/07/06/dobbs-double-cross-how-justice-alito-misused-pro-choice-scholars-work [https://perma.cc/9QAA-A6JU] (arguing that Alito's use of liberal scholars articles to justify his decision is represents an incomplete and inaccurate understanding of their research); Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022, 4:30 AM),

Yet, within his lengthy opinion, one particular sentence stood out for attorneys who represent media clients: "Until the latter part of the 20th century, such a right [abortion] was entirely unknown in American law."[5] Sandwiched into the second-to-last paragraph on page five of the Court's opinion, this sentence should alarm anyone who values our "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."[6] After all, the *Sullivan* case, in which the Court first ruled that the First Amendment limited plaintiffs' ability to recover in defamation cases, was decided in 1964—less than a decade before *Roe v. Wade*.[7]

For members of the media defense bar, *Dobbs* demonstrated the Court's willingness to simply cast precedent aside.[8] It signified the beginning of a new era—one that many fear could culminate in the abrogation of critical protections for the press. Media attorneys and scholars had sensed this increasing danger for some time now, as the rhetoric around "actual malice" has been escalating within both the judicial and executive branches. Starting in 2005 with Justice Scalia's criticism of the landmark First Amendment decision as wrongly decided in an "off-the-record" conversation with members of the media,[9] the

https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174 [https://perma.cc/2BRR-UYQM] (arguing that historically in the U.S. abortion during the first trimester happened regularly and was not considered immoral).

[5] *Dobbs*, 142 S. Ct. at 2242.

[6] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[7] *See id.*; Roe v. Wade, 410 U.S. 113 (1973).

[8] Some scholars have argued the Court's decision in *New York State Rifle & Pistol Association v. Bruen* – issued just two days before *Dobbs* – outlined the path forward should the Court seek to overturn *Sullivan*. *See* Michael L. Smith & Alexander S. Hiland, *Using* Bruen *to Overturn* New York Times v. Sullivan, 2022 PEPP. L. REV. 80, 84 (2022).

[9] *See* John W. Dean, *Justice Scalia's Thoughts, and a Few of My Own on* New York Times v. Sullivan, FINDLAW (Dec. 2, 2005), https://supreme.findlaw.com/legal-commentary/justice-scalias-thoughts-and-a-few-of-my-own-on-new-york-times-v-sullivan.html [https://perma.cc/THB3-V5Y5]. Scalia continued to announce his views on *Sullivan* and libel throughout his time on the bench. *See, e.g.*, Dahlia Lithwick, *Justice Scalia Sets His Sights on* New York Times Co. v. Sullivan, SLATE (July 17, 2007, 2:42 PM), https://slate.com/news-and-politics/2007/07/justice-scalia-sets-his-sights-on-new-york-times-co-v-sullivan.html [https://perma.cc/8FDR-GJPC]; David G. Savage, *Scalia Criticizes Historic Supreme Court Ruling on Freedom of the Press*, L.A. TIMES (Apr. 18, 2014, 10:53 AM), https://www.latimes.com/nation/nationnow/la-na-nn-scalia-ginsburg-supreme-court-libel-20140418-story.html#axzz2zGMyP2LB [https://perma.cc/KPF2-CMWF].

conversation has grown to include calls from a sitting president,[10] current Supreme Court justices,[11] lower court judges,[12] and others to scale back free speech protections.[13] Although stated concerns differ—as I'll explore in this article—desired outcomes, including making it easier for defamation plaintiffs to succeed and recover punitive damages, align alarmingly well. More importantly, though, a rollback in constitutional protection for speech—particularly criticism of government officials or issues important to our communities—poses a grave threat to our nation's democratic foundation. Thankfully, attorneys and scholars have begun to publicly push back against *Sullivan*'s critics, but it is unclear whether they can hold off the attacks.[14] Although Florida lawmakers were unsuccessful in their attempt to push through legislation supported by Republican Governor Ron DeSantis that would have attempted to remove *Sullivan*'s protections within the state, the bill's sponsor vowed to re-introduce it next year.[15]

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[10] 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/V73N-8XXR]; Adam Liptak & Eileen Sullivan, *Trump, Angry Over Woodward Book, Renews Criticism of Libel Laws*, N.Y. TIMES (Mar. 30, 2017), https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html [https://perma.cc/4V9Z-KFTM]; *Stung by Wolff Book, Trump Calls for Stronger U.S. Libel Laws*, REUTERS (Jan. 10, 2018, 11:39 AM), https://www.reuters.com/article/us-usa-trump-libel/stung-by-wolff-book-trump-calls-for-stronger-u-s-libel-laws-idUSKBN1EZ2B2 [https://perma.cc/DW82-R542] [hereinafter *Stung by Wolff*]; John Wagner, *Trump Suggests Libel Laws Should be Changed After Uproar Over Woodward Book*, WASH. POST (Sept. 5, 2018, 3:07 PM), https://www.washingtonpost.com/politics/trump-suggests-libel-laws-should-be-changed-after-uproar-over-woodwards-book/2018/09/05/9c00f2be-b02b-11e8-9a6a-565d92a3585d_story.html [https://perma.cc/8BJU-QVJ8].

[11] *See, e.g.*, McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (mem.) (Thomas, J., concurring in the denial of certiorari); Berisha v. Lawson, 141 S. Ct. 2424, 242 (2021) (mem.) (Thomas, J., dissenting from a denial of certiorari); Coral Ridge Ministries Media v. S. Poverty L. Ctr., 142 S. Ct. 2453, 2454 (2022) (mem.) (Thomas, J., dissenting from a denial of certiorari); *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting from a denial of certiorari).

[12] *See* Tah v. Glob. Witness Publ'g, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting).

[13] *See, e.g.*, Carson Holloway, *Rethinking Libel, Defamation and Press Accountability*, CLAREMONT INST. CTR. FOR THE AM. WAY OF LIFE (Sept. 21, 2022), https://dc.claremont.org/rethinking-libel-defamation-and-press-accountability/ [https://perma.cc/HW7Y-VQC3].

[14] *See infra,* notes 16, 101, 118.

[15] Mary Ellen Klas, *Defamation Bill Dead for this Florida Legislative Session, Sponsor Says*, TAMPA BAY TIMES (Apr. 26, 2023), https://www.tampabay.com/news/florida-politics/2023/04/26/defamation-bill-dead-this-florida-legislative-session-sponsor-says/ [https://perma.cc/V7TV-CGE3].

In some ways, it is unsurprising that such an outcry around freedom of expression has gained traction in this historical moment of political polarization. Many parallels can be found between the decade leading up to *Sullivan* and the current times once *Sullivan* is examined in its full context as a civil rights case. Freedom of expression is, and always has been, about power, and professor Samantha Barbas' work documented in meticulous detail the extent to which the tort of libel tort was used in the 1950s and 1960s to silence progressive voices (including the news media) that advocated for civil rights.[16] Just as white Southerners and segregationists felt their power being usurped in the 1950s and 1960s when the courts began to racially integrate American society, today's conservative, often white and rural, voters have expressed similar concerns in response to recent efforts to increase individual rights based on factors they perceive as a threat, including sexual orientation, gender identity, religion, citizenship status, race, ethnicity and primary spoken language.[17] As Professor Lawrence Glickman wrote "These individual backlashes are all instances of a reactionary tradition, one that is deeply woven into American political culture and that extends back to the era of Reconstruction, at least."[18]

Some of the specific concerns raised in the attacks on *Sullivan*'s actual malice standard are valid, given the rapid changes to our modern media landscape in the ensuing 60 years, but many are spurious.[19] Yet, as I have previously argued,[20] a return to the "matter of public concern"

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[16] *See generally* SAMANTHA BARBAS, ACTUAL MALICE: CIVIL RIGHTS AND FREEDOM OF THE PRESS IN *NEW YORK TIMES V. SULLIVAN* (Univ. of Cal. Press, 2023).

[17] For an interesting summary of recent research on the urban/rural political divide, *see* Thomas B. Edsall, *The Resentment Fueling the Republican Party Is Not Coming From the Suburbs*, WASH. POST. (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/opinion/rural-voters-republican-realignment.html [https://perma.cc/VKP8-AGZU].

[18] This anger and hostility can be seen in state legislative efforts that target transgender individuals, books related to civil rights and LGBTQ topics and even attempts to outlaw men dressing in "opposite gender" clothing. In reaction to the anti-making protests during early 2020, Glickman briefly outlined the history of backlash in the United States, noting white backlash has long stymied progressive advancement in the country. *How White Backlash Controls American Progress*, THE ATLANTIC (May 21, 2020), https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/ [https://perma.cc/42BG-UAWK].

[19] In a lengthy analysis, Kevin Drum attributes increasing American angst to the growth of Fox News since 2000. Of particular interest is his discussion of social media and the change in the media landscape. *The Real Source of America's Rising Rage*, MOTHER JONES (Sept./Oct. 2021), https://www.motherjones.com/politics/2021/07/american-anger-polarization-fox-news/ [https://perma.cc/J644-367Q].

[20] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), *abrogated by* Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974).

standard promulgated by a plurality of the Supreme Court in *Rosenbloom v. Metromedia* would strike a balance that not only protects the role of a watchdog press but also addresses many of the issues brought about by our technological revolution. When I began studying online defamation as a graduate student at the University of Florida in 2003, I expressed concerns about the Court's ability to grapple with the coming deluge of online defamation cases.[21] It was clear in early jurisprudence that a tension would soon arise—a tension exacerbated by the ability of nearly anyone to quickly and cheaply spread their messages far and wide to audiences around the world.[22]

In Part I, I provide a brief overview of *New York Times v. Sullivan* and its progeny—including a short discussion of other legal developments since *Sullivan* that have affected plaintiffs' outcomes in defamation cases—to properly contextualize modern criticisms of the decision and the actual malice standard. In Part II, I lay out the positions of key *Sullivan* opponents. Part III details the Court's short-lived plurality decision in *Rosenbloom v. Metromedia.* In Part IV, I apply the *Rosenbloom* "matter of public concern" standard to address modern concerns about the actual malice standard. I conclude with a call to revisit *Rosenbloom* as a means of striking the proper balance between the protection for individual reputation and the ability to engage in meaningful public deliberation in a democratic society.

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[21] *See generally, e.g.*, Amy Kristin Sanders, *Defining Defamation: Community in the Age of the Internet*, 15 COMMC'N L. & POL'Y 231, 231–264 (2010); Amy Kristin Sanders, *Defining Defamation: Plaintiff Status in the Age of the Internet*, 1 U. BALT. J. MEDIA L. & ETHICS 155, 155–85 (2009) [hereinafter Sanders, *Defining Defamation*]; Amy Kristin Sanders & Sarah J. Arendt, *Bloggers as Limited-Purpose Public Figures: New Standards for a New Medium*, 2 J. MEDIA L. & ETHICS 5, 5–27 (2010) [hereinafter Sanders & Arendt]; Amy Kristin Sanders & Natalie Hopkins Best, *Re-Defining Defamation: Psychological Sense of Community in the Age of the Internet*, 17 COMMC'N L. & POL'Y 355, 355–384 (2012); Amy Kristin Sanders, *Defining Defamation: Evaluating Harm in the Age of the Internet*, 3 U. BALT. J. MEDIA L. AND ETHICS 110, 110–133 (2012) [hereinafter Sanders, *Evaluating Harm*]; Amy Kristin Sanders, *Fast Forward Fifty Years: Defining Public Plaintiff Status after* New York Times v. Sullivan, 88 GA. L. REV. 843, 843–63 (2014); Amy Kristin Sanders & Holly Miller, *Revitalizing Rosenbloom: The Matter of Public Concern Standard in the Age of the Internet*, 12 FIRST AMEND. L. REV. 529, 529–57 (2014) [hereinafter Sanders & Miller]; Amy Kristin Sanders & Kirk von Kreisler, *Is Defamation Law Outdated? How Justice Powell Predicted the Current Criticism*, 20 FIRST AMEND. L. REV. 1, 1–29 (2022) [hereinafter Sanders & von Kreisler].

[22] *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (Cornell Univ. Press, 2019).

II. *NEW YORK TIMES V. SULLIVAN* AND PROGENY: HOW WE GOT HERE[23]

Prior to the U.S. Supreme Court's unanimous 1964 decision in *New York Times v. Sullivan*,[24] the tort of defamation was solely a creature of state law. In fact, it was widely believed that there was no constitutional protection for false statements of fact. But the Court's opinion, penned by Justice William Brennan, made clear that the First Amendment to the U.S. Constitution curbed public officials' ability to prevail in a libel lawsuit unless they proved "actual malice."[25] The importance of *Sullivan*'s protections—and the subsequent constitutionalization of libel law—cannot be overstated. As Pulitzer Prize-winning journalist Anthony Lewis wrote:

> No one could have guessed that it would become a landmark of freedom. But that is what happened.
>
> . . . .
>
> The Court used to the full its extraordinary power to lay down the fundamental rules of our national life. It made clearer than ever that ours is an open society, whose citizens may say what they wish about those who temporarily govern them. The Court drew fresh meaning from those few disarmingly simple words written into the Constitution in 1791, in the First Amendment:
>
> *Congress shall make no law . . . abridging the freedom of speech, or of the press.*[26]

Few words could more accurately capture the crux of the controversy in which *Sullivan* finds itself today. Lewis foreshadowed, in many ways, the criticisms leveled by Justices Scalia and Thomas and the criticism that has fueled former President Trump's displeasure with the state of American libel law.

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[23] A version of the abbreviated summary of the Supreme Court's defamation jurisprudence is contained in my doctoral dissertation. *See* Amy Kristin Sanders, *Defining Defamation: Community, Harm and Plaintiff Status in the Age of the Internet*, U. FLA. (2007).

[24] 376 U.S. 254, 269 (1964).

[25] *Id.* At 283–84.

[26] ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT, 7–8 (Vintage, 1991).

A. New York Times v. Sullivan: Applying the First Amendment to Defamation Law

The landmark First Amendment case arose after the *New York Times* published a one-page, pro-civil rights advertisement titled "Heed Their Rising Voices."[27] The ad described the Rev. Martin Luther King's arrest in Alabama, and it suggested authorities had arrested him as a means of hampering the civil rights movement.[28] L.B. Sullivan, who served as Montgomery's city commissioner, sued both the newspaper and prominent signatories including Black ministers, whose names appeared at the bottom of the advertisement.[29] Although he was not named, Sullivan argued the ad criticized the police and personally defamed him as a result, given his role overseeing policing.[30] Under the state's libel law, Sullivan did not have to prove the ad's publication harmed him, only that it was published and identified him. Unfortunately for the *Times*, the ad contained minor factual misstatements, including that a historically Black university had been "ringed" by "truckloads of police armed with shotguns and tear-gas," negating truth as a defense under Alabama law.[31] Sullivan prevailed in the trial court, winning a $500,000 damage award.[32] The *Times* was not alone. At the same time, other major news organizations, including CBS and the Associated Press, faced myriad libel lawsuits brought by segregationists as well, with damages across these lawsuits totaling nearly $300 million.[33]

Although the *Times* appealed to the Alabama Supreme Court, Sullivan prevailed, and the court upheld the trial court's decision and final

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[27] *Sullivan*, 376 U.S. at 256.

[28] *Id.* at 256–57.

[29] *Id.* at 256 n.1.

[30] *Id.* at 256–58.

[31] *Id.* at 257. The Supreme Court opinion went to great lengths to describe procedural aspects of the initial verdict: "The trial judge submitted the case to the jury under instructions that the statements in the advertisement were 'libelous per se' and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made 'of and concerning' respondent. The jury was instructed that, because the statements were libelous per se, 'the law . . . implies legal injury from the bare fact of publication itself,' 'falsity and malice are presumed,' 'general damages need not be alleged or proved but are presumed,' and 'punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.'" *Id.* at 262.

[32] *Id.* at 256. A $500,000 judgment in 1962 would be the equivalent to a judgment of nearly $5 million today. *See* U.S. INFLATION CALCULATOR, https://www.usinflationcalculator.com/ [https://perma.cc/T7YT-8U8K] (last visited July 9, 2023).

[33] BARBAS, *supra* note 16, at 2.

verdict.[34] Alabama's high court ruled that the jury could have properly inferred the statements were "of and concerning" Sullivan, and that the verdict was proper because malice could be inferred from the *Times'* failure to issue a correction for the ad's misstatements.[35] The newspaper sought a *writ of certiorari*, which the U.S. Supreme Court granted in 1964.[36]

In a unanimous opinion, the Court held that Sullivan could not prevail under Alabama law, which permitted strict liability in libel cases.[37] According to the Court, the First Amendment required at least some proof of fault or falsity in defamation cases involving public officials.[38] Justice Brennan wrote for the Court that citizens in a democracy must be able to participate in political and social discourse:

> Thus we consider this 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.[39]

Hearkening back to the days of seditious libel in late 1700s and early 1800s, the Court argued that criticism of elected officials should not lose its First Amendment protection simply because it may tarnish the officials' reputations.[40] Citizen oversight of government officials serves as the bedrock on which the American system of democratic governance is built.[41] Because many states—and the U.S. Constitution[42]—immunize certain elected officials from liability for critical commentary, the Court believed such protections should logically apply to citizens who were

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[34] *See* N.Y. Times Co. v. L. B. Sullivan, 144 So.2d 25 (Ala. 1962), *rev'd*, 376 U.S. 254 (1964).

[35] *Id.* at 39, 51.

[36] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[37] *See id.*

[38] *Id.* at 264. "We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." *Id.*

[39] *Id.* at 270.

[40] *Id.* at 273.

[41] *Id.* at 274.

[42] *See* U.S. CONST. art. I § 6. The Speech and Debate Clause of Article I provides: "They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." *Id.*

being critical of the government.[43] As a result of the Court's decision, public officials seeking damages for defamation are required to prove actual malice—or reckless disregard for the truth.[44] Under the First Amendment, it is unconstitutional for public official plaintiffs to prevail in a libel lawsuit under a theory of strict liability.[45] The *Sullivan* decision fundamentally altered the course of American defamation law by requiring public officials to prove fault and falsity—that the defendant knew or should have known they were publishing a false, factual statement.[46] Not long after *Sullivan* was decided, the Court extended the actual malice rule to libel plaintiffs who were not considered public officials but whose fame or prominence made them public figures.[47]

B. Sullivan's Progeny: Expanding the Scope of First Amendment Protection

It only took three years for the Court to decide a case requiring public figures to prove actual malice as well. The Supreme Court used the companion cases of *Curtis Publishing v. Butts* and *Associated Press v. Walker*,[48] to establish a second category of defamation plaintiffs required to prove actual malice: public figures.[49] The plaintiffs in the cases were Wally Butts, a prominent football coach for the University of Georgia Bulldogs, and Edwin Walker, a retired general who had been involved in the 1957 Little Rock desegregation stand-off.[50] After *Curtis Publishing*, plaintiffs adjudged to have risen to a place of societal prominence faced the same high burden of proof in defamation cases as public officials. Extending the protections announced in *Sullivan* safeguarded defamatory criticism of those who aren't government officials but who "are nevertheless intimately involved in the resolution of important public

[43] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

[44] *Id.* Black's Law Dictionary defines "actual malice" as "Knowledge (by the person who utters or publishes a defamatory statement) that a statement is false, or reckless disregard about whether the statement is true." *See Actual Malice*, BLACK'S LAW DICTIONARY (8th ed. 2004).

[45] *Sullivan*, 376 U.S. at 283–84.

[46] *Id.* at 279–80. "The constitutional guarantees require, we think, 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'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*

[47] *See generally* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

[48] *Id.* at 155 (holding that the U.S. Constitution requires a public figure prove recklessness to succeed in a defamation action regarding a matter of public concern).

[49] *Id.*

[50] *Id.* at 135–36, 140.

questions or, by reason of their fame, shape events in areas of concern to society at large."[51] As a result, the public figure doctrine was born.

The Court acknowledged that public figures have similar influence on societal decisions and policy making.[52] Therefore, the Court saw no reason to differentiate between the public officials and public figures merely on the "assumption that criticism of private citizens who seek to lead in the determination of policy will be less important to the public interest than will criticism of government officials."[53] Using language from the Declaration of Independence, the opinion regarded the communication of information about a matter of a public concern as an "unalienable right."[54] In terms of a libel lawsuit, public figures more closely resemble public officials than private people, and as a result, the Court extended the First Amendment protection—in the form of the actual malice standard—to defendants being sued by public figures.[55]

Curtis Publishing was not the Court's final word on the scope of First Amendment protection for defamation defendants. In 1974, the Court decided *Gertz v. Welch*.[56] Both a federal district court and the Seventh Circuit ruled that attorney Elmer Gertz had not shown sufficient evidence that the editors of *American Opinion*, a magazine published by the conservative John Birch Society, had acted with actual malice when they printed an article accusing Gertz of being a "Leninist" and "Communist-fronter" after he represented plaintiffs who were suing the police.[57] By a 5-4 vote, the Court overturned the appellate court decision, which had been written by then-Judge John Paul Stevens.[58] Justice Powell, writing for the Court, opined that Elmer Gertz and other private people should not be required to prove *New York Times* actual malice as had been previously established in *Sullivan* and *Curtis Publishing*.[59] The Court rebuffed

[51] *Id.* at 164.

[52] *Id.* at 145. "In many situations, policy determinations which traditionally were 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." *Id.* at 163–64.

[53] *Id.* at 148 (quoting Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 196 (8th Cir. 1966)).

[54] *Id.* at 149–50.

[55] *Id.* at 150. "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.*

[56] 418 U.S. 323, 347 (1974) (holding that even private plaintiffs must prove some level of fault to prevail in a defamation case).

[57] *Id.* at 331–32, 326.

[58] *Id.* at 333.

[59] *Id.* at 350–51.

Justice Brennan's earlier assertion in *Rosenbloom v. Metromedia,* finding that it was easier to determine whether a matter was one of public concern than to decide if a plaintiff was a public official or public figure. Powell wrote for the Court:

> But this approach [in *Rosenbloom*] would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.[60]

Justice Powell believed that private people did not have the same power as public officials and public figures to counteract damage to reputation.[61] In particular, private people did not have the same level of access to the media to help rebut false statements, and they had not necessarily voluntary opened themselves and their lives up to public scrutiny.[62] Perhaps more importantly, Powell believed the state's interest in protecting private people's reputations was much higher than the public's interest is criticizing those individuals.[63] Because of this, the *Gertz* Court held that states could establish any level of fault for private plaintiffs—even actual malice—in defamation cases, as long as it was higher than strict liability.[64] However, the Court ruled that all plaintiffs who sought punitive damages would be required to prove actual malice—extending the *Sullivan* actual malice rule to protect defendants against punitive damages.[65]

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[60] *Id.* at 343–44.

[61] *Id.* After *Rosenbloom* was decided, Powel expressed clear concern about the decision in his papers. Ultimately, he even seemed remorseful that the lower courts had applied *Gertz* in ways he had not intended to broaden the categories of public figures who would be required to prove actual malice. *See generally* Sanders & von Kreisler, *supra* note 21.

[62] Gertz v. Robert Welch, Inc., 418 U.S. 323, 343–45 (1974).

[63] *Id.* at 344.

[64] *Id.* at 347–48.

[65] *Id.* at 348–50.

C. The Bar Rises: Additional Modern Hurdles for Defamation Plaintiffs

As discussed in greater detail in Part II below, one aspect of many critics' arguments is that the actual malice standard has established too high of a bar for defamation plaintiffs and prevents worthy plaintiffs from being able to recover as a result.[66] Interestingly, as far back as the 1980s and 1990s, scholars were noting both an increase in the number of libel lawsuits and the size of defamation judgements.[67] But recent cases suggest the narrative is far more complex. Recent high-profile defamation cases illustrate several additional hurdles other than actual malice—all of which have arisen since 1964—that plaintiffs must overcome to succeed in a libel lawsuit.

1. Rhetorical Hyperbole

In 2018, a federal judge dismissed Stormy Daniels' defamation lawsuit against Trump for a tweet calling her "a con job."[68] Judge Otero agreed with the defense that Trump's tweet constituted a "rhetorical hyperbole" that was unlikely to be believed. [69] Quoting the Supreme Court's 1990 opinion in *Milkovich v. Lorain Journal*,[70] Judge Otero said:

> Specifically, Mr. Trump's tweet displays an incredulous tone, suggesting that the content of his tweet was not meant to be understood as a literal statement about Plaintiff. Instead, Mr. Trump sought to use language to challenge Plaintiff's account of her affair and the threat that she purportedly received in 2011.[71]

Even though Judge Otero relied heavily on *Milkovich*, the Court first articulated the doctrine of rhetorical hyperbole in two cases it heard during the early 1970s. In *Greenbelt Cooperative Publishing Association v. Bresler*,[72] the Court rejected the idea that "blackmail" imputed criminal conduct in the context of a newspaper describing a developer's negotiation

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[66] *See infra* notes 98–152 and accompanying text.

[67] *See* Russell Weaver & Geoffrey Bennett, *Is the New York Times Actual Malice Standard Really Necessary? A Comparative Perspective*, 54 LA. L. REV. 1153, 1154 n.8–9 (1993).

[68] Clifford v. Trump, 339 F. Supp. 3d 915, 919 (C.D. Cal. 2018).

[69] *Id.* at 925.

[70] 497 U.S. 1, 32 (1990).

[71] *Clifford*, 339 F. Supp. 3d at 926.

[72] 398 U.S. 6 (1970).

tactics. It argued the use of the word was not literal.[73] The Court said, "the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."[74] Four years later, in *Letter Carriers v. Austin*, the Court reversed three state court libel verdicts in cases where the term "scab" was used to refer to non-union workers, citing to the rhetorical hyperbole doctrine.[75]

Rhetorical hyperbole can be a strategic tool for the defense. The *Daniels* case is not the only recent case where actual malice was not dispositive of the defamation claim. The Arizona Supreme Court recently ruled that a trial court should have dismissed a former U.S. Senate candidate's defamation lawsuit against a conservative talk show host because the statements were "all readily recognized as rhetorical political invective or mere hyperbole and not statements or implications of objective fact."[76] There, the radio host made comments about the candidate, calling him "a sad example of a conservative" and alleging that he associated with "unhinged" people who were "acting like Antifa" as well as "thugs" and other "shady" people.[77]

2. Anti-SLAPP Statutes

More than 60 percent of the states now have anti-SLAPP statutes on the books, which are designed to deter "strategic lawsuits against public participation."[78] These laws target vexatious defamation lawsuits that are intended to silence defendants who are speaking on matters of public concern.[79] Although the laws provide varying levels of protection

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[73] *Id.* at 14.

[74] *Id*.

[75] *See* 418 U.S. 264 (1974). "As in *Bresler,* Jack London's 'definition of a scab' is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 285–86.

[76] *See* Harris v. Warner, in and for Cnty. of Maricopa, 527 P.3d 314, 319 (Ariz. 2023).

[77] *See* Jim Small, *Arizona Supreme Court Tosses GOP Senate Candidate's Defamation Lawsuit Against Radio Talker*, AZ MIRROR (Apr. 14, 2023, 2:11 PM), https://www.azmirror.com/blog/783ncoura-supreme-court-tosses-gop-senate-candidates-defamation-lawsuit-against-radio-talker/ [https://perma.cc/6P5J-N8D9].

[78] *See* Shannon Jankowski & Charles Hogle, *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, AM. BAR ASS'N (Mar. 16, 2022), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws/ [https://perma.cc/6LM2-WERM].

[79] *See generally Understanding Anti-SLAPP Laws?*, REP. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/resources/anti-slapp-laws/ [https://perma.cc/UH7A-T9PB] (last visited July 9, 2023).

depending on their verbiage, they have been beneficial in many cases where powerful plaintiffs attempt to use lawsuits to chill their critics' speech.[80] The impetus behind the statutes was to ensure "open debate among an informed public[,]"[81] and they provide another hurdle for plaintiffs to overcome in a defamation lawsuit.

In many ways, these laws aim to combat the systemic power imbalance in the legal system. The cost of filing a defamation lawsuit is relatively negligible, but the cost of defending one can be excessive.[82] Increasing discovery costs alone can be prohibitive for defendants. Because vexatious defamation lawsuits are often designed to silence critics, they can take on a David and Goliath appearance. Anti-SLAPP laws are intended to level the playing field:

> SLAPPs are often brought by the wealthy or influential against the less-well-resourced or powerful. Would-be speakers are forced into a perverse cost-benefit analysis, weighing the value of participating in public debate against the burden of defending against a lawsuit. SLAPPs also have a deleterious effect on the ability of journalists to deliver the news, with the specter of frivolous lawsuits hanging over their reporting on the rich and powerful.[83]

But anti-SLAPP laws have limited application. Because there is no federal anti-SLAPP law, defendants who find themselves in federal court against a diverse party may have no recourse if they are in a circuit that does not believe state protections apply.

In state court, however, anti-SLAPP laws can be a powerful tool for the defense. In March 2023, a New York state trial judge granted a motion

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[80] Not everyone lauds the value of anti-SLAPP laws. *See* Justin W. Aimonetti & M. Christian Talley, *How Two Rights Make a Wrong: Sullivan, Anti-SLAPP and the Underenforcement of Public-Figure Defamation Torts*, 130 YALE L. J. F. 708, 716 (2021) (arguing public figures are unduly burdened in defamation lawsuits because they must plead actual malice, which makes it hard to survive a motion to dismiss under an anti-SLAPP standard).

[81] Jankowski & Hogle, *supra* note 78.

[82] *See* David Keating, *Estimating the Cost of Fighting a SLAPP in a State with No Anti-SLAPP*, INST. FOR FREE SPEECH (June 16, 2022), https://www.ifs.org/blog/estimating-the-cost-of-fighting-a-slapp-in-a-state-with-no-anti-slapp-law/ [https://perma.cc/65PR-LD8D] "We estimate that it would cost between $21,000 and $55,000 to defeat a typical meritless defamation lawsuit in court, with the median at about $39,000. But the cost of a legal defense can easily soar into the six figures, and we've seen legal bills run in the millions of dollars." *Id.*

[83] Jankowski & Hogle, *supra* note 78.

to dismiss under New York's state anti-SLAPP law.[84] The judge threw out a case in which Amuze, an online clothing retailer, sued the Better Business Bureau of Greater Maryland after the consumer protection organization awarded it a letter grade of F based on negative reviews left by customers.[85]

3. Heightened Federal Pleading Standards

Two U.S. Supreme Court cases from the late 2000s that heightened pleading standards under the Federal Rules of Civil Procedure ("FRCP") proved a valuable deterrent in libel actions.[86] Under the *Iqbal* and *Twombly* standards, it has become more difficult for defamation plaintiffs to withstand a motion to dismiss for failure to state a claim under FRCP Rule 12(b)(6).[87] Under the heightened standards, judges must discard all conclusory allegations from the pleadings and then evaluate whether the factual allegations support a claim that is "plausible on its face."[88] Law professor Judy Cornett found that by 2017, all the circuits that had addressed the heightened pleading standards in the context of public-plaintiff defamation cases applied the heightened standard to the pleading of actual malice by clear and convincing evidence,[89] which she argued makes it very difficult for public plaintiffs to survive a 12(b)(6) motion.[90] Yet, these cases exist. Cornett went on to detail the Nicole Eramo lawsuit, in which the former University of Virginia administrator successfully sued *Rolling Stone* and won a jury verdict of $3 million that eventually resulted

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[84] Jay Ward Brown & Alia L. Smith, *Defamation Lawsuit Against Better Business Bureau Dismissed Under NY's Anti-SLAPP Law*, BALLARD SPAHR (Mar. 7, 2023), https://www.ballardspahr.com/Insights/News/2023/03/Defamation-Lawsuit-Against-Better-Business-Bureau-Dismissed-Under-nYs-Anti-SLAPP-Law [https://perma.cc/96D9-8WJH].

[85] Amuze v Better Bus. Bureau, 2023 N.Y. Misc. LEXIS 958 (N.Y. Sup. Ct. Mar. 3, 2023).

[86] *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[87] *See generally* Judy M. Cornett, *Pleading Actual Malice in Defamation Action After Twiqbal: A Circuit Survey*, 17 NEV. L.J. 709 (2017).

[88] *Twombly*, 550 U. S. at 570.

[89] Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016); Biro v. Condé Nast, 807 F.3d 541, 546 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2015 (2016); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 377 (4th Cir. 2012); Schatz v. Republican State Leadership Comm., 669 F.3d 50, 58 (1st Cir. 2012); *see also* Shay v. Walters, 702 F.3d 76 (1st Cir. 2012) (applying *Twiqbal* standard to allegation of "fault" in libel suit by non-public figure).

[90] *See generally* Cornett, *supra* note 87; *see also* cases cited *supra* note 89.

in a settlement.[91] As a public figure, Eramo was required to plead and prove actual malice.

At the state level, where many defamation cases begin, the pleading standards vary. Although a majority of states' civil procedure rules replicate the federal rules, Professor A. Benjamin Spencer found some reluctance to apply the *Twombly/Iqbal* plausibility standard:

> In the three years since *Twombly* was decided, courts in 14 of the "replica" states have had occasion to reexamine their pleading standards. Seven replica state courts have declined to follow the federal move in the direction of plausibility pleading, but only two so indicated through their states' highest courts. The courts in the other seven replica states that have addressed these cases appear to have embraced the fact-pleading requirement, including the highest courts in five of those states. In the non-replica states, there has been little response from the few that use notice pleading, and there can be little expectation that the remaining states whose courts already use fact pleading will be significantly impacted by the new federal regime. The resulting box score is 24 states for tighter pleading and 27 apparently maintaining notice pleading.[92]

Not surprisingly, plaintiffs will likely find it far easier to survive a motion to dismiss in states that continue to permit a lower pleading standard. As recently as 2017, Cornett found at least seven states had not followed suit with the federal standard, which led her to raise concerns about this variance:

> In states that have rejected the plausibility standard, and whose Rule 9(b) mirrors the federal rule, actual malice can still be pleaded generally. Thus, a state court defamation action by a public figure can proceed in the absence of specific facts to support knowledge of falsity

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[91] Cornett, *supra* note 87, at 723–27; *see also* Doreen McCallister, *Rolling Stone Settles Defamation Case with Former U.Va. Associate Dean*, NPR (Apr. 12, 2017, 4:32 AM), https://www.npr.org/sectionsIo-way/2017/04/12/523527227/rolling-stone-settles-defamation-case-with-former-u-va-associate-dean [https://perma.cc/ES4D-48JW].

[92] A. Benjamin Spencer, *Pleading in State Courts after* Twombly *and* Iqbal, POUND CIV. JUST. INST. (2010), https://www.poundinstitute.org/wp-content/uploads/2019/04/2010-Pound-Forum-Spencer-Paper-1.pdf [https://perma.cc/3BBE-EK6S].

> or reckless disregard of truth or falsity, while a federal court action would be dismissed.[93]

Indeed, we have seen several of these state court actions move forward in recent years. In fact, several high-profile defamation actions, including the Alex Jones case, the Johnny Depp/Amber Heard case, and the Fox/Dominion case, have moved forward in state court in recent years, suggesting the argument that plaintiffs cannot recover because of pleading standards likely falls short. More recently, retired NFL player Brett Favre, a public figure, chose Mississippi state court, where there is no anti-SLAPP protection in place,[94] to file three defamation cases in February 2023.[95] Mississippi also follows a more lenient pleading standard than the Federal Rules for Civil Procedure and *Iqbal*/*Twombly* establish.[96]

III. THE CRITICS: KEY ARGUMENTS TO REVISIT DEFAMATION LAW[97]

It is perhaps no coincidence that many of the most prominent critics of the actual malice standard, and defamation law more generally, have found themselves and their choices placed under a microscope by virtue of holding public office or public prominence. In fact, even some of democracy's staunchest defenders have been known to waffle a bit when they find themselves on the receiving end of critical commentary.[98] Today's defamation lawsuits and calls to "reform" defamation law are not terribly far removed from the power struggles that preceded the *Sullivan* decision. As First Amendment scholar Genevieve Lakier wrote for the *Washington Post:*

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[93] Cornett, *supra* note 87, at 732–33.

[94] *See Mississippi*, INST. FOR FREE SPEECH, https://www.ifs.org/anti-slapp-states/mississippi/ [https://perma.cc/BGF3-8CWP] (last visited July 9, 2023).

[95] *See* Emily Wagster Pettus, *Brett Favre Sues Auditor, Sportscasters in Defamation Case*, ASSOC. PRESS (Feb. 10, 2023, 7:44 AM), https://apnews.com/article/sports-legal-proceedings-scandals-brett-favre-mississippi-d0ae88cc6727fd74b4686fb09d9e7dcc [https://perma.cc/PMC8-USWH].

[96] *See* MISS. R. CIV. P. 12 (2023).

[97] For a thorough analysis of the justices' arguments in *McKee* and *Berisha*, *see* Matthew L. Schafer, *In Defense:* New York Times v. Sullivan, 82 LA. L. REV. 81, 84–95 (2021) [hereinafter Schafer, *In Defense*].

[98] Law Professor Rick Hasen provides detailed coverage of Marc Elias' Twitter meltdown in which he questioned the value of *Sullivan*'s actual malice standard after being under scrutiny for his role in funneling 'dark money' into political elections. *See generally* Rick Hasen, *Marc Elias is Sometimes Counterproductive When It Comes to Protecting Voting Rights, Election Integrity, and the Interests of the Democratic Party*, ELECTION L. BLOG (Jan. 30, 2022, 3:02 PM), https://electionlawblog.org/?p=127270 [https://perma.cc/C2LL-XN7V].

> [O}ver the past few years, a growing number of scholars, judges and politicians have argued that the Sullivan rule does more harm than good, but removing incentives for journalists and other public speakers to be careful with the truth. . . . Sullivan's critics argue that the 'actual malice' standard might have made sense in 1964, when the primary players in the public sphere were large media organizations like the Times that had a vested interest in being perceived as reliable disseminators of news—but it makes no sense today, when anyone can spread misinformation so long as they have social media followers.[99]

To better understand current criticisms of the *Sullivan* standard, I will briefly outline the arguments of five of the most prominent critics—all of whom are men who have held, or currently hold, positions in the federal government.

A. Justices Antonin Scalia and Clarence Thomas–The 'Originalist' Critique

"You can libel public figures at will so long as somebody told you something, some reliable person told you the lie that you then publicized to the whole world — that's what New York Times v. Sullivan *says."*[100]

When it came to his opinions, Justice Scalia was never one to mince words. In her tribute to him, Justice Ruth Bader Ginsburg wrote, "He was eminently quotable, his pungent opinions so clearly stated that his words never slipped from the reader's grasp."[101] Ever passionate when it came to the U.S. Constitution, Justice Scalia had many opinions—nearly all of them critical—of the Court's defamation jurisprudence. Whether it was at

[99] Genevieve Lakier, *Is the Legal Standard for Libel Outdated? Sarah Palin Could Help Answer*, WASH. POST (Feb. 11, 2022, 10:23 AM), https://www.washingtonpost.com/outlook/2022/02/03/sullivan-nyt-palin-free-press/ [https://perma.cc/FS82-9HSM].

[100] *See* Erik Wemple, *Antonin Scalia hates* 'NYT v. Sullivan', WASH. POST (Dec. 4, 2012, 2:18 PM), https://www.washingtonpost.com/blogs/erik-wemple/wp/2012/12/04/antonin-scalia-hates-nyt-v-sullivan/ [https://perma.cc/7LN6-54ME].

[101] *See* Dara Lind, *Read Justice Ginsburg's Moving Tribute to her "Best Buddy" Justice Scalia*, VOX (Feb. 14, 2016, 4:00 PM), https://www.vox.com/2016/2/14/10990156/scalia-ginsburg-friends [https://perma.cc/9ZJ8-6NQE].

a private event among the media elite or on the air with Charlie Rose,[102] Justice Scalia routinely took a moment to share his displeasure with *Sullivan's* actual malice standard.

Like many of Justice Scalia's grievances, his disdain for *Sullivan* arose from his "originalist" views. He regularly invoked his beliefs on what the founders thought about the First Amendment at the time of its ratification when calling *Sullivan* into question:

> Nobody thought that libel, even libel of public figures, was permitted, was sanctioned by the First Amendment. Where did that come from? Who told Earl Warren and the Supreme Court that what had been accepted libel law for a couple hundred years was no longer accepted?"[103]

If that refrain sounds oddly familiar, it is because Justice Thomas has taken up the mantle where Justice Scalia had left off. It only takes a quick skim of Justice Thomas' concurrence in the denial of certiorari for *McKee v. Cosby* to see the connections between his grievances and Justice Scalia's complaints.[104] Thomas' concurrence unsurprisingly garnered significant media coverage from a group of journalists concerned about the erosion of their First Amendment rights.[105] Attorneys, scholars, and reporters alike latched on to what has likely become the most famous phrase from the opinion—which Thomas took six months to pen:[106]

> *New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law. Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own "'federal rule[s]'" by balancing the "competing values at stake in defamation suits."[107]

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[102] *See Antonin Scalia*, CHARLIE ROSE (Nov. 27, 2012), https://charlierose.com/videos/17653 [https://perma.cc/WA3M-ZD5L].

[103] *See* Wemple, *supra* note 100.

[104] 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

[105] *See, e.g.*, Robert Barnes, *Justice Thomas Calls for Reexamining Landmark Libel Decision in Case Involving Cosby Accuser*, WASH. POST (Feb. 19, 2019, 1:07 PM), https://www.washingtonpost.com/politics/courts_law/justice-thomas-calls-for-reexamining-landmark-libel-decision-in-case-involving-cosby-accuser/2019/02/19/de78477c-3457-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/H8R4-Y82M].

[106] *See* Schafer, *In Defense*, *supra* note 97, at 86.

[107] *McKee*, 139 S. Ct. at 676 (2019) (Thomas, J., concurring in denial of certiorari).

But Thomas' real grievance seemed to be rooted in a belief that the First and Fourteenth Amendments should not be able to displace the common law of libel as applied by the states.[108] Schafer summarizes Thomas' attempt to support his opposition to *Sullivan:*

> (1) the common law of libel's treatment of public officials, (2) the Court's pre-*Sullivan* treatment of libel law, (3) the historical support for the proposition that either state or federal constitutions were intended to displace the common law of libel, and, finally, (4) Sullivan's alleged failure to point to any historical evidence supporting the establishment of the actual-malice rule except "opposition surrounding the Sedition Act of 1798."[109]

Yet, Schafer handily refuted Thomas' critique of the *Sullivan* Court's role, [110] noting that he falls victim to a reliance on limited and misguided notions of libel law's past, which Schafer called "ahistoric and un-American."[111] Schafer is not alone in his criticism of Thomas. Well-known media lawyer Lee Levine and his co-author Stephen Wermiel also called Thomas' reliance on original intent into question.[112] They argued that Thomas largely overlooks Justice Brennan's recounting of the historical analysis contained in *Sullivan*—"four full pages of which are squarely developed to the Framers' intent as gleaned from the most analogous historical experience."[113] Not only did Justice Brennan discuss the Sedition Act of 1798 in the Court's opinion in *Sullivan,* he went further by detailing published views from Justice Oliver Wendell Holmes, Justice Louis Brandeis and Justice Robert Jackson.[114] Notably, Levine and Wermiel pointed out Thomas' failure to acknowledge the seditious libel trial of John Peter Zenger in 1735, which many scholars and historians

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[108] *See generally id.*

[109] *Id.* at 681.

[110] *See generally* Schafer, *In Defense*, *supra* note 97.

[111] *See id.* at 158.

[112] Lee Levine & Stephen Wermiel, *Dubious Doubts and 'the Central Meaning of the First Amendment'—A Preliminary Reply to Justice Thomas*, FIRST AMEND. WATCH (Mar. 1, 2019), https://firstamendmentwatch.org/levine-and-wermiel-dubious-doubts-and-the-central-meaning-of-the-first-amendment-a-preliminary-reply-to-justice-thomas/ [https://perma.cc/EEW4-HX7F] [hereinafter Levine & Wermiel, *Dubious Doubts*].

[113] *Id.*

[114] *Id.*

note as a turning point in public opinion about seditious libel in the American Colonies.[115]

B. Former President Donald Trump–The Personal Aggrievement Critique

"I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws."[116]

The television-boss-turned-leader-of-the-free-world holds a paradoxical perspective on libel laws, having been both a plaintiff and a defendant in multiple defamation cases.[117] Despite his appearances on both sides of litigation, one of his campaign rallying cries involved changing defamation laws—which, ironically, he had no power to do as the president:

> One of the things I'm going to do if I win, and I hope we do and we're certainly leading. I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. 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.[118]

This refrain continued even after his election to the Oval Office. It was often preceded by the publication of an article or book he felt was unfairly critical of him. In September 2018, he tweeted in response to

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[115] *Id.*

[116] *See* Gold, *supra* note 10.

[117] *See Donald Trump: Three Decades 4,095 Lawsuits*, USA TODAY, https://www.usatoday.com/pages/interactives/trump-lawsuits/ [https://perma.cc/J4YC-K9T7] (last visited July 9, 2023) [hereinafter *Trump's 4,095 lawsuits*]. A 2016 investigation by USA Today found that President Trump had been involved in at least 14 media- or defamation-related cases, split equally between being a plaintiff and being a defendant. These cases have involved everyone from Bill Maher to Miss Pennsylvania. *See* Nick Penzenstadler, *Trump, Bill Maher and Miss Pennsylvania: The 'I'll Sue You' Effect*, USA TODAY (July 11, 2016, 4:01 PM), https://www.usatoday.com/story/news/politics/elections/2016/2016/07/11/trump-bill-maher-and-miss-pennsylvania-ll-sue-you-effect/85877342/ [https://perma.cc/BG4X-U2SK].

[118] *See* Gold, *supra* note 10.

Pulitzer Prize-winning journalist Bob Woodward's book, *Fear: Trump in the White House*:

> Isn't it a shame that someone can write an article or book, totally make up stories and form a picture of person that is literally the exact opposite of fact, and get away with it without retribution or cost. Don't know why Washington politicians don't change libel laws?[119]

Less than a year earlier, in January 2018, he responded similarly to Michael Wolff's book, *Fire and Fury: Inside the Trump White House*.[120] Reporters quoted Trump saying, "Our current libel laws are a sham and a disgrace and do not represent American values of American fairness so we're going to take a strong look at that."[121]

Trump has spent much, but not all, of this time as the plaintiff in defamation lawsuits, but he has rarely prevailed.[122] In October 2022, he filed a $475 million lawsuit against CNN, alleging the network's use of the phrase "The Big Lie" defamed him.[123] Prior to that, his campaign sued the *New York Times* and *Washington Post* over their coverage of him.[124] In conjunction with that coverage, Trump filed suit against the Pulitzer Prize board in December 2022, after the awards organization decided not to revoke their 2018 Pulitzer awards for reporting on Russian collusion in

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[119] John Wagner, *supra* note 10; Donald Trump (@realDonaldTrump), X (Sept. 5, 2018, 6:33 AM), https://twitter.com/realDonaldTrump/status/1037302649199177728 [https://perma.cc/NB8W-LGSB] (last visited July 9, 2023).

[120] *Trump: Michael Wolff book on administration is 'full of lies'*, BBC (Jan. 5, 2018), https://www.bbc.com/news/world-us-canada-42574419 [https://perma.cc/M3JY-6Z5D].

[121] *Stung by Wolff*, *supra* note 10.

[122] *See Trump's 4,095 lawsuits*, *supra* note 117. "Trump has threatened to sue several media outlets and individuals over the years for words that slighted the businessman, plus several other cases involving the mass media or media issues. . . . He has won only one case over defamation, and the ultimate disposition of that case is in dispute." *Id.*

[123] *First Amendment Scholar Timothy Zick Dismantles* Trump v. CNN *Lawsuit*, FIRST AMEND. WATCH, https://www.documentcloud.org/documents/23178893-first-amendment-scholar-timothy-zick-distmantles-trump-v-cnn-lawsuit [https://perma.cc/N885-TESS] (last visited July 9, 2023).

[124] *See* Michael M. Grynbaum, *Trump Sues CNN for Defamation, Seeking $475 Million*, N.Y. TIMES (Oct. 3, 2022), https://www.nytimes.com/2022/10/03/business/media/trump-cnn-lawsuit.html [https://perma.cc/R95U-UJG8].

the 2016 election.[125] In November 2020, Trump's campaign dropped a defamation lawsuit it filed against a Wisconsin television station over a Super PAC ad the campaign claimed deceptively spliced together Trump quotes from various speeches to mislead voters.[126]

In none of his public criticism does Trump appear to delve into his specific grievances or his reasoning for wanting to change libel laws, which he has used to sue others for statements they have made about him that he claims are false. Rather than having a substantive issue with the law, it seems he does not believe he should be subject to any criticism as a public official or public figure. Given their timing, his frequent objections often seem rooted in personal aggrievement. The former president's repeated attacks on libel law, even though they seem rooted in his personal feelings about being criticized, are important because they contribute to the public dialogue and opinion about defamation reform even if they do not add substantively to the conversation about the law's impact. Despite his criticism that the actual malice standard is too high, Trump has clearly benefited from the law's protection when he is a defendant in a lawsuit. In 2018, a federal judge dismissed Stormy Daniels' defamation lawsuit against President Trump.[127] Even though E. Jean Carroll prevailed with a $5 million jury verdict in her initial lawsuit against Trump in May 2023, she was required to prove the former president acted with actual malice when he tweeted about her:

> To prove her defamation claim, the jury had to find that Carroll's legal team proved by the preponderance of the evidence that Trump knew it was false when he published the statement about Carroll last year and knowingly exposed her to public ridicule. They also had to determine that she proved by clear and convincing evidence that the statement was false, and that Trump made the statement with actual malice.[128]

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[125] *See* Zach Schonfeld, *Trump Sues Pulitzer Board for Defamation in Defending Winning Russia Collusion Stories*, THE HILL (Dec. 14, 2022, 1:21 PM), https://thehill.com/homenews/media/3775079-trump-sues-pulitzer-board-for-defamation-in-defending-winning-russia-collusion-stories/ [https://perma.cc/7DJF-CU3P].

[126] David Shepardson, *Trump Campaign Drops Suit Against Wisconsin NBC Affiliate Over Ad*, REUTERS (Nov. 16, 2020, 5:41 PM), https://www.reuters.com/article/us-usa-election-ad-lawsuit/trump-campaign-drops-suit-against-wisconsin-nbc-affiliate-over-ad-idUSKBN27W320 [https://perma.cc/5YRV-BJ95].

[127] Clifford v. Trump, 339 F. Supp. 3d 915 (C.D. Cal. 2018).

[128] *See* Lauren del Valle, *What E. Jean Carroll Had to Prove to Win Her Case Against Donald Trump*, CNN (May 9, 2023, 4:27 PM),

In an unusual twist, Carroll has asked the court to amend her defamation lawsuit against Trump so that she could seek punitive damages after he repeated the statements about Carroll that the jury had found to be defamatory.[129] Even after she petitioned to amend her lawsuit, Trump could not resist repeating his initial claims on social media yet a third time:

> I don't know E. Jean Carroll, I never met her or touched her (except on a celebrity line with her African American husband who she disgustingly called the 'Ape,'), I wouldn't want to know her or touch her, I never abused or raped her or took her to a dressing room 25 years ago in a crowded department store where the doors are locked, she has no idea when, or did anything else to her, except deny her Fake, Made Up Story, that she wrote in a book. IT NEVER HAPPENED, IS A TOTAL SCAM, UNFAIR TRIAL.[130]

C. Justice Neil Gorsuch–A Changed Course on the High Court

*"*New York Times v. Sullivan *was, as you say, a landmark decision and it changed pretty dramatically the law of defamation and libel in this country. … That's been the law of the land for, gosh, 50, 60 years."*[131]

Despite his previous support of *Sullivan* as a federal appellate judge,[132] and his response when Senator Amy Klobuchar of Minnesota, a Democrat, questioned him directly during his Senate confirmation

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https://www.cnn.com/2023/05/09/politics/carroll-trump-jury-deliberations/index.html [https://perma.cc/X6DS-WJDW].

[129] Kara Scannell, *E. Jean Carroll Asks Judge to Amend Lawsuit to Seek Further Damages for What Trump Said at CNN Town Hall*, CNN (May 22, 2023, 6:04 PM), https://www.cnn.com/2023/05/22/politics/e-jean-carroll-damages-trump-cnn-town-hall/index.html [https://perma.cc/LD3C-A9DT].

[130] *See* Nikki McCann Ramirez, *Trump Can't STFU About E. Jean Carroll*, ROLLING STONE (May 23, 2023), https://www.rollingstone.com/politics/politics-news/trump-calls-e-jean-carroll-liar-sues-1234740382/ [https://perma.cc/J7R9-TBVQ].

[131] *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 150th Cong. (2017) [hereinafter *Confirmation*].

[132] *See generally* Bustos v. A&E Televisions Networks, 646 F.3d 762 (10th Cir. 2011). *See also Special Report on Supreme Court Nominee Neil Gorsuch*, REPS. COMM. FOR FREEDOM OF THE PRESS (Feb. 2, 2017), https://www.rcfp.org/gorsuch/ [https://perma.cc/ZZL7-REVU].

hearing,[133] Justice Gorsuch quickly joined Justice Thomas in his criticism once he was sworn in as a U.S. Supreme Court justice. He has agreed that *Sullivan* represents a "[d]eparture[] from the Constitution's original public meaning."[134] But Justice Gorsuch also said he believes the Court's decision in *Sullivan* and its progeny were "the product of good intentions."[135]

Unlike Thomas, Gorsuch's primary issues with *Sullivan* stem from how the actual malice standard operates in practice today. He was willing to concede that actual malice may have been needed in the past to ensure robust public discourse.[136] He accepted the inability to punish all lies in order to avoid suppressing speech—a "necessary and acceptable cost" that protects speech "vital to democratic self-government."[137] But Justice Gorsuch bristled at the way the doctrine has expanded since 1964. If it remained limited, applying only to a "small number of prominent government officials," it is likely he would find the actual malice standard more palatable.[138]

In Justice Gorsuch's eyes, the changed media environment has weakened historical justifications for such robust protection. Rather than

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[133] In response to Sen. Klobuchar's question about *New York Times v. Sullivan*, then Judge-Gorsuch responded in full: "*New York Times v. Sullivan* was, as you say, a landmark decision, and it changed pretty dramatically the law of defamation and libel in this country. Rather than the common law of defamation and libel, applicable normally for a long time, the Supreme Court said the First Amendment has special meaning and protection when we are talking about the media, the press in covering public officials, public actions, and indicated that a higher standard of proof was required in any defamation or libel case. Proof of actual malice is required to state a claim. That has been the law of the land for, gosh, 50, 60 years.

I could point you to a case in which I have applied it, and I think it might give you what you are looking for, Senator, in terms of comfort about how I apply it, *Bustos v. A&E Network*. It involved a prisoner who was concerned that he had been misrepresented as a member of the Aryan Brotherhood. He claimed he was not a Member, just a fellow traveler, and sought damages for that. Our court declined to grant that relief, saying that substantial truth is protected even if it is not strictly true, and much more is required by the First Amendment in order to state a claim." *Confirmation*, *supra* note 131.

[134] Berisha v. Lawson, 141 S. Ct. 2424, 2429 (2021) (mem.) (Gorsuch, J., dissenting in denial of certiorari).

[135] *Id.*

[136] *See id.* at 2427 ("In 1964, the Court may have seen the actual malice standard as necessary 'to ensure that dissenting or critical voices are not crowded out of public debate.'" (quoting Brief in Opposition at 22, Berisha v. Lawson, 141 S. Ct. 2424 (2021) (No. 20-1063), 2021 WL 2020775, at *22).

[137] *Id.* at 2428 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–72 (1964)).

[138] *Id.* at 2428 ("In 1964, the Court may have thought the actual malice standard would apply only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs.").

having a few powerful speakers driving the narrative, "everyone carries a soapbox in their hands."[139] It seems Gorsuch only supported *Sullivan* in an era where the institutional press and its layers of editorial control "deter[ed] the dissemination of defamatory falsehoods and misinformation" because their profit motive was to be a standard-bearer for quality journalism.[140] Perhaps unsurprisingly after his confirmation process, Justice Gorsuch has become skeptical—viewing the media industry as responsible for the amplification dissemination of disinformation and "falsehoods in quantities no one could have envisioned almost 60 years ago."[141] Justice Gorsuch is certainly not alone in voicing concerns about the prominence of the internet and social media. Many have blamed these changes in the media ecosystem—from a few trusted news sources in the *Sullivan* era to the rise of independent, and often partisan, bloggers and tweeters—as fueling the increase in misinformation and political polarization.[142] But as journalism professor Ed Wasserman pointed out, reforming libel laws alone will not stop the vast transmission of misinformation on the internet because much of it does nothing to injure someone's reputation:

> The connection Is bogus. Falsehoods that cause personal damage are a miniscule fraction of online falsity, which is a massive cultural and technological failure, not the work of professional journalists who cut corners because they think some jurisprudential loophole lets them.[143]

Yet, Justice Gorsuch seems willing to punish all speakers, including members of the press, for the transgressions of the few.

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[139] *Id.* at 2427.

[140] *Id.* at 2427–28 ("Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation.").

[141] *Id.* at 2428. Justice Gorsuch specifically points to the *Sullivan* rule as "no longer merely tolerat[ing] but encourage[ing]" such falsehoods. *Id.*

[142] *See, e.g.*, Jeff Allen, *Misinformation Amplification Analysis and Tracking Dashboard*, THE INTEGRITY INST. (Oct. 13, 2022), https://integrityinstitute.org/blog/misinformation-amplification-tracking-dashboard [https://perma.cc/R44P-KGAA]; Gizem Ceylan et al., *Sharing of Misinformation is Habitual, Not Just Lazy or Biased*, 120 PROC. OF THE NAT'L ACAD. SCI. 1 (2023); Michela Del Vicario et al., *The Spreading of Misinformation Online*, 113 PROC. OF THE NAT'L ACAD. SCI. 554, 554–59 (2016).

[143] Edward Wasserman, *The Future of Libel: Should* Times v. Sullivan *be the last Word?*, 33 MEDIA ETHICS MAG. 1 (2022).

D. Federal Circuit Judge Laurence Silberman

> "*After observing my colleagues' efforts to stretch the actual malice rule like a rubber band, I am prompted to urge the overruling of* New York Times v. Sullivan*. ... The holding has no relation to the text, history or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication.*"[144]

It is perhaps unsurprising that Judge Silberman, who has been described as Clarence Thomas' "mentor and best friend on the [D.C. Circuit] at the time,"[145] would announce his public criticism of the decades-old actual malice standard in a dissenting opinion lauding Justice Thomas.[146] "Justice Thomas has already persuasively demonstrated that *New York Times* was a policy-driven decision masquerading as constitutional law."[147] In his screed, Silberman goes on to call the decision "a threat to American Democracy," saying "[i]t must go."[148] He connects his disdain for *Sullivan* back to what he characterizes as history of over-constitutionalization by the Court, noting he had previously pointed out similar flaws in the doctrine of qualified immunity:

> I readily admit that I have little regard for holdings of the Court that dress up policymaking in constitutional garb. That is the real attack on the Constitution, in which—it should go without saying—the Framers chose to allocate political power to the political branches. The notion that the Court should somehow act in a policy role as a Council of Revision is illegitimate.[149]

Despite his clear scorn for the Court's decision, his loathing of the media also features prominently in his dissent: "The increased power of the press is so dangerous today because we are very close to one-party control of these institutions."[150] Ironically, history has shown us not that the institutional press has grown more powerful since *Sullivan,* but indeed

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[144] *See* Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251 (D.C. Cir. Mar. 19, 2021) (Silberman, J., dissenting).

[145] Gregory G. Katsas, *Justice Thomas Joins the Supreme Court*, HARV. J.L. & PUB. POL'Y 1 (2021).

[146] *Tah*, 991 F.3d at 251.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 252.

[150] *Id.*

that its influence is waning. Certainly, the public has many more options from which to consume its news in 2023 than it did in the pre-Internet *Sullivan* era.

From there, Silberman's dissent took on a heavily ideological tone. At one point he goes as far as to claim the news section of The Wall Street Journal is left-leaning, making it difficult to take his dissent seriously.[151] However, he closes with a cautionary tale that even I agree with:

> It should be borne in mind that the first step taken by any potential authoritarian or dictatorial regime is to gain control of communications, particularly the delivery of news. It is fair to conclude, therefore, that one party control of the press and media is a threat to a viable democracy. It may even give rise to countervailing extremism. The First Amendment guarantees a free press to foster a vibrant trade in ideas.[152]

And yet, Justice Silberman's dissent calls for the repeal of those very First Amendment protections he claims to value—protections that permit the punishment of speakers who knowingly trade in falsehoods.

IV. *ROSENBLOOM* REDUX: WHAT THE PLURALITY CAN TEACH US

For the sake of clarity, the earlier discussion of *Sullivan* and its progeny overlooked a key U.S. Supreme Court decision: *Rosenbloom v. Metromedia.*[153] Short-lived and only decided by a plurality, *Rosenbloom* had the potential to shift the defamation landscape markedly. Although the decision itself did not have significant staying power, the legal standard it embodied—the "matter of public concern" standard—finds its roots in Justice Brennan's *Sullivan* decision.[154] There, Brennan wrote:

> The present advertisement, as an expression of grievance and protest on *one of the major public issues of our time*, would seem clearly to qualify for the constitutional protection.[155]

Given the salience of matters of public concern to self-governance in a democratic society, I argue the Court would be wise to return to the *Rosenbloom* standard as a means of quelling some criticisms that have

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[151] *Id.*

[152] *Id.* at 255–56.

[153] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

[154] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

[155] *Id.* (emphasis added).

bubbled up around *Sullivan*. Doing so would signal a recommitment to "an open society"—albeit one a bit different than that envisioned by Anthony Lewis.[156] Under the *Rosenbloom* standard, citizens would not be able to "say what they wish about those who temporarily govern them,"[157] but instead would be able to say what they wish about the important political and social issues that play a role in our democratic governance—which might very well include criticism of those who govern them. As I will discuss in my conclusion, this seemingly small distinction portends a significant difference in how some defamation cases would turn out. Rather than placing an emphasis on who is suing for defamation, a return to the matter of public concern standard would shift the focus to the importance of the speech in our society—reserving the highest levels of First Amendment protection for discussions about core political and social issues.

A. Understanding Rosenbloom

Four years after *Curtis Publishing*, and three years before *Gertz*, the Supreme Court faced the question of what fault standard should apply in lawsuits involving private figures. The case was *Rosenbloom v. Metromedia*,[158] whose failure to garner a majority opinion likely rested on the fact that Justice William O. Douglas—a strong supporter of First Amendment protections for freedom of expression—[159]did not participate in the decision. Adult magazine distributor George Rosenbloom sued Metromedia, whose radio station repeatedly reported Rosenbloom had been arrested for possession of obscene literature.[160] A mere private figure, Mr. Rosenbloom certainly did not meet the standards established in *Sullivan* or *Butts*. At trial, the district court did not apply the actual malice standard, and the jury awarded Mr. Rosenbloom punitive damages. On appeal to the Third Circuit,[161] the decision was overturned with a panel of judges holding Mr. Rosenbloom should have been required to show the statements were made with reckless or knowing falsity.[162]

The Supreme Court granted certiorari. In an interesting turn of events, the plaintiff conceded that the statements about him occurred during the discussion of a matter of public interest.[163] A plurality of the

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[156] LEWIS, *supra* note 26, at 2.

[157] *Id.*

[158] *Rosenbloom*, 403 U.S. at 29.

[159] *See generally* L.A. Powe Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment,* 74 COLUM. L. REV. 371 (1974).

[160] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 32 (1971).

[161] Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 893 (3d Cir. 1969).

[162] *Id.* at 896.

[163] *Rosenbloom*, 403 U.S. at 40.

Court favored requiring Mr. Rosenbloom to prove actual malice even though he was a private person because the case involved a matter of public concern.[164] Applying the actual malice standard would ensure critical speech would not be chilled. Matters of public concern, the plurality noted, are central to the First Amendment's protections.[165] Quoting *Thornhill v. Alabama*,[166] the plurality reasoned:

> Freedom of discussion, 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.[167]

Less than a decade after writing the Court's unanimous decision in *Sullivan,* Justice Brennan had become keenly aware of the challenges associated with plaintiff status determinations.[168] In his view, the protections of the First Amendment should not be dependent on the status of the person spoken about but rather on the topics being discussed.[169] Writing for the plurality, he noted:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. 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.[170]

It is perhaps ironic that plaintiff status determinations have become increasingly difficult for judges to make, resulting in conflicting outcomes dependent upon state law.[171] In his *Gertz* decision, Justice Powell offered a similar warning about the matter of public concern standard to justify the Court's return to the public versus private plaintiff distinction:

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[164] *Id.* at 52.

[165] *Id.* at 44.

[166] Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

[167] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41 (1971).

[168] For a detailed discussion of how the courts have handled plaintiff status determinations, with particular attention to the challenges posed by early online defamation cases, *see* Sanders, *Defining Defamation*, *supra* note 21.

[169] *Id.*

[170] *Rosenbloom*, 403 U.S. at 43.

[171] For an in-depth discussion of plaintiff status determinations, *see* Sanders, *Defining Defamation*, *supra* note 21.

> But this approach [in *Rosenbloom*] would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.[172]

B. The Matter of Public Concern Standard in Free Speech Cases

Courts have experience determining what constitutes a "matter of public concern." This is because the Supreme Court's subsequent decisions in *Dun & Bradstreet v. Greenmoss Builders*,[173] and *Philadelphia Newspapers v. Hepps*,[174] required judges to apply the standard in cases involving private plaintiffs. In these cases, judges must decide whether the speech involved a matter of public concern in addition to making determinations about plaintiff status. As the *Hepps* Court noted:

> When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern.[175]

The Court has even defined—albeit somewhat vaguely—what speech constitutes a matter of public concern. In *First National Bank of Boston v. Bellotti*, the Supreme Court wrote, *"*In short, speech on matters of public concern is that speech which lies 'at the heart of the First Amendment's protection.'"[176] But the Court went further in subsequent

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[172] Gertz v. Robert Welch, Inc., 418 U.S. 323, 343–44 (1974).

[173] Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985) (holding that a private person need not prove actual malice to recover presumed or punitive damages in a defamation action involving purely private matters).

[174] Phila. Newspapers v. Hepps, 475 U.S. 767 (1986) (holding that private figures must prove falsity to recover from a media defendant if the defamatory statement stemmed from an issue of public concern).

[175] *Id.* at 775.

[176] 435 U.S. 765, 776 (1978).

cases, establishing what it has referred to as "guiding principles, principles that accord broad protection to speech to ensure the courts themselves do not become inadvertent censors."[177] In that case, the Court hearkened back to two cases that included some of the guiding language. In *Connick v. Myers,* the Court referred to speech on matters of public concern as "relating to any matter of political, social or other concern to the community."[178] In another case, *San Diego v. Roe,* the Court articulated a similar standard "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[179]

The Supreme Court's long history of deference to speech on matters of public concern runs the gamut from student speech to hate speech. In *Snyder v. Phelps,* the majority wrote that the First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate."[180] In *Rankin v. McPherson*, it opined that"[t]he inappropriate . . . character of a statement is irrelevant to the question whether it deals with a matter of public concern."[181] More recently in *Mahanoy Area School District v. B. L.*, a case regarding a teen's vulgar social media post, Justice Alito, wrote in his concurrence:

> This is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies at the heart of the First Amendment's protection.[182]

Over the years, lower courts have defined public concern in their own words, but they have found common ground in largely coherent standards that judges can apply in defamation cases. In *Waldbaum v. Fairchild Publications*, Judges Tamm and McKinnon wrote: "A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way."[183] Although the concept has been articulated differently by various courts, the standard still points to a roughly defined group of political and social issues that affect the community.

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[177] Snyder v. Phelps, 562 U.S. 443, 452 (2011).
[178] 461 U.S. 138, 146 (1983).
[179] 543 U.S. 77, 83–84 (2004).
[180] *Snyder*, 562 U.S. at 461.
[181] 483 U.S. 378, 387 (1987).
[182] 141 S. Ct. 2038, 2055 (Alito, J., concurring).
[183] 627 F.2d 1287, 1296 (D.C. Cir. 1980).

C. "Matters of Public Concern": A Standard Not Without Controversy

It would be irresponsible to argue in favor of the "matter of public concern" standard without acknowledging its critics.[184] Justice Powell was not the only legal mind critical of the concept. Law professor Arlen Langvardt took issue with the Supreme Court's failure to provide lower courts with clear guidance on how to apply the standard.[185] Law professor Nat Stern wrote that the standard was "so vague and subjective, courts can (and often do) arrive in good faith at opposite characterizations of essentially similar expression."[186] Perhaps the harshest critic of all, law professor Cynthia Estlund wrote:

> The public concern test rests on an unduly constricted vision of public discourse. It undermines the capacity of the citizenry to bring hitherto "private" and particularized grievances onto the public agenda, and it inevitably leads to the suppression and the deterrence of speech that is important to public debate. These serious flaws are inherent in the nature of the public concern test, and would similarly plague any content-based category of privileged or disfavored speech that assigned the function of explicitly sorting out "speech that matters" from speech that doesn't.[187]

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[184] *See, e.g.*, Arlen W. Langvardt, *Public Concern Revisited: A New Rule For An Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 258–59 (1987) (arguing the Court should reinstate the original understanding of *Gertz* because of the Court's lack of guidance on how to apply the matter of public concern standard); David W. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 240 (1976) (concluding *Gertz's* plaintiff categorization method is a compromise between the interests of free speech and an individual's reputation and lays out a more stable standard than the matter of public concern standard); Nat Stern, *Private Concerns of Private Plaintiffs: Revising A Problematic Defamation Category*, 65 MO. L. REV. 597, 653 (2000) (arguing the public concern standard is "vague and subjective" and that *Dun & Bradstreet* contradicts the Court's holding in Gertz); Stephen J. Mattingly, Note, *Drawing a Dangerous Line: Why the Public-Concern Test in Constitutional Law of Defamation is Harmful to the First Amendment, and What Courts Should Do About It*, 47 LOUISVILLE L. REV. 739, 739 (2009) (advocating that use of the public concern test is a threat to the First Amendment, as government officials would be deciding what constitutes matters worthy of being debated).

[185] Langvardt, *supra* note 184, at 270.

[186] Stern, *supra* note 184, at 653.

[187] Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of An Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 55 (1990).

But the courts have increasingly grown more comfortable with the standard since these scholars lodged their critiques.

As I wrote in a previous article, "[t]he law will never be all things to all parties,"[188] but the Court has already interwoven the complexities of the "matter of public concern standard" into the evaluation of defamation lawsuits.[189] Removing the additional layer of analysis required by the public plaintiff analysis could not only streamline defamation cases, but also provide a broader range of protection for important categories of public discourse. Because of this, the standard has a group of supporters, including Justice Brennan, as well.[190] Among them, David Lat and Zach Shemtob cited changes in the media landscape, including the accessibility of the internet, as a reason to abandon the private/public distinction in favor of the *Rosenbloom* standard: "Only by rejecting *Gertz* and adopting Justice Brennan's more fluid *Rosenbloom* position, treating us all as public figures to some degree, can such law begin to make sense in the age of new media and social networks."[191]

V. SILENCING THE CRITICS WITHOUT STIFLING PUBLIC DELIBERATION

A. Addressing the 'Not in the Constitution' Concern

Justices Scalia and Thomas are not alone in asserting an "originalist" position in opposition to *Sullivan*. Professor Carson Holloway repeated many of their concerns in an essay for the Claremont Institute, a conservative think tank:

> Moreover, these grave evils by no means result from a necessary fidelity to the Constitution. On the contrary,

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[188] Sanders & Miller, *supra* note 21, at 556.

[189] *Id.*

[190] *See, e.g.*, David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. TELECOMM. & HIGH TECH. L. 403, 410 (2011) (rendering Gertz's plaintiff categorization standard obsolete with such profound changes to the media landscape and advent of digital media); Gerald Ashdown, *Of Public Figures and Public Interest -The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937, 951 (1984) (arguing plaintiff categorization is unworkable and that the public concern standard is a more sensible approach); R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 29 (1987) (acknowledging the public concern standard comes with difficulties but concludes it is preferred over a more convenient standard); Robert E. Drechsel, *Defining "Public Concern" in Defamation Cases Since* Dun & Bradstreet v. Greenmoss Builders, 43 FED. COMM. L.J. 1, 2 (1990) (identifying ways the Court can ascertain what type of speech should be classified as a matter of public concern).

[191] Lat & Shemtob, *supra* note 190, at 419.

> they arise from constitutional infidelity. With its opinion in *New York Times v. Sullivan*, the Supreme Court of 1964 was not discovering and adhering to the original meaning of the First Amendment. It was, rather, departing from that meaning and imposing its own novel standards on our nation's First Amendment jurisprudence. The key elements of the *New York Times* doctrine—the distinction between public figures and all other Americans, and the burden on the former to demonstrate "actual malice" in order to prevail in a libel action—are not rooted in the original understanding of the First Amendment. The original understanding instead held that libel—false, defamatory publication—is outside the freedom of the press and not protected by that venerable principle.[192]

To defend his position, Holloway recounted verdicts in several pre-*Sullivan* cases in which public figures were not required to prove actual malice.[193] As scholars like Schafer and attorneys like Levine have pointed out, the repetition of these refrains, without specific citation to historical documents and contemporary accounts, has become commonplace among *Sullivan*'s naysayers.[194]

It should be noted that not all conservatives agree with Justices Scalia and Thomas. Conservative legal scholar Josh Blackman noted concerns over the 1798 Sedition Act as "originalist basis to impose a higher bar for libel suits filed by government officials."[195] Writing for the CATO Institute, attorneys David Rivkin Jr. and Andrew Grossman outlined their "originalist" case in favor of First Amendment constraints on defamation law.[196] Noting that state law serves as the basis for liability in a defamation case, they argued that civil defamation cases awarding plaintiffs money for injury to reputation based on someone's speech are no different than if the state were to impose fines for seditious libel:

> And while it may be that "the freedom of speech" recognized by the First Amendment does not protect

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[192] Holloway, *supra* note 13.

[193] *Id.*

[194] *See* Levine & Wermiel, *Dubious Doubts*, *supra* note 112; Matthew L. Schafer, *An American Freedom: The Intelligentsia and Freedom of the Press after Blackstone*, 127 PENN. ST. L. REV. 455 (2022) [hereinafter Schafer, *An American Freedom*].

[195] Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 NYU J.L. & LIBERTY 44, 54–55 (2019).

[196] *See* David B. Rivkin Jr. & Andrew M. Grossman, *An Originalist Libel Defense*, CATO INST. (Aug. 2, 2019), https://www.cato.org/commentary/originalist-libel-defense [https://perma.cc/G79E-64M7].

> defamatory speech — which was Scalia's view and apparently is Justice Thomas's — no one seriously argues that a state can punish any speech it wants, free from constitutional scrutiny, merely by labeling it "defamation." That means the court has to define the term somehow.[197]

Rivkin and Grossman acknowledged Justice Thomas' concerns with the actual malice standard, such as his assertion that case law suggests the First and Fourteenth Amendments do not undo the common law of libel.[198] They noted that Thomas attempts to rely on the history of libel law in the United States as the basis for this position, which proves problematic.[199]

Similar to Justice Alito's opinion in *Dobbs,* the historical arguments made in favor of abandoning the *Sullivan* actual malice standard have come under harsh criticism from legal scholars, who say they ignore important parts of our nation's history and misapply certain legal authorities. Schafer's historical studies of libel and actual malice are perhaps the most persuasive in this regard.[200] Since Justice Thomas' 2019 concurrence in the denial of certiorari in *McKee v. Cosby*—where he publicly called into question the validity of the actual malice standard—Schafer and other legal scholars have attempted to set the record straight by presenting thoroughly researched, well-cited, and detailed historical accounts of the state of libel in colonial America, during the nation's founding, and prior to the Court's 1964 *Sullivan* decision.[201] As Rivkin and Grossman noted, several types of libel claims have historically been subject to the actual malice standard:

> But plaintiffs often *did* have to prove actual malice to prevail. The law recognized circumstances in which a libel defendant could assert a "qualified" or "defeasible"

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[197] *See id.*

[198] *Id.*

[199] *Id.*

[200] *See, e.g.*, Schafer, *An American Freedom*, *supra* note 194 (arguing that early Americans did not adopt Blackstone's views as their own as conservative judges have claimed); Schafer, *In Defense*, *supra* note 97; Matthew L. Schafer & Jeff Kosseff, *Protecting Free Speech in a Post*-Sullivan *World*, 75 FED. COMM. L.J. 1 (2022) (proposing Congress codify some of the existing constitutional protections for defamation, including the actual malice standard, using a preemption statute).

[201] *See, e.g.*, WENDELL BIRD, THE REVOLUTION IN FREEDOMS OF PRESS AND SPEECH: FROM BLACKSTONE TO THE FIRST AMENDMENT AND FOX'S LIBEL ACT (2020), Jane E. Kirtley, *Uncommon Law: The Past, Present and Future of Libel Law in a Time of "Fake News" and "Enemies of the People"*, 2020 UNI. OF CHI. LEGAL F. 117 (2020); Philip A. Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985).

> immunity from damages and thereby put the plaintiff to the burden of proving "express" or "actual" malice under more or less the same standard *Sullivan* prescribed. One musty treatise, published in 1877, reports such immunity applies whenever the speaker has a "legal, social, or moral" duty to comment on another's character, fitness or conduct, including in matters of business, crime, morality or religion. Moreover, libel claims concerning government officials' conduct were often subject to the actual-malice standard, as were claims for punitive damages. *Sullivan*'s reasoning was loose, but it didn't fashion actual malice out of whole cloth.[202]

Taken together, their work has largely refuted Justice Thomas' ahistorical claims that *Sullivan* and its progeny are "policy-driven decisions masquerading as constitutional law."[203]

B. Addressing the 'Too Many Public Plaintiffs' Concern

Although it is unclear whether *Sullivan* and its progeny have resulted in an overly generous categorization of public figure plaintiffs, this concern is perhaps most valid in criticisms advocating for defamation reform. Some scholars have argued that viral content now unfairly subjects a larger class of defamation plaintiffs to the burden of proving actual malice.[204] Even in the wake of the *Gertz* ruling, Justice Powell expressed concern that lower courts were taking liberties he had not intended.[205] Co-author Kirk von Kreisler and I have previously argued that Powell's concerns in the 1970s and 1980s served as a preview of Justice Gorsuch's more modern criticisms.[206]

If the First Amendment centrally concerns the protection of robust public discourse as Brennan, Levine and others have suggested, then a return to *Rosenbloom's* "matter of public concern" standard provides protection based on the content of the speech rather than the public stature of the defamed party. Although social media has, in some ways, helped

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[202] Rivkin & Grossman, *supra* note 196.

[203] McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

[204] *See, e.g.*, Derigan Silver & Loryn Rumsey, *Going Viral: Limited-Purpose Public Figures, Involuntary Public Figures, and Viral Media Content*, 27 COMMC'N L. & POL'Y 49 (2022); Sanders & Arendt, *supra* note 21, at 7.

[205] *See* Lewis F. Powell, Jr., Editorial, *Repression of Civil Liberties: Fact or Fiction?*, RICHMOND TIMES DISPATCH, 11 (June 28, 1971) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Powell Speeches).

[206] Sanders & von Kreisler, *supra* note 21.

galvanize certain political movements, much of the content goes viral on social media—including cat videos, makeup tutorials, lip-sync TikToks and live-streaming video games—hardly pertains to the important social and political issues at the core of First Amendment protection. As a result, some plaintiffs who might otherwise be categorized as public officials or public figures required to prove actual malice would instead need only prove something more akin to negligence if the defamatory statements about them did not pertain to "matters of public concern."

C. Addressing the 'Social Media Run Amok' Concern

Many have tried to attribute the decline in civil discourse to the rise of the internet and social media, which is often used by the legacy media as a platform to republish clips from broadcasts or for their journalists and commentators to share their opinions with audiences in a more informal context.[207] Some lawmakers, including Republican Senators Ron Johnson[208] and John Kennedy,[209] have even proposed banning anonymous online speech. More recently, news organizations, journalists and progressives cheered on defamation lawsuits against Fox News and other conservative media outlets for their broadcasts and social media posts related to the 2020 election, arguing that holding Fox and others liable would send a strong message about the need for truthful reporting.[210] One of the nation's largest journalism industry organizations, the Society of Professional Journalists, issued a sternly worded press release, saying "No

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[207] *See* Nancy Costello, *Free-Speech Ruling Won't Help Declining Civil Discourse*, THE CONVERSATION (June 25, 2021, 8:22 AM), https://theconversation.com/free-speech-ruling-wont-help-declining-civil-discourse-163325 [https://perma.cc/7C6X-6LEJ].

[208] Senator Ron Johnson (@SenRonJohnson), X (Jan. 26, 2021, 6:04 PM), https://twitter.com/SenRonJohnson/status/1354218776670203905 [https://perma.cc/5QAY-ZXPH].

[209] Karl Herchenroeder (@KarlHerk), X (Jan. 29, 2021, 8:08 AM), https://twitter.com/KarlHerk/status/1355155938022457349 [https://perma.cc/4XTV-YPM5].

[210] *See, e.g.*, *Wajahat Ali, Dominion's Big Fox News Settlement is America's Loss*, THE DAILY BEAST (Apr. 18, 2023, 8:02 PM), https://www.thedailybeast.com/dominions-big-fox-news-settlement-is-americas-loss [https://perma.cc/R94T-T2HZ]; Elie Mystal, *Fox News May Finally Pay the Price for its Lies*, THE NATION (Mar. 9, 2023), https://www.thenation.com/article/politics/fox-may-finally-get-its-comeuppance/ [https://perma.cc/948V-KM7C]; Jon Allsop, *The Dominion-Fox Case Has Clear Lessons—Whether or not it Settles*, COLUM. JOURNALISM REV. (Apr. 17, 2023), https://www.cjr.org/the_media_today/dominion_fox_trial_settlement.php [https://perma.cc/FT9W-L25K].

responsible journalist can accept or excuse this behavior."[211] But free speech advocates who sought to punish Fox missed the point, which law professor Jeff Kosseff noted in his column for the *New York Times*: "Overturning nearly six decades of vital First Amendment precedent would not benefit conservatives, liberals or anyone other than those who seek to stifle reporting and criticism with the threat of litigation."[212]

Some legal scholars and attorneys are deeply aware of the dangers associated with the scaling back of *Sullivan.* Fox's attorneys called the Dominion litigation "a profound threat to the First Amendment."[213] Liberals who revel in the idea that a defamation lawsuit could cripple Fox must remember that the rules can be turned against news organizations and speakers—including MSNBC, Mother Jones, the Atlantic, Rachel Maddow, Joy Reid and more—expressing opinions with which they may agree. Journalism professor Genelle Belmas acknowledged this in an April 2023 interview with the *Christian Science Monitor*: "I think Dominion should win this case, because I do think this is a clear case of actual malice. . . . But in the larger sense, that doesn't fix the problem of disinformation, and it could be weaponized, potentially weaponized, against press freedoms."[214] Others worry about the dangers of second-guessing journalism and editorial decision-making in a way that delves deeply into how news organizations operate. Few media organizations have the wherewithal, including a large in-house legal department and deep pockets, that Fox displayed in fighting Dominion's lawsuit. Journalism professor Jane Kirtley cautioned that similar lawsuits could be ruinous for smaller news organizations at a time where there is a shortage of local news.[215] "Many news organizations would not withstand the degree of scrutiny that Fox will be subjected to. I don't like the idea that we're having effectively truth tribunals here, that are declaring whether the

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[211] Claire Regan & Zoë Berg, *SPJ on Fox News Lawsuit Allegations: 'No Responsible Journalist Can Accept or Excuse This Behavior'*, SOC'Y OF PRO. JOURNALISTS (Mar. 29, 2023, 9:50 AM), https://www.spj.org/news.asp?REF=2928 [https://perma.cc/FY9J-7WZ2].

[212] Jeff Kosseff, *What Protects Fox News Also Protects our Democracy*, N.Y. TIMES (Apr. 14, 2023), https://www.nytimes.com/2023/04/14/opinion/dominion-fox-news-supreme-court-sullivan.html [https://perma.cc/4LWD-WQMC].

[213] Jacob Shamsian, *Dominion's Case Against Fox News Goes to Trial This Week. Is the First Amendment Really on the Line?*, INSIDER (Apr. 16, 2023, 6:00 AM), https://www.businessinsider.com/fox-news-dominion-defamation-lawsuit-trial-first-amendment-free-speech-2023-4 [https://perma.cc/7ANJ-8299].

[214] Harry Bruinius, Dominion v. Fox*: Could Case be Weaponized Against Freedom of the Press?*, CHRISTIAN SCI. MONITOR (Apr. 17, 2023), https://www.csmonitor.com/Business/2023/0417/Dominion-v.-Fox-Could-case-be-weaponized-against-freedom-of-press [https://perma.cc/B6TQ-KNMK].

[215] *Will Dominion Lawsuit Hurt Other Journalism?*, CNN BUS., https://www.cnn.com/videos/media/2023/04/15/smr-impact-of-dominion-on-journalism.cnn [https://perma.cc/V8S5-KXFH] (last visited July 10, 2023).

press is telling the truth or not."[216] Kirtley's comments serve as a stark reminder of the *Sullivan*-era judgements against major news organizations who dared challenged the Southern White segregationist narrative during the Civil Rights Movement.

VI. CONCLUSION: THE 'MATTER OF PUBLIC CONCERN' COMPROMISE

When a unanimous *Sullivan* Court brought the defamation tort under the auspices of the First Amendment, it did not do so lightly. The Justices articulated a clear concern for the role that critical discourse plays in a deliberative democracy. But there is no doubt that today's media landscape has changed significantly since the 1964 decision. After all, *Sullivan* predates social media, mobile phones, broadband internet and even cable and satellite television. However, technological change alone should not justify a departure from foundational principles of our democratic heritage. Rather, we should reconsider how to best protect citizens engaged in the discussion of important political and social issues while also striking a balance to prevent unnecessary injury to reputation. A return to the *Rosenbloom* "matter of public concern" standard, which would require defamation plaintiffs to prove actual malice based on the subject matter of the statements rather than their status as public plaintiffs, strikes that balance. It would ensure that public officials and public figures can maintain some private aspects of their lives that are off limits while also protecting the rights of citizens to discuss the most pressing issues of the day.

If adoption of the matter of public concern standard can quell even some of the criticism of *Sullivan*—as I have suggested above it should—then it might just be worth the compromise if it means keeping the actual malice rule in place for the very types of issues that news organizations should be addressing.

[216] *Id.*