Enduring Legacy of Seditious Libel Protections Worth Preserving

by Frank Corrado

Nearly 60 years ago, the United States Supreme Court decided *New York Times Co. v. Sullivan*.[1] In an opinion authored by Justice William Brennan, the Court for the first time extended First Amendment protection to certain forms of defamation—a category of speech previously considered beyond the amendment's scope.[2]

Sullivan held, as a matter of constitutional law, that public officials could not recover for defamatory criticism of their conduct unless they proved, by clear and convincing evidence, that the defamatory criticism was made with "actual malice"—knowledge or reckless disregard of its falsity.[3] In essence, the Court declared that the First Amendment protected seditious libel—the criticism by a citizen or a media outlet of a public official's actions.

Because it guarantees our right to criticize those who govern us, *Sullivan* is one of the Court's most important First Amendment decisions.[4] When it was announced, Alexander Meiklejohn, the philosopher and constitutional scholar whose view of the First Amendment informs much of the opinion, called the decision "an occasion for dancing in the streets."[5]

Since then, and for the past half-century, *Sullivan* has remained the most potent, and most effective, expression of our First Amendment right to criticize the actions of our government and its officials.

Recently, however, Justice Clarence Thomas has questioned *Sullivan's* legitimacy and asked the Court to "reconsider its jurisprudence in this area."[6]

In 2019, concurring in the denial of a petition for *certiorari*, Thomas called *Sullivan* "a policy-driven decision [] masquerading as constitutional law."[7] He further suggested that the "original understanding of the First Amendment" did not include any constitutional protection for defamation, and that the Court should leave the balance between "robust public discourse" and reputation exclusively to the states.[8]

Justice Thomas' suggestion is troubling, and if accepted would undermine key protections for free speech about public officials' conduct. There are numerous reasons why the Supreme Court should reject Justice Thomas' invitation to "reconsider" *Sullivan* by applying an "originalist" approach to the First Amendment.

First (and irrespective of First Amendment concerns), Justice Thomas' suggestion would violate the principle of *stare decisis*. *Sullivan* is now 56 years old. Its rule—at least with respect to criticism of public officials' conduct—has proven both clear and workable. Lawyers who handle public official defamation cases have come to rely on it. It has become a standard feature of public official defamation law. And as discussed below, the rule protects interests essential to our democracy.

In short, none of the traditional reasons to disregard *stare decisis* exists in these circumstances.[9]

More importantly, an originalist approach would not allow the Court to articulate, or rely upon, a viable theory of the First Amendment—that is, a rationale that explains why the amendment might apply in one situation but not in another.

Perhaps more than any other constitutional provision, the First Amendment requires such a theory. This is so for at least two reasons.

First, the amendment's language cannot be taken literally: if the government could truly make "no law…abridging the freedom of speech"[10] there would be no crime of perjury, or blackmail, or terroristic threats; no regulation of advertising; no bans on obscenity; no restrictions of hate speech or "fighting words." A court's application of the amendment's text thus requires a principled basis for distinguishing those types of speech the government can restrict from those it must protect.

Moreover, the term "speech" itself is fluid, and encompasses a vast and ever-evolving range of expressive activity. The framers cannot possibly have imagined, or considered the amendment's application to, many of the forms of speech commonplace today.[11]

An originalist approach cannot account for these considerations. And in fact, the history of First Amendment jurisprudence reveals the Court's recognition that originalism and a meaningful First Amendment are fundamentally incompatible.

The Court's initial encounters with the First Amendment reflect a belief that its sole purpose was to prohibit prior restraints, and that subsequent punishment of speech—even speech critical of a public official's conduct—was permissible.[12]

Gradually, however, partly through cases that arose during World War I and the "Red Scare" of the 1920s, the Court came to acknowledge that the First Amendment's reach was broader, and depended on its ability to protect speech-related values important to a healthy society.

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Three such values in particular resonated with the Court: 1) the need for a vigorous "marketplace of ideas" to ensure attainment of the public good;[13] 2) the need for robust debate on public affairs to ensure an informed citizenry and to facilitate a fully functioning democratic process;[14] and 3) the need to prohibit the government from censoring citizens who disagree with it.[15]

Justice Brennan's opinion in *Sullivan* embodied these three First Amendment theories, especially the second. "The central meaning of the First Amendment," he wrote, is "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."[16]

Justice Brennan grounded his opinion in the notion that citizens in a democracy must be free to criticize official conduct, and that consequently punishment for sedition violates the First Amendment. He supported that argument by reference to "the great controversy over the Sedition Act of 1798," and Madison's condemnation of that act as unconstitutional.[17]

In his *McKee* concurrence, Justice Thomas suggests the historical record does not support the idea that the framers meant the First Amendment to modify or restrict the common law of defamation.[18] But if Justice Thomas were correct that the framers did not intend the First Amendment to prohibit punishment for seditious defamation, an "originalist" approach would, in effect, eviscerate a citizen's right to criticize the conduct of public officials, and would subvert important values the Court has long held that the First Amendment exists to protect.[19]

To put it another way, even if the framers did not expressly articulate it, who would want a First Amendment that does not protect our right to criticize, with impunity, the conduct of public officials?

"Originalism," in other words, does not embrace a theory of the First Amendment; and if applied to defamation of public officials, would deprive the Court of the ability to establish the most fundamental of First Amendment rights.

It is true, as Justice Thomas points out, that the Court subsequently extended *Sullivan's* "actual malice" rule to "public figures," as well as public officials.[20] But that extension does not justify wholesale reconsideration of *Sullivan's* core holding. And in any event, enhanced protection for criticism of public figures advances the same First Amendment values that *Sullivan* vindicates.

Moreover, simply as a practical matter, where criticism of public official conduct is concerned, a uniform national rule of law—as opposed to Justice Thomas' suggested state-by-state approach—is essential. Were it otherwise, critics of official conduct would face the prospect of 50 different state approaches to defamation. A defamation plaintiff, particularly one suing a mass media defendant, would have the opportunity to "forum shop" for the venue with the law most favorable to the plaintiff.[21]

Similarly, without a uniform, constitutionally based rule, states could vary the line between "official" conduct subject to heightened protection against defamation, and "private" conduct by a public official that could form the basis of a successful defamation suit. But as the Supreme Court has made clear, that line is exceptionally hard to draw—and perhaps non-existent—where a public official's conduct is concerned.[22]

The better, more speech-protective approach, whether or not originally intended by the framers, is to establish a First Amendment-based "floor" on public-official defamation liability and allow individual states to supplement that floor as each sees fit.[23]

Finally, Justice Thomas' historical premise—that the framers did not intend the First Amendment to modify the common law of defamation—is flawed. As noted above, and as Justice Brennan's opinion makes clear, ample evidence exists that the framers opposed punishment for seditious defamation and intended the First Amendment to prohibit, or at least limit, punishment for it. Furthermore, the Court's consistent expansion of First Amendment protections for public speech, in the 60 years following the *Sullivan* case, undermines the constitutional stasis inherent in an originalist approach to this aspect of First Amendment law.

New York Times Co. v. Sullivan provides citizens and media with an essential free speech guarantee. Justice Thomas' suggestion that the Court "revisit" it is misguided and jeopardizes a fundamental constitutional right. The Court should reject his invitation. ⚖

Endnotes

1. 376 U.S. 254 (1964).
2. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).
3. 376 U.S. at 279-80.
4. In fact, together with *Brandenberg v. Ohio*, 395 U.S. 444 (1969), and *Cohen v. California*, 403 U.S. 15 (1971), it forms the basis for the modern Court's understanding of the First Amendment.
5. Lewis, *Make No Law: The Sullivan Case and the First Amendment* at 154 (Random House 1991).
6. *McKee v. Cosby*, 586 U.S. ___, ___, 139 S.Ct. 675, 682 (2019). *McKee* was a libel suit against Bill Cosby; the lower court dismissed it on the ground that Ms. McKee was a "limited purpose public figure" who could not establish actual malice. The Supreme Court denied Ms. McKee's request to review that "public figure" classification.

7. *Id*. at ___, 139 S.Ct. at 676.
8. *Id*. at___, 139 S.Ct. at 682.
9. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).
10. U.S. Const. Amend. 1.
11. *E.g., Matal v. Tam*, 582 U.S. __, 137 S. Ct. 1744 (2017) (offensive trademark).
12. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).
13. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
14. *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).
15. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (per Jackson, J.) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").
16. 376 U.S. at 270, 273.
17. *Id*. at 273-74 (*citing* 4 *Elliot's Debates on the Federal Constitution* (1876) at 553-554). That section of Elliot's work quotes a passage from the Virginia Resolutions of 1798, authored by Madison, condemning the Alien and Sedition Acts as unconstitutional.
18. 586 U.S. at ____, 139 S.Ct. at 677-680.
19. Interestingly, the *Times's* principal argument in *Sullivan* was that the First Amendment absolutely privileged a citizen, or the media, to criticize official conduct. The "actual malice" rule was an alternative argument. Justice Black's concurring opinion in *Sullivan* accepts the "absolute privilege" rule. *See* 376 U.S.at 293. *See generally*, Lewis, *supra*, at 130-31,
20. 586 U.S. at ____, 139 S.Ct. at 677. *See Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).
21. *See Keeton v. Hustler Magazine, Inc*., 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984).
22. *Monitor-Patriot Co. v. Roy*, 401 U.S.265, 274-75 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-301 (1971).
23. New Jersey, for example, has extended the actual malice rule not just to public officials and public figures, but also to statements about any "matter of public interest or concern." *See Senna v. Florimont*, 196 N.J. 469, 484-491 (2008).