

12-8-2021

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Matthew L. Schafer

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# In Defense: *New York Times v. Sullivan*

Matthew L. Schafer\*

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## INTRODUCTION

“[T]hat way madness lies,” or so said one nineteenth-century commentator exasperated from summarizing the law of libel.<sup>1</sup> And that was before the United States Supreme Court, in 1964, began constitutionalizing substantial parts of it in *New York Times v. Sullivan*, transforming personal injury lawyers into constitutional ones overnight. In that case, the Court declared that the First Amendment had a “central meaning,” namely, protecting the public discussion necessary for effective self-governance.<sup>2</sup> Or in the words of James Madison, “In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law.”<sup>3</sup> “The choice of [the Court’s] language was unusually apt,” Harry Kalven wrote.<sup>4</sup> “The Amendment has a ‘central meaning’—a core of protection of speech without which democracy cannot function, without which, in Madison’s phrase, ‘the censorial power’ would be in the Government over the people and not ‘in the people over the government.’”<sup>5</sup>

To give force to the central meaning, the Court determined that the First Amendment protected even some false and defamatory speech. The logic being that an “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”<sup>6</sup> As such, in *Sullivan*, the Court adopted the actual-malice requirement, which required that a public-official defamation plaintiff plead and ultimately prove that the defendant knew what she was publishing was false or had a high degree of awareness that it probably was.<sup>7</sup> While *Sullivan* only imposed the actual-malice requirement on public-official plaintiffs, the Court later extended it to public figures as well, i.e., those who achieved “pervasive

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1. William MacKay, *Libel*, 16 TIME 268, 273 (1887), <https://catalog.hathitrust.org/Record/000519851> [<https://perma.cc/FM8X-J7QS>].

2. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964).

3. *Id.* at 275 (citing 4 JONATHAN ELLIOT, ELLIOT’S DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 570 (2d ed. 1836) [hereinafter ELLIOT’S DEBATES]).

4. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 208.

5. *Id.*

6. *Sullivan*, 376 U.S. at 271–72 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

7. *Id.* at 279–80.

fame or notoriety” in the community or those who “voluntarily inject[]” themselves or are “drawn into a particular public controversy.”<sup>8</sup>

To defense lawyers, the actual-malice requirement is a formidable defense; to plaintiffs’ lawyers, it stands as a “daunting” obstacle.<sup>9</sup> And for years, the actual-malice standard “seemed settled.”<sup>10</sup> But then in 2019, Justice Clarence Thomas penned an opinion concurring in the denial of certiorari in *McKee v. Cosby* to question the provenance of *Sullivan*’s actual-malice requirement.<sup>11</sup> According to Thomas, the Court in *Sullivan*—a unanimous Court no less—failed to make “a sustained effort to ground [its] holding[] in the Constitution’s original meaning.”<sup>12</sup> Instead, he characterized *Sullivan* “and the Court’s decisions extending it [as] policy-driven decisions masquerading as constitutional law.”<sup>13</sup> These rulings, he said, “broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law.”<sup>14</sup>

Then in 2021, in *Berisha v. Lawson*, in response to a petition asking the Court to overrule its precedents extending the actual-malice requirement to public figures, Thomas and Justice Neil Gorsuch filed opinions dissenting from the denial of certiorari.<sup>15</sup> In his dissent, Thomas again maintained that “[t]his Court’s pronouncement that the First Amendment requires public figures to establish actual malice bears ‘no relation to the text, history, or structure of the Constitution.’”<sup>16</sup> Gorsuch, for the first time, expressed his agreement: “Departures from the Constitution’s original public meaning are usually the product of good

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8. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *see generally* *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

9. *McFarlane v. Esquire Mag.*, 74 F.3d 1296, 1308 (D.C. Cir. 1996).

10. Jaden Edison, *Defamation was considered a well-settled area of law. Then came social media.*, POYNTER (July 9, 2021), <https://www.poynter.org/reporting-editing/2021/defamation-was-considered-a-well-settled-area-of-law-then-came-social-media> [<https://perma.cc/L55J-G6RP>].

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

12. *Id.* at 678.

13. *Id.* at 676.

14. *Id.* at 678.

15. In *Berisha v. Lawson*, the author was counsel to Simon & Schuster, Inc., the publisher-defendant in the case. The views expressed in this Article are his own.

16. *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari) (citing *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting)).

intentions. But less clear is how well *Sullivan* and all its various extensions serve its intended goals in today's changed world."<sup>17</sup>

This Article is in defense of *Sullivan*, challenging Thomas's and Gorsuch's attacks on that case. First, Part I summarizes the justices' main complaints with *Sullivan* and the actual-malice rule. Turning to the challenge, Part II raises questions about Thomas's purported method for understanding the meaning of the First Amendment at the Founding. Parts III–VI then conduct a wide-ranging analysis of the historical record as it concerns the interaction of freedom of the press and libel in the early United States, drawing into doubt the central claim that the Founders simply equated freedom of the press in America to freedom of the press in England. This review demonstrates that far from freedom of the press forming against the backdrop of the common law of libel, as Thomas suggests, the law of libel in the United States formed against the backdrop of an American understanding of freedom of the press. Finally, Part VII offers some responses to Thomas's and Gorsuch's more pragmatic attacks on *Sullivan*.

## I. THE PETITIONS

In the decades since the Court decided *Sullivan*, litigants rarely questioned it. About 20 years ago, however, that began to change as defamation plaintiffs filed petitions asking the Court to limit or overrule the case. Time and again, the Court refused.<sup>18</sup> So in 2019, when Thomas called on the Court to take up one of these petitions, people took notice.<sup>19</sup> First Amendment lawyers Lee Levine and Stephen Wermiel said there was no reason for alarm: “Justice Clarence Thomas’s broadside against *New York Times v. Sullivan* would most likely not have fazed Justice William

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17. *Id.* at 2429 (Gorsuch, J., dissenting from denial of certiorari).

18. *See, e.g.,* *McKee v. Cosby*, 139 S. Ct. 675 (2019); *Horne v. WTVR, LLC*, 139 S. Ct. 823 (2019); *Cottrell v. Smith*, 137 S. Ct. 648 (2017); *Knight v. Chi. Trib. Co.*, 558 U.S. 817 (2009); *Gray v. St. Martin’s Press, Inc.*, 531 U.S. 1075 (2001).

19. David Schulz, *INSIGHT: Justice Thomas Takes Troubling Turn on Landmark Libel Decision*, BLOOMBERG L. (Mar. 25, 2020, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-justice-thomas-takes-troubling-turn-on-landmark-libel-decision> [<https://perma.cc/DHN7-BCF7>]; Rod Smolla, *Look to Bill Cosby case as proof that American defamation law needs a review*, DEL. ONLINE (Mar. 12, 2019, 10:04 AM), <https://www.delawareonline.com/story/opinion/2019/03/12/bill-cosby-case-proof-american-defamation-law-needs-review/3138481002> [<https://perma.cc/4VQX-JD57>].

J. Brennan Jr., the author of that landmark decision.”<sup>20</sup> Thomas relied “on arguments made and rejected decades earlier,” and “Brennan would likely say he had heard it all before, both from the unsuccessful plaintiff in *Sullivan* itself and from his successors in the roughly 30 cases decided by the Supreme Court that collectively constitute *Sullivan*’s progeny.”<sup>21</sup>

Still, there was the question of whether Thomas was right that *Sullivan* cannot be supported under an originalist understanding of the First Amendment. On this, scholars disagreed. Cass Sunstein argued that in devising the *Sullivan* rule, “the Court did not really speak in originalist terms.”<sup>22</sup> On the other hand, Josh Blackman asserted that the “constitutional objections to the Sedition Act of 1798 provide some originalist basis to impose a higher bar for libel suits filed by government officials.”<sup>23</sup> Marty Lederman also questioned Thomas’s thesis, calling it not “terribly compelling.”<sup>24</sup> To begin to assess the bona fides of these competing claims, we have to look to Thomas’s and Gorsuch’s opinions themselves.

#### A. McKee v. Cosby

Kathrine McKee alleged that she was one of Bill Cosby’s numerous victims of sexual violence.<sup>25</sup> In response to one of McKee’s interviews, Marty Singer, Cosby’s lawyer, sent a letter to the news organization “attack[ing] McKee with numerous false allegations, calling her an admitted liar, not credible, unchaste, and a criminal.”<sup>26</sup> As a result, McKee filed a defamation lawsuit.<sup>27</sup> The district court dismissed that lawsuit on a number of grounds, and the First Circuit affirmed, finding that McKee was

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20. Lee Levine & Stephen Wermiel, *What Would Justice Brennan Say to Justice Thomas?*, 34 COMM’NS LAW. 1 (2019) (footnote omitted).

21. *Id.*

22. Cass R. Sunstein, *Falsehoods and the First Amendment* 14 n.73 (July 25, 2019) (unpublished manuscript) ([https://papers.ssrn.com/abstract\\_id=3426765](https://papers.ssrn.com/abstract_id=3426765)) [<https://perma.cc/4NH5-7CMS>].

23. Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44, 54–55 (2019).

24. Marty Lederman, *Justice Thomas’s Attack on New York Times v. Sullivan: Old Originalism in New Originalist Garb*, BALKINIZATION (Feb. 23, 2019), <https://balkin.blogspot.com/2019/02/justice-thomas-and-nyt-v-sullivan-old.html> [<https://perma.cc/U9MU-7RF3>].

25. Petition for Writ of Certiorari at 1, *McKee v. Cosby*, 139 S. Ct. 675 (2018) (No. 17-1542).

26. *Id.* at 5.

27. *Id.* at 6.

a limited-purpose public figure who failed to adequately plead actual malice.<sup>28</sup>

McKee filed her petition for a writ of certiorari in April 2018. The petition presented a single question: “Whether a victim of sexual misconduct who merely publicly states that she was victimized . . . has thrust herself to the forefront of a public debate . . . thereby becoming a limited purpose public figure who loses her right to recover for defamation absent a showing of actual malice.”<sup>29</sup> The petition did not otherwise challenge the validity of the actual-malice requirement or ask the Court to reconsider it. Instead, it claimed that there was a split on a more picayune question: what was needed to show that a private figure had become a public figure.<sup>30</sup>

Cosby waived the right to respond to the petition, but the Court requested one.<sup>31</sup> Cosby then argued that the petition should be denied because, among other things, no circuit split existed.<sup>32</sup> After receiving McKee’s reply brief, the case was set to be distributed for the justices’ conference to be held on September 24, 2018.<sup>33</sup> But the petition’s consideration was rescheduled 12 times.<sup>34</sup> At the time, the reason for the rescheduling was a mystery, but Thomas’s opinion concurring in the denial would reveal that it was Justice Thomas, in chambers, with the pen. For six months, Thomas was researching and writing his opinion concurring in the denial of the petition.<sup>35</sup>

In that opinion, Thomas agreed with the Court’s decision to deny certiorari rather than wade into the “factbound question” of whether McKee was a limited-purpose public figure.<sup>36</sup> Thomas wrote for himself, however, to explain “why, in an appropriate case, [the Court] should reconsider the precedents that require courts to ask it in the first place.”<sup>37</sup> The headline was a bold one: *Sullivan* “and the Court’s decisions extending it were policy-driven decisions masquerading as constitutional law,” and they should be “reconsider[ed].”<sup>38</sup> According to Thomas, the

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28. *Id.*

29. *Id.* at i.

30. *Id.* at 7–9.

31. Waiver, *McKee*, 139 S. Ct. 675 (No. 17-1542).

32. Brief of Respondent William H. Cosby, Jr., *McKee*, 139 S. Ct. 675 (No. 17-1542).

33. Docket, *McKee*, 139 S. Ct. 675 (No. 17-1542).

34. *Id.*

35. *See generally* *McKee*, 139 S. Ct. 675.

36. *Id.*

37. *Id.*

38. *Id.* at 676.

Court “did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified,” and it should leave it to the States to “stri[k]e an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.”<sup>39</sup>

Thomas’s ultimate thesis was this: “The constitutional libel rules adopted by this Court in [*Sullivan*] and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law.”<sup>40</sup> He supported this theory in four parts, focusing on (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.”<sup>41</sup> His factual support for each point came in three kinds: two nineteenth-century treatises and William Blackstone’s *Commentaries on the Laws of England*; pre-*Sullivan* Supreme Court jurisprudence; and a handful of nineteenth-century state-court libel decisions.<sup>42</sup>

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39. *Id.* at 682.

40. *Id.* at 678.

41. *Id.* at 681.

42. The entirety of materials Thomas provides in support of his arguments (in order of appearance) are: HENRY COLEMAN FOLKARD, FOLKARD’S STARKIE ON SLANDER AND LIBEL (H.G. Wood ed., 4th ed. 1877); 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., Philadelphia, Birch & Small 1803) [hereinafter TUCKER’S BLACKSTONE]; MARTIN L. NEWELL, DEFAMATION, LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES AS ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA (1890); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Roth v. United States*, 354 U.S. 476 (1957); *Commonwealth v. Clap*, 4 Mass. 163 (1808); *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007); *Dexter v. Spear*, 7 F. Cas. 624 (C.C.R.I. 1825) (No. 3,867); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Near v. Minnesota*, 283 U.S. 697 (1931); *Schneider v. New Jersey*, 308 U.S. 147 (1939); George Chase, *Criticism of Public Officers and Candidates for Office*, 23 AM. L. REV. 346 (1889); *Root v. King*, 7 Cow. 613 (N.Y. Sup. Ct. 1827); *Hamilton v. Eno*, 81 N.Y. 116 (1880); *Lewis v. Few*, 5 Johns. 1 (N.Y. Sup. Ct. 1809); *Royce v. Maloney*, 5 A. 395 (Vt. 1886); *Wheaton v. Beecher*, 33 N.W. 503 (Mich. 1887); *Prosser v. Callis*, 19 N.E. 735 (Ind.1889); *People v. Crosswell*, 3 Johns. Cas. 337



First, Thomas argued that neither in 1791, when the States ratified the First Amendment, nor in 1868, when they ratified the Fourteenth, did “[t]he common law of libel . . . require public figures to satisfy any kind of heightened liability standard as a condition of recovering damages.”<sup>43</sup> A plaintiff in a civil defamation case typically, Thomas wrote, “needed only to prove ‘a false written publication that subjected him to hatred, contempt, or ridicule.’”<sup>44</sup> Malice and injury were presumed, and truth was a defense.<sup>45</sup> As to criminal libel at common law, Thomas noted that “truth traditionally was not a defense to libel prosecutions—the crime was intended to punish provocations to a breach of the peace, not the falsity of the statement.”<sup>46</sup> These laws, he said, were widespread at the Founding—the implication being that no one understood them to be unconstitutional in 1791. Still, Thomas admitted that both civil and criminal libel law developed throughout the nineteenth century, before the Fourteenth Amendment was adopted.<sup>47</sup>

Moreover, Thomas said, “Far from increasing a public figure’s burden in a defamation action, the common law deemed libels against public figures to be, if anything, more serious and injurious than ordinary libels.”<sup>48</sup> He supported this assertion by reference to Blackstone and an early treatise that explained, “Libel of a public official was deemed an offense ‘most dangerous to the people, and deserv[ing of] punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties.’”<sup>49</sup> He also offered as support the medieval English statutes of *scandalum magnatum* that found words “in derogation of a peer, a judge, or other great officer of the realm” to be “*more* heinous” than other libels.<sup>50</sup>

Second, Thomas argued that the “‘core private righ[t]’ of a person’s ‘uninterrupted enjoyment of . . . his reputation formed the backdrop against which the First and Fourteenth Amendments were ratified’” and was never viewed by the Court as colliding with these Amendments.<sup>51</sup>

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(N.Y. Sup. Ct. 1804); *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1825); ELLIOT’S DEBATES, *supra* note 3.

43. *McKee*, 139 S. Ct. at 678.

44. *Id.* (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring)).

45. *Id.*

46. *Id.* at 678 (citing 4 TUCKER’S BLACKSTONE, *supra* note 42, at \*150–51).

47. *Id.* (citing *Beauharnais*, 343 U.S. at 254–55).

48. *Id.* at 679 (emphasis omitted).

49. *Id.* (citing NEWELL, *supra* note 42, at 533).

50. *Id.* at n.2 (citing 3 TUCKER’S BLACKSTONE, *supra* note 42, at \*123).

51. *Id.* at 679.

Before *Sullivan*, he said, the Supreme Court in cases like *Chaplinsky v. New Hampshire* and *Near v. Minnesota* “consistently recognized that the First Amendment did not displace the common law of libel.”<sup>52</sup> Instead, the Court recognized that libel, like obscenity, was one of the “well-defined and narrowly limited classes of speech . . . which have never been thought to raise any Constitutional problem.”<sup>53</sup> Yet the *Sullivan* Court refused to repudiate these earlier cases on its way to the holding in that case, choosing instead to merely reject the “generality of this historic view.”<sup>54</sup>

Third, Thomas wrote that there “are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompass[ed] an actual-malice standard for public figures or otherwise displac[ed] vast swaths of state defamation law.”<sup>55</sup> There was “[s]cant, if any, evidence . . . that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers.”<sup>56</sup> Rather, “protections for free speech and a free press” were understood “not [to] abrogate the common law of libel.”<sup>57</sup> In support, he offered seven nineteenth-century cases and asserted that “[p]ublic officers and public figures continued to be able to bring civil libel suits for unprivileged statements without showing proof of actual malice.”<sup>58</sup> He further pointed to states that continued to criminalize libel against public officials, citing the Court’s 1952 decision in *Beauharnais v. Illinois* and three state courts’ opinions.<sup>59</sup> Moreover, multiple Reconstruction Congresses “approved Constitutions of ‘Reconstructed’ States that expressly mentioned state libel laws, and

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52. *Id.* at 680.

53. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

54. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 386 (1974) (White, J., dissenting)).

55. *Id.*

56. *Id.* (citing *Gertz*, 418 U.S. at 381 (White, J., dissenting)).

57. *Id.* at 681 (citing *Chase*, *supra* note 42).

58. *Id.* (first citing *Root v. King*, 7 Cow. 613, 628 (N.Y. Sup. Ct. 1827); then citing *White v. Nicholls*, 44 U.S. (3 How.) 266, 291 (1845); then citing *Hamilton v. Eno*, 81 N.Y. 116, 126 (1880); then citing *Lewis v. Few*, 5 Johns. 1 (N.Y. Sup. Ct. 1809); then citing *Royce v. Maloney*, 5 A. 395 (Vt. 1886); then citing *Wheaton v. Beecher*, 33 N.W. 503 (Mich. 1887); and then citing *Prosser v. Callis*, 19 N.E. 735 (Ind. 1889)).

59. *Id.* (first citing *Beauharnais v. Illinois*, 343 U.S. 250, 254–55 (1952); then citing *People v. Croswell*, 3 Johns. Cas. 337, 377–78, 393–94 (N.Y. Sup. Ct. 1804); then citing *Commonwealth v. Clap*, 4 Mass. 163, 179–70 (1808); and then citing *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 311–14 (1825)).

also approved similar Constitutions for States erected out of the federal domain.”<sup>60</sup>

Finally, Thomas turned to *Sullivan* itself, faulting the Court for too brief a historical survey. *Sullivan*, he said, “pointed only to opposition surrounding the Sedition Act of 1798, which prohibited ‘any false, scandalous and malicious writing’ against ‘the government of the United States.’”<sup>61</sup> This history was not persuasive, because “constitutional opposition to the Sedition Act—a federal law directly criminalizing criticism of the Government—d[id] not necessarily support a constitutional actual-malice rule in all civil libel actions brought by public figures.”<sup>62</sup> And Madison, rather than eschew the common law in his fight against the Sedition Act, “seemed to contemplate that ‘those who administer [the Federal Government]’ retain ‘a remedy, for their injured reputations, under the same laws, and in the same tribunals.’”<sup>63</sup> In sum, Thomas said, “[T]here appear[ed] to be little historical evidence suggesting that the [*Sullivan*] actual-malice rule flows from the original understanding of the First or Fourteenth Amendment.”<sup>64</sup>

Thomas conceded, nevertheless, “that defamation law did not remain static after the founding.”<sup>65</sup> He acknowledged that the “common law did afford defendants a privilege to comment on public questions and matters of public interest.”<sup>66</sup> The privilege, he said, allowed discussion about the “public conduct of a public man,” which was seen as “a ‘matter of public interest’ that could ‘be discussed with the fullest freedom.’”<sup>67</sup> The privilege was nevertheless limited by its purpose: it did not extend to an official’s private conduct and “applied only when the facts stated were true.”<sup>68</sup> On the criminal side, state courts in the nineteenth century began “allow[ing] truth or good motives to serve as a defense to a libel

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60. *Id.* (citing *Beauharnais*, 343 U.S. at 293–94).

61. *Id.* (citing Alien and Sedition Acts of 1798, ch. 74, 1 Stat. 596); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–77 (1964).

62. *Id.* at 682.

63. *Id.* (citing ELLIOT’S DEBATES, *supra* note 3, at 573). “Seemed to contemplate” here is doing a lot of heavy lifting, as the portion quoted by Thomas was from a question Madison was posing, not a declarative statement.

64. *Id.*

65. *Id.*

66. *Id.* at 679 (citing FOLKARD, *supra* note 42, at 237–38).

67. *Id.* (citing FOLKARD, *supra* note 42, at 242).

68. *Id.* (citing FOLKARD, *supra* note 42, at 238 n.4); *White v. Nicholls*, 44 U.S. (3 How.) 266, 290 (1845)).

prosecution.”<sup>69</sup> Eventually, criminal libel virtually disappeared.<sup>70</sup> Yet these changes were not the product of constitutional law but changing policy judgments.<sup>71</sup>

If the hope had been to get other justices to sign on, it would soon be dashed. Thomas wrote for himself alone. And while there was a general fear that the new crop of conservative judges appointed by Donald Trump would be hostile to the press, the most recent appointees to the Supreme Court, Gorsuch and Justice Brett Kavanaugh, had enthusiastically endorsed *Sullivan* in opinions as circuit judges.<sup>72</sup> Other conservatives on the Court appeared equally unlikely to support Thomas’s vision. Justice Samuel Alito had previously endorsed the Court’s jurisprudence: “The constitutional guarantee of freedom of expression serves many purposes, but its most important role is protection of robust and uninhibited debate on important political and social issues.”<sup>73</sup> “If citizens cannot speak freely and without fear about the most important issues of the day,” Alito wrote, “real self-government is not possible.”<sup>74</sup>

If Thomas was going to find any sympathizers, Justice Elena Kagan was his best bet. Decades earlier, Kagan wrote in a law review article that “the revolution worked by *Sullivan* in the treatment of public official libel suits appears justified, correct, even obvious.”<sup>75</sup> But, she added, *Sullivan* “impose[d] serious costs,” the “adverse consequences” of which “do not prove *Sullivan* itself wrong, but . . . force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far.”<sup>76</sup> Later, during her confirmation hearing, Kagan also asserted, consistent with Thomas, that “[t]he Framers of the Constitution

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69. *Id.* at 678 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 254–55 n.4 (1952)).

70. *Id.* at 682 (citing *Garrison v. Louisiana*, 379 U.S. 64, 69 (1964)).

71. *Id.* at 681.

72. *Special Report on Supreme Court Nominee Brett M. Kavanaugh*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (July 12, 2018), <https://www.rcfp.org/kavanaugh/> [<https://perma.cc/BEJ4-RDMU>]; *Special Report on Supreme Court Nominee Neil Gorsuch*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Feb. 2, 2017), <https://www.rcfp.org/gorsuch/> [<https://perma.cc/G25V-3EA4>].

73. *Nat’l Rev., Inc. v. Mann*, 140 S. Ct. 344, 346 (2019) (Alito, J., dissenting from denial of certiorari).

74. *Id.*

75. Elena Kagan, *A Libel Story: Sullivan Then and Now* (reviewing Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991)), 18 L. & SOC. INQUIRY 197, 204 (1993).

76. *Id.* at 204–05.

did not understand the First Amendment as extending to libelous speech.”<sup>77</sup> But Kagan did not sign on to Thomas’s dissent either.

### B. *Berisha v. Lawson*

In *Berisha v. Lawson*, Shkëlzen Berisha, the son of former Albanian Prime Minister Sali Berisha, sued the publisher Simon & Schuster and its author, Guy Lawson, for defamation arising out of the book *Arms and the Dudes*, which was later turned into the movie *War Dogs*.<sup>78</sup> Berisha argued that the book defamed him insofar as it alleged that Berisha was part of the Albanian mafia and involved in a “tragic explosion of an Albanian munitions stockpile” that “killed 26 people.”<sup>79</sup> The district court granted summary judgment on the grounds that Berisha was a public figure who lacked sufficient evidence demonstrating that defendants acted with actual malice.<sup>80</sup> On appeal, the Eleventh Circuit agreed.<sup>81</sup>

In February 2021, Berisha filed a petition for a writ of certiorari, which, unlike the *McKee* petition, posed the question directly: “The question presented is whether this Court should overrule the ‘actual malice’ requirement it imposed on public figure defamation plaintiffs.”<sup>82</sup> As in *McKee*, the defendants waived their right to respond to the petition, but the Court requested one.<sup>83</sup> And, as in *McKee*, once the Court received the response, the case was relisted multiple times. Then, on the last day of the term, in the last order list of the term, the Court denied the petition.<sup>84</sup> This time, Thomas dissented, as did Gorsuch.

Citing his decision in *McKee*, Thomas began: “Berisha . . . asks this Court to reconsider the ‘actual malice’ requirement as it applies to public figures. As I explained recently, we should.”<sup>85</sup> Thomas explained again that “[t]his Court’s pronouncement that the First Amendment requires public figures to establish actual malice bears ‘no relation to the text,

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77. Questions for the Record by Senator John Cornyn with Elena Kagan, Nominee, Supreme Court of the United States, [https://www.scotusblog.com/wp-content/uploads/2010/07/Written\\_Cornyn.pdf](https://www.scotusblog.com/wp-content/uploads/2010/07/Written_Cornyn.pdf) [<https://perma.cc/DR5Y-HEP7>].

78. *Berisha v. Lawson*, 973 F.3d 1304, 1306–09 (11th Cir. 2020).

79. *Id.* at 1308.

80. *Berisha v. Lawson*, 378 F. Supp. 3d 1145, 1159–61 (S.D. Fla. 2018).

81. *Berisha*, 973 F.3d at 1321.

82. Petition for Writ of Certiorari at i, *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (No. 20-1063).

83. Waiver, *Berisha*, 141 S. Ct. 2424 (No. 20-1063).

84. Order, *Berisha*, 141 S. Ct. 2424 (No. 20-1063).

85. *Berisha*, 141 S. Ct. 2424, 2424 (Thomas, J., dissenting from denial of certiorari).

history, or structure of the Constitution.”<sup>86</sup> “In fact,” he wrote, “the opposite rule historically prevailed . . . .”<sup>87</sup> And the “Court provided scant explanation for the decision to erect a new hurdle for public-figure plaintiffs so long after the First Amendment’s ratification.”<sup>88</sup> He also questioned why becoming a public figure, i.e., exposing oneself to increased risk of injury by defamatory falsehood, should “mean[] forfeiting the remedies legislatures put in place for such [defamation] victims.”<sup>89</sup> After cataloguing all the real-world effects of the rule, he concluded, “The proliferation of falsehoods is, and always has been, a serious matter. Instead of continuing to insulate those who perpetrate lies from traditional remedies like libel suits, we should give them only the protection the First Amendment requires.”<sup>90</sup>

Gorsuch, too, claimed that the dearth of historical support for *Sullivan* merited granting the petition. According to him, “To govern themselves wisely, the framers knew, people must be able to speak and write, question old assumptions, and offer new insights.”<sup>91</sup> But with this right came a duty: “[T]hose exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, answer in tort for the injuries they caused.”<sup>92</sup> “This principle,” he said, “extended far back in the common law and far forward into our Nation’s history.”<sup>93</sup> Citing Blackstone, Gorsuch argued that “[e]very freeman has an undoubted right to lay what sentiments he pleases before the public, but if he publishes falsehoods he must take the consequence of his own temerity.”<sup>94</sup>

Gorsuch also observed that in the nineteenth century, Justice Joseph Story maintained that “the liberty of the press do[es] not authorize malicious and injurious defamation.”<sup>95</sup> It was this view, he said, that was accepted in “this Nation for more than two centuries.”<sup>96</sup> Thus, from the Founding to 1964 when the Court decided *Sullivan*, defamation law was

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86. *Id.* at 2425 (quoting *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021)).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 2425–26 (Gorsuch, J., dissenting from denial of certiorari).

92. *Id.* at 2426.

93. *Id.*

94. *Id.* (quoting 4 TUCKER’S BLACKSTONE, *supra* note 42, at \*151–52).

95. *Id.* (quoting *Dexter v. Spear*, 7 F. Cas. 624 (C.C.R.I. 1825) (No. 3,867)).

96. *Id.*

“almost exclusively the business of state courts and legislatures.”<sup>97</sup> Before *Sullivan*, “all persons could recover damages for injuries caused by false publications about them.”<sup>98</sup>

He spent the rest of his opinion cataloguing how different the world in 2021 was from that of 1964. In 1964, “building printing presses and amassing newspaper distribution networks demanded significant investment and expertise,” and broadcasting television “required licenses for limited airwaves and access to highly specialized equipment.”<sup>99</sup> As a result, a few “large companies dominated the press, often employing legions of investigative reporters, editors, and fact-checkers.”<sup>100</sup> But “today virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world.”<sup>101</sup> These changes had the knock-on effect of decimating responsible publishers’ newsrooms and replacing them with “24-hour cable news and online media platforms that ‘monetize anything that garners clicks’” and do more to deceive than inform.<sup>102</sup>

It was “hard not to wonder what these changes mean for the law,” Gorsuch said.<sup>103</sup> In other words, “it’s less obvious what force [the actual-malice rule] has in a world in which everyone carries a soapbox in their hands,” as opposed to one with “comparatively few platforms for speech.”<sup>104</sup> And Gorsuch argued that in 1964, unlike today, the Court “may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation.”<sup>105</sup> But now, “in a new era where the old economic model that supported reporters, fact-checking, and editorial oversight is disappearing,” he questioned whether either assumption remained true.<sup>106</sup>

These changes raised still more fundamental questions.<sup>107</sup> Gorsuch argued that in *Sullivan*, the Court accepted that the actual-malice rule

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97. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369–70 (1974) (White, J., dissenting)).

98. *Id.* (citations omitted).

99. *Id.* at 2427 (citing David A. Logan, *Rescuing Our Democracy by Rethinking* *New York Times Co. v. Sullivan*, 81 OHIO STATE L.J. 759, 794 (2020)).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (citing Logan, *supra* note 99, at 794–95).

106. *Id.*

107. *Id.*

would shield “*some* false information,” but in practice the actual-malice rule has turned into something of a grant of “immunity from liability.”<sup>108</sup> Indeed, in 2017 there were only three libel trials, while there had been nearly 30 in the 1980s.<sup>109</sup> Worse still, of those plaintiffs who do secure a jury verdict, “nearly one out of five today will have their awards eliminated in post-trial motions practice.”<sup>110</sup> The actual-malice rule has also been applied to an ever-growing class of plaintiffs—not just prominent government officials: “In 1964, the Court may have thought the actual-malice standard would apply only to a small number of prominent governmental officials,” but today it applies to the vast majority of public officials and public figures.<sup>111</sup> With the internet, “private citizens can become ‘public figures’ on social media overnight.”<sup>112</sup> Thus, random people “can be deemed ‘famous’ because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most.”<sup>113</sup>

This led to Gorsuch’s “bottom line”: “It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy.”<sup>114</sup> “[I]gnorance is bliss.”<sup>115</sup> When the actual-malice rule is combined “with the business incentives fostered by our new media world,” “the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth.”<sup>116</sup> “Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public’s business,” Gorsuch said, “increasingly seem to leave even ordinary Americans without recourse for grievous defamation.”<sup>117</sup> In light of all of this, invoking the law review article published by Kagan, he wrote, “[I]t’s hard not to ask whether it now even ‘cut[s] against the very values underlying the decision.’”<sup>118</sup>

In short, “it’s far from obvious whether *Sullivan*’s rules do more to encourage people of goodwill to engage in democratic self-governance or

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 2429.

113. *Id.*

114. *Id.* (citing Logan, *supra*, note 99, at 778–79).

115. *Id.* (citing Logan, *supra*, note 99, at 778).

116. *Id.* at 2428.

117. *Id.* at 2429 (citing Logan, *supra*, note 99, at 778).

118. *Id.* at 2428 (quoting Kagan, *supra* note 75, at 207).



discourage them from risking even the slightest step toward public life.”<sup>119</sup> So he added his voice to the “[m]any Members of this Court [who] have raised questions about various aspects of *Sullivan*”—although, unlike Thomas, he did “not profess any sure answers” and was “not even certain of all the questions we should be asking.”<sup>120</sup> While he did not doubt the Court had good intentions—“[d]epartures from the Constitution’s original public meaning are usually the product of good intentions”—he urged that the Court “return[] its attention, whether in this case or another, to a field so vital to the ‘safe deposit’ of our liberties.”<sup>121</sup>

## II. WHAT HISTORY COUNTS?

Having reviewed Thomas’s and Gorsuch’s attacks, we can turn to the real endeavor here: determining whether they are right about the historical record. Thomas’s thesis in *McKee*, with which Gorsuch seemed to agree in *Berisha*, is simple: “The constitutional libel rules adopted by this Court in [*Sullivan*] and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law.”<sup>122</sup> This Article’s counter-thesis is also simple: since 1791, the development of the common law of libel in early America alongside that of the freedom of the press demonstrates that *Sullivan* and its progeny were far from an aberration.

As we have competing theses, a note on the burden here seems appropriate. Thomas and Gorsuch have, to borrow some debate terminology, made the motion that *Sullivan* should be overruled because it lacks originalist support. This Article, however, is not meant to establish the converse of the motion, that is, that the actual-malice rule follows invariably from an originalist’s analysis of the First Amendment. Nor could it: not all of Thomas’s and Gorsuch’s historical authority can be swept away. This Article freely admits as much.

What this Article is meant to establish is reasonable doubt as to Thomas’s and Gorsuch’s claim.<sup>123</sup> It does so by marshalling historical evidence drawing into doubt the absolutist conclusions they make. And that is the point. Thomas and Gorsuch present the history of the common

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119. *Id.* at 2429.

120. *Id.*

121. *Id.* at 2430.

122. *McKee v. Cosby*, 139 S. Ct. 675, 678 (2019).

123. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (“[O]ur own investigation convince[s] us that, although these [historical] sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”).

law of libel as if it were a tidy corner of the law where nothing is out of place. They do the same of the understanding of the First and Fourteenth Amendments before *Sullivan*. But libel in the United States is not now, nor ever was, tidy. And the history of the First Amendment, let alone the Fourteenth, is not a monolith. The founding generation and the Congresses of the Reconstruction were not of one mind when it came to the common law of libel or the effect, if any, the First and Fourteenth Amendments had on it. In short, this Article brings into high relief the historical wrinkles that Thomas tried to flatten out or that Gorsuch simply ignored to make their arguments more attractive.

For the same reason, this Article does not really quibble with originalism.<sup>124</sup> It suffices to note now some of the problems with the approach. First, there is the issue of how much history one needs to conclude that he or she has arrived at an originalist understanding. Thomas, for example, has relied on varying amounts of historical evidence to satisfy himself that history is on his side. In *McIntyre v. Ohio Elections Commission*, he cataloged the historical record at length but characterized it as “not as complete or as full as I would desire” yet good enough to conclude that the Founders intended the First Amendment to protect anonymous speech.<sup>125</sup> In *44 Liquormart, Inc. v. Rhode Island*, he rested on just three post-Reconstruction cases.<sup>126</sup> In *Morse v. Frederick*, he satisfied himself based on a smattering of cases from the 19th and early 20th centuries.<sup>127</sup> Later, in *Mahanoy Area School District v. B.L.*, Thomas relied principally on a single pre-Reconstruction case, which earned the response from Alito and Gorsuch that a single case provided “no basis for concluding that the original public meaning of the free-speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off-premises student speech.”<sup>128</sup>

Second, there is the issue of what is to be done with historical evidence that cuts in opposite directions. *McIntyre* highlights this problem. There, Thomas pointed out that early legislatures attempted to unmask the

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124. See Thomas B. Colby & Peter Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009).

125. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 367 (1995) (Thomas, J., concurring).

126. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in judgment).

127. *Morse v. Frederick*, 551 U.S. 393, 413–15 (2007) (Thomas, J., concurring).

128. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2054 n.14 (2021) (Alito, J., concurring).

identities of various authors.<sup>129</sup> In one vignette, he explained that during a sitting of the Continental Congress, Elbridge Gerry “moved to haul the printer of the newspaper before Congress to answer questions concerning Leonidas[’s] [identity].”<sup>130</sup> The motion was defeated, but one would think that the fact it was even made—by Gerry no less—demonstrates that there was no universal understanding that the First Amendment protected anonymous speech. Thomas tells a similar story of the Upper House of the New Jersey Legislature that was, in turn, defeated by the Lower House in its attempts to identify an author.<sup>131</sup> Despite these conflicts, Thomas offers an unqualified conclusion: “[T]he Framers shared the belief that such activity [of anonymous publication] was firmly part of the freedom of the press.”<sup>132</sup>

Third, there is the problem of what part of history matters. This is not simply a question of whether we should look at history in the run up to the ratification of the First Amendment but not after; or whether we should look at history in the run up to the ratification of the Fourteenth Amendment but not after. Instead, the issue is more basic: whatever part of history may be relevant, within that part, where should we look? In *McKee*, Thomas cited a set of medieval statutes adopted to outlaw certain criticisms of public officials as support for his thesis.<sup>133</sup> But he largely ignored that the statutes were rejected after the Glorious Revolution, fell into disuse, and were repealed. In *Rogers v. Grewal*, a Second Amendment case, Thomas took the opposite approach.<sup>134</sup> There, he ignored that the statute was adopted, which would have cut in favor of the constitutionality of gun regulations, dismissing it as being adopted “during a time of political transition.”<sup>135</sup> Instead, he focused on the statute’s ultimate demise after the Glorious Revolution. And it was this history, Thomas said, that mattered: “[F]or purposes of discerning the original meaning of the Second Amendment, it is this founding era understanding that is most pertinent.”<sup>136</sup> These approaches are irreconcilable.

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129. *McIntyre*, 514 U.S. at 361–62 (Thomas, J., concurring).

130. *Id.* at 361.

131. *Id.* at 362.

132. *Id.* at 367.

133. *McKee v. Cosby*, 139 S. Ct. 675, 682 n.2 (2019).

134. *Rogers v. Grewal*, 140 S. Ct. 1865 (2020) (Thomas, J., dissenting from denial of certiorari).

135. *Id.* at 1869.

136. *Id.* at 1871.

And, of course, there is the question of whether history should matter at all.<sup>137</sup> There are persuasive arguments that when it comes to questions of speech, an originalist approach is the wrong approach: “[T]he meaning of the First Amendment did not crystallize in 1791.”<sup>138</sup> As Zechariah Chafee Jr. observed early in the twentieth century, “The framers would probably have been horrified at the thought of protecting books by Darwin or Bernard Shaw, but ‘liberty of speech’ is no more confined to the speech they thought permissible than ‘commerce’ in another clause is limited to the sailing vessels and horse-drawn vehicles of 1787.”<sup>139</sup> Freedom of the press, after all, “was far from complete” in the Colonies.<sup>140</sup>

While Thomas would argue that this lack of freedom supports his thesis, this history makes Thomas’s wish for a return to a similar system downright terrifying. Take, for example, the treatment of individuals before and around the Founding. In 1661, the Massachusetts Bay legislature ordered the suppression of a book, because it “advocated popular election of officials.”<sup>141</sup> One author in the colony spent a year in jail after criticizing ecclesiastical authorities.<sup>142</sup> In 1722, the Pennsylvania Council “barred a printer . . . from publishing without permission anything that had to do with governmental affairs.”<sup>143</sup> Unsurprisingly, in Revolutionary America, “Tory printers were being harassed by mobs and by the new state legislatures.”<sup>144</sup> And by 1778, “every state had some form of sedition law which was broadly interpreted to penalize open denunciation of the patriot cause.”<sup>145</sup> None of this is something we should be trying to resurrect. Half the country would be in jail.

This approach, if adopted throughout the Court’s First Amendment canon, would also require throwing out most of the Court’s First Amendment jurisprudence. As Professor Dorf said, “First Amendment doctrine is pervasively nonoriginalist. . . . ‘If an originalist wanted First Amendment doctrine to track Founder Era judicial reasoning, the Supreme

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137. RICHARD A. POSNER, REFLECTIONS ON JUDGING 233 (2013) (“originalism is fake”).

138. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 32 (2d ed. 1967).

139. *Id.*; see also *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring) (en banc).

140. Jerome Lawrence Merin, *The Supreme Court and Libel*, 11 WM. & MARY L. REV. 371, 373 (1969).

141. *Id.*

142. *Id.* at 374.

143. *Id.*

144. *Id.* at 376.

145. *Id.*

Court's decisions in *Texas v. Johnson*, *Boy Scouts of America v. Dale*, *Citizens United v. FEC*, and *Snyder v. Phelps*, among many, many others, would likely have to go."<sup>146</sup> Thomas, Dorf noted, "joined the majority opinion in every one of the specifically listed cases except *Johnson*, which was decided before he joined the Court."<sup>147</sup> It seems unlikely though that Thomas would revisit these decisions. And, until he can explain the difference in treatment, a full-throated application of originalist interpretation in this corner of the cannon lacks intellectual merit.

Additionally, an application of originalism to the First Amendment is especially problematic, because what presumably should matter most—the debates surrounding that Amendment's adoption—is universally agreed to be unclear.<sup>148</sup> Any serious scholar who has studied the adoption of the First Amendment has admitted this. As Leonard Levy said, "The Congressional debate on the amendment . . . was unclear and apathetic; ambiguity, brevity and imprecision in thought and expression characterize the comments of the few members who spoke."<sup>149</sup> Jerome Lawrence Merin, who made an early historical assessment of *Sullivan*, wrote similarly, "The debates in Congress and in the states over the Bill of Rights . . . give us little clue as to what the framers had in mind when they stated that Congress should make no law abridging freedom of the press."<sup>150</sup> The Court and various justices have also accepted this view.<sup>151</sup>

With those clarifications and qualifications out of the way, what follows is an examination of historical support for the originalist case against *Sullivan*. It is divided into four parts. First, Part III reviews some early influential cases demonstrating that far from freedom of the press developing against the backdrop of the common law of libel, the opposite was true. At the Founding and shortly after, courts were cultivating an *American* understanding of the freedom of the press and libel. Second, Part

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146. Michael C. Dorf, *Justice Thomas's Faux-Originalist Critique of Overbreadth is Radically Underinclusive (and Wrongheaded in Other Ways Too)*, DORF ON L. (May 11, 2020), [www.dorfonlaw.org/2020/05/justice-thomass-faux-originalist.html](http://www.dorfonlaw.org/2020/05/justice-thomass-faux-originalist.html) [<https://perma.cc/B22L-CY8W>] (first citing *Texas v. Johnson*, 491 U.S. 397 (1989); then citing *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); then citing *Citizens United v. FEC*, 558 U.S. 310 (2010); and then citing *Snyder v. Phelps*, 562 U.S. 443 (2011)).

147. *Id.*

148. Merin, *supra* note 140, at 378.

149. LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 224 (1960).

150. Merin, *supra* note 140, at 377.

151. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 381–84 n.6 (1974) (White, J., dissenting).

IV takes on some specifics of Thomas's and Gorsuch's arguments, explaining the shortcomings of their views on the treatment of public-official libel plaintiffs historically. Part V considers the historical support for extending rules adopted for public officials to public figures. Part VI sows doubt about the influence of Blackstone and other English authorities in debates about freedom of the press in the United States. Finally, Part VII cleans up some other minor historical arguments advanced by Thomas and some pragmatic ones advanced by Gorsuch.

### III. REPUBLICANISM AND THE COMMON LAW OF LIBEL

We begin where Thomas and Gorsuch did: the premise that *Sullivan* cannot be reconciled with an originalist understanding of the First Amendment. In *McKee*, Thomas marshalled the lion's share of historical support for that premise; in *Berisha*, Gorsuch followed, adding in some throwaway citations to Blackstone and Story. While there is much in the historical record that counters this evidence, we begin with the big picture: did the Founders and early Americans intend after the Revolution to transplant the entirety of English common law of libel? The short answer is *no*: “[o]ne of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.”<sup>152</sup>

While there is considerable scholarly support for this conclusion,<sup>153</sup> this Part focuses on three early libel cases on which Thomas himself relied—each of which is emblematic of the troubles English libel law faced in a young United States: *Commonwealth v. Clap*, *People v. Croswell*, and *Lewis v. Few*.<sup>154</sup> These cases, from New York and Massachusetts, demonstrate two things. First, as a doctrinal matter, they demonstrate how early courts grappled with questions about the role of truth and falsity in libel (*Clap*) and questions about the relevance of one's intent (*Croswell* and *Lewis*). It turns out, contrary to Thomas's suggestion otherwise, courts focused on both questions to ensure that freedom of the press was not trammled on by the common law of libel.

Second, these cases demonstrate how early state courts struggled to reconcile the brutish nature of English libel law with a new constitution

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152. Henry Schofield, *Freedom of the Press in the United States*, 9 PROC. AM. SOC. SOC'Y 67, 76 (1914).

153. *Id.* at 80 (observing that the “true view of the original declarations of liberty of the press would appear to be, then, that they wiped out the English common law”).

154. *Commonwealth v. Clap*, 4 Mass. 163 (1808); *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804); *Lewis v. Few*, 5 Johns. 1 (N.Y. Sup. Ct. 1809).

that guaranteed a “Republican form of Government.”<sup>155</sup> In departing from the common law of England, these courts did so precisely because following it would be incompatible with the nature of government that the States adopted after the Revolution. True, there were no good answers early on. It was hard for the States, and the conservative judiciaries that occupied their benches, to cleave themselves entirely from the English common law. But even if they did not cleave, through these cases they whittled away at it, sanded smooth its rough edges with the commitment to freedom of the press, and carved a decidedly *American* law of libel.

#### A. Commonwealth v. Clap

Let’s start with the 1808 Massachusetts Supreme Judicial Court case of *Commonwealth v. Clap*. In *Clap*, authorities indicted the defendant for libeling an auctioneer, considered a public official at the time, with the charge that he was “a liar, a scoundrel, a cheat, and a swindler.”<sup>156</sup> The issue was, because the auctioneer was a public official, whether the criminal defendant should be able to offer evidence demonstrating that the charge was true.<sup>157</sup>

In *McKee*, Thomas cited *Clap* because the Massachusetts court wrote that libels against public officials were “most dangerous to the people.”<sup>158</sup> But Thomas missed what is actually important about *Clap*: its concern about protecting a sphere of public debate from the common law of libel such that the People could criticize their public officials. Indeed, *Clap* is representative of early conflicts between the enforcement of the law of libel and the desire to protect the political debate necessary for a republican form of government. Far from supporting Thomas’s thesis, it cuts against him.

At common law, truth was no defense to a criminal libel charge. As the saying goes: the greater the truth, the greater the libel.<sup>159</sup> All that was required to secure a conviction in front of a jury was a showing that the libel was published.<sup>160</sup> But counsel for Clap questioned the application of

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155. U.S. CONST. art. IV, § 4.

156. *Clap*, 4 Mass. at 163.

157. *Id.* at 168.

158. *Id.* at 169.

159. *Id.*; see also *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

160. *Clap*, 4 Mass. at 168; see also ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 19 (1920) (noting that one of the early conflicts in the United States surrounding the law of libel was “first, that the jury and not the judge ought to

these rules in a republican democracy like the United States. He argued that to the extent the common law was against him, it “was virtually repealed by the provisions of the constitution of this commonwealth; and he went much at large into the consideration of the right of the citizens of a free elective republic to speak and publish the truth respecting the characters of men in office.”<sup>161</sup> The reason for this freedom was simple: “[t]he community [has] an interest in his integrity, and [has] a right to be informed what his conduct in office is, that they may judge whether it be safe and discreet to intrust their property to his care and management.”<sup>162</sup> It was, thus, “of much greater importance that this high constitutional privilege be preserved unimpaired, than that a libeller should now and then go unpunished.”<sup>163</sup>

While the solicitor general said that “he had never known a decision that the truth might be given in evidence,” even in cases concerning the libel on a public official, he admitted that “whenever he had had the direction of prosecutions of this kind, he had always yielded to such a defence without opposition.”<sup>164</sup> In fact, he had “even courted” defendants “to attempt a defence of this kind.”<sup>165</sup> The attorney general agreed as well, but argued that the auctioneer was not a public official:

As to public men, the measures of government, and candidates for public offices, the Attorney-General said he had always held the people to be their proper and constitutional judges; and he never should, while he held his present office, oppose the giving of the truth in evidence to justify any publications charged as libellous in relation to those objects.<sup>166</sup>

It was only in that case that he did not believe the victim of the libel—an auctioneer—should be considered a public official.<sup>167</sup>

The court sided with the Commonwealth. It agreed with the attorney general that the auctioneer, as a mere appointed officer, rather than an elected one, was not a public official. As a result, the republican principles about holding public officials accountable were irrelevant. Thus, the court

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decide the libellous nature of the writing, and secondly, that the truth of the charge ought to prevent conviction”).

161. *Clap*, 4 Mass. at 165.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 167.

167. *Id.*



applied the traditional rules of the common law of libel, i.e., that truth was irrelevant in criminal libel cases:

[I]t is not considered whether the publication be true or false; because a man may maliciously publish the truth against another, with the intent to defame his character, and if the publication be true, the tendency of it to inflame the passions, and to excite revenge, is not diminished, but may sometimes be strengthened.<sup>168</sup>

Moreover, were truth allowed to be proven at trial, the victim of the libel, who in the criminal prosecution for that libel is not a party, might suffer admission of “evidence at the trial [that] might more cruelly defame his character than the original libel.”<sup>169</sup>

But, in dicta, *Clap* then suggested an alteration of the common law by finding that in some cases, truth might still be offered in justification because of the very republican principles *Clap*’s counsel had advocated. As the court explained, “the defendant may repel the charge, by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man.”<sup>170</sup> In this effort to prove that the conduct was justified, the court found that “there may be cases, where the defendant . . . may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame.”<sup>171</sup> “Upon this principle,” the court wrote, “a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel.”<sup>172</sup>

Importantly, the court explained why a defendant should not be deprived of the right to prove truth in all cases: “[W]hen any man shall consent to be a candidate for a public office conferred by the election of the people, *he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office.*”<sup>173</sup> Echoing *Clap*’s arguments, the court then held that “publications of the truth on this subject, with the honest intention of informing the people, are not a libel. For it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offence against

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168. *Id.* at 168.

169. *Id.* at 169.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* (emphasis added).

their laws.”<sup>174</sup> Far from reinforcing the common law then, the court’s “novel dictum that publication of truth as to the characters of elective officers, or of candidates for such office, was not a libel” was a “judicial enlargement of the freedom of the press.”<sup>175</sup>

In *McKee*, Thomas ignored the *Clap* court’s embrace of republican principles as a limit on defamation law. He focused instead on what *Clap* said about *false* charges after announcing the new limitation on libel law:

For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offence most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties.<sup>176</sup>

But even this does not carry Thomas far. *Clap* held that false statements relating to public officials were unprotected “*for the same reason*” that truthful ones should be considered protected.<sup>177</sup> *Clap* did not find false statements “most dangerous” for the common law reason that truthful charges were just as likely to result in violence as false ones were or because of the supposed common law rule that public officials were inherently deserving of more protection than others.<sup>178</sup> Rather, it found false statements unprotected because of their tendency to undermine republican debate.

In this way, the court’s logic in *Clap* had one vitally important thing in common with *Sullivan*: the common law of libel must be considered against the backdrop of republican principles. This was an early *American* way of thinking about libel. *Sullivan* did not depart from an original understanding of the common law; it was an iteration of the same ideas that courts and counsel had developed some 150 years prior. While reaching different results, both *Sullivan* and *Clap* recognized that speech about public officials necessitated greater protection because it was different in kind than speech about private figures. One implicated the public’s interests; the other did not. And in the case of speech about public officials, both *Sullivan* and *Clap* sought to protect the “free trade in ideas” within “the competition of the market” by easing the rules of the common law of libel. The difference between *Sullivan* and *Clap* was that *Sullivan*

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174. *Id.*

175. CLYDE AUGUSTUS DUNIWAY, DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS 152 (1906).

176. *Clap*, 4 Mass. at 169–70.

177. *Id.* at 163 (emphasis added).

178. *Id.* at 169.

aimed to protect inputs (the introduction of new ideas into the market) while *Clap* aimed to protect outputs (the result of the competition)—while English law, on which both Thomas and Gorsuch lean so strongly, cared about neither.

### B. *People v. Croswell*

In 1804, the New York Supreme Court—the State’s highest court at that time—decided an “interesting and celebrated” case on “a very important and much litigated subject of jurisprudence.”<sup>179</sup> Harry Croswell, a New York printer, had published allegations in *The Wasp* that Thomas Jefferson had paid James Callendar, a prominent republican printer, to call George Washington “a traitor, a robber, and a perjurer” and John Adams “a hoary-headed incendiary.”<sup>180</sup> Croswell asked that the trial be delayed until he could have Callendar, who would prove that the allegations were true, travel from Virginia.<sup>181</sup> The judge refused, and at trial, the jury found Croswell guilty, having been instructed that “it was no part of the province of a jury to inquire or decide on the intent of the defendant; or whether the publication in question was true, or false, or malicious.”<sup>182</sup> The only question for the jury was whether Croswell published the allegations in his newspaper.<sup>183</sup>

On appeal, as in *Clap*, the issue was again whether “the defendant [may] give the truth in evidence.”<sup>184</sup> A separate issue was whether it was the province of the jury to decide both law, i.e., the existence of a malicious falsehood, and fact, i.e., publication by the defendant.<sup>185</sup> Alexander Hamilton, who was one of New York’s delegates at the Constitutional Convention, defended Croswell on appeal. Hamilton’s defense of Croswell is one of the great early examples of American understandings of freedom of the press. He began with the question of whether evidence of truth should be allowed. He argued that it should. The doctrine of the greater the truth, greater the libel, he said, “originated in a polluted source, the despotic tribunal of the *Star Chamber*.”<sup>186</sup> Since the earliest days of England, the defendant had been allowed to prove the truth of the charge, and to the extent that later authority was to the contrary, it came from the

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179. WILLIAM DRAPER LEWIS, *GREAT AMERICAN LAWYERS* 377 (1907).

180. *People v. Croswell*, 3 Johns. Cas. 337, 338 (N.Y. Sup. Ct. 1804).

181. *Id.*

182. *Id.* at 342.

183. *Id.*

184. *Id.* at 337.

185. *Id.*

186. *Id.* at 344.

Star Chamber and could not alter the common law.<sup>187</sup> Even the Sedition Act, Hamilton argued, required that falsity must be proven.<sup>188</sup> Hamilton also argued that “the court cannot judge of that intent.”<sup>189</sup> Instead, “the jury must find it.”<sup>190</sup> The “intent constitutes [the] crime” in libel cases, because the act of printing itself is not unlawful.<sup>191</sup> On this question, the “time and circumstances” of the alleged libel are “very material.”<sup>192</sup> Thus, a jury must be able to inquire into the context in which the alleged libel was printed.

On reply to the attorney general’s arguments, Hamilton proposed a new standard for freedom of the press: “The liberty of the press consisted in publishing with impunity, truth *with good motives*, and *for justifiable ends*, whether it related to [public] men or to measures.”<sup>193</sup> This, he argued, was necessary in a government where the governors were representatives of the People:

To discuss measures without reference to men, was impracticable. Why examine measures, but to prove them bad, and to point out their pernicious authors, so that the people might correct the evil by removing the men? There was no other way to preserve liberty, and bring down a tyrannical faction. If this right was not permitted to exist in vigour and in exercise, good men would become silent; corruption and tyranny would go on, step by step, in usurpation, until, at last, nothing that was worth speaking, or writing, or acting for, would be left in our country.<sup>194</sup>

Nor did intent stand separate from truth, Hamilton said. Instead, “[t]he question how far the truth is to be given in evidence, depends much on the question of intent . . . .”<sup>195</sup> And if the jury must decide intent, as Hamilton argued, it must also be able to pass on the truth or falsity of the charge, because truth is a “requisite,” a “means to determine the intent.”<sup>196</sup> From

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187. *Id.*

188. *Id.*

189. *Id.* at 345.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 352 (emphasis added); *see also* Schofield, *supra* note 152, at 89 (“He professed that he found or discovered this definition in the English common-law. But it was not there.”).

194. *Id.* at 352–53.

195. *Id.* at 356.

196. *Id.* at 356–57.

the Roman Empire forward, Hamilton asserted, “falsity was an ingredient in the crime,” and the common law continued to require it.<sup>197</sup>

New York’s arguments to the contrary, Hamilton said, were derived from the “polluted source” of the Star Chamber.<sup>198</sup> That was not “the court from which we are to expect principles and precedents friendly to freedom.”<sup>199</sup> Instead, it was the “most arbitrary, tyrannical and hated tribunal.”<sup>200</sup> Being able to give truth in evidence, on the other hand, was “all-important to the liberties of the people,” because truth was “an ingredient in the eternal order of things.”<sup>201</sup> Hamilton, ever the Federalist, thus “felt a proud elevation of sentiment” in the Sedition Act having “established this great vital principle.”<sup>202</sup> Hamilton concluded that being allowed a defense of truth was “essential to the preservation of a free government; the disallowance of it fatal.”<sup>203</sup>

The court split 2–2, leaving *Croswell*’s conviction in place, and no judgment was issued. Morgan Lewis, the chief judge and a Jeffersonian, along with Brockholst Livingston, who would soon become an associate justice on the Supreme Court, would have adopted the common law view that truth was not a defense.<sup>204</sup> However, Judge James Kent, a Federalist, and his colleague Smith Thompson, a Democratic-Republican who had come up in the bar with Kent and would also become an associate justice, would have adopted Hamilton’s proposed truth-and-good-motives standard.<sup>205</sup>

Like the opinion in *Clap*, Kent’s opinion in *Croswell* is some of the best evidence of the early debates over the collision of libel law and freedom of the press in a republic. More importantly, it is the best evidence of whether and why courts thought a publisher’s *intent* was important. Libel, Kent observed at the outset, “is a defamatory publication, made with a malicious intent.”<sup>206</sup> Where the jury found that the defendant published the libel, malice was presumed to exist. But Kent questioned whether malice should be presumed: “There can be no crime without an evil mind.”<sup>207</sup> Kent thought the jury should have the chance to decide

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197. *Id.* at 357.

198. *Id.*

199. *Id.* at 358.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 360.

204. *Id.* at 394–411 (Lewis, J.); *id.* at 411–13 (Livingston, J.).

205. *Id.* at 363–94 (Kent, J.).

206. *Id.* at 377.

207. *Id.* at 364.

(1) whether the defendant published the libel and (2) the “*particular* intent and tendency that constituted the libel.”<sup>208</sup>

Kent believed that the jury should be given the chance to decide both questions because, echoing Hamilton, “[o]pinions and acts may be innocent under one set of circumstances, and criminal under another.”<sup>209</sup> As he explained:

[W]hat can be a more important circumstance than the truth of the charge, to determine the goodness of the motive in making it, if it be a charge against the competency or purity of a character in public trust, or of a candidate for public favour, or a charge of actions in which the community have an interest, and are deeply concerned? To shut out wholly the inquiry into the truth of the accusation, is to abridge essentially the means of defence. It is to weaken the arm of the defendant, and to convict him, by means of a presumption [of malice], which he might easily destroy by proof that the charge was true, and that, considering the nature of the accusation, the circumstances and time under which it was made, and the situation of the person implicated, his motive could have been no other than a pure and disinterested regard for the public welfare.<sup>210</sup>

When it came to “public libel,” falsehood had always been “a material ingredient” in a prosecution.<sup>211</sup> Agreeing with Hamilton, Kent said that the civil law—that is, law descending from the Romans as opposed to the common law descending from the English—had long permitted truth as a defense in cases reaching public persons.<sup>212</sup> English courts too—despite the Star Chamber—had “occasionally admitted” it.<sup>213</sup> And in “this country,” the rule had “taken firmer root”: “in regard to the measures of government, and the character and qualifications of candidates for public trust, it is considered as the vital support of the liberty of the press.”<sup>214</sup>

To the extent that English law was not in accord, Kent rejected it. The Star Chamber, which denied truth as a defense at the height of its “terrors,” was an outlier.<sup>215</sup> And its doctrine of the greater the truth the greater the

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208. *Id.*

209. *Id.*

210. *Id.* at 377–78.

211. *Id.* at 379.

212. *Id.* at 383.

213. *Id.* at 379.

214. *Id.*

215. *Id.* at 385.

libel was incompatible with political debate in the States: “There be many cases . . . where a man may do his country good service, by libelling; for where a man is either too great, or his vices too general to be brought under a judiciary accusation, there is no way but this extraordinary method of accusation.”<sup>216</sup> In other words, at times, people might have an affirmative obligation to libel public officials.

Importantly, Kent then disavowed the common law altogether: “But, whatever may be our opinion on the *English* law, there is another and a very important view of the subject to be taken, and that is with respect to the true standard of the freedom of the *American* press.”<sup>217</sup> Unlike in England, he wrote, “the people of this country have always classed the freedom of the press among their fundamental rights.”<sup>218</sup> The First Congress, he pointed out, had placed freedom of the press as one of the “five invaluable rights, without which a people cannot be free and happy.”<sup>219</sup> The importance of the freedom of the press consisted, Congress declared in 1774, “in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, *whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.*”<sup>220</sup> In the New York Ratifying Convention of 1788, the delegates declared that “the freedom of the press was a right which could not be abridged or violated.”<sup>221</sup> Kent observed that the “same opinion is contained in the amendment to the constitution of the United States, and to which this state was a party,” and in state constitutions, which already provided for truth as a defense in criminal cases relating to public officials.<sup>222</sup> Even the Sedition Act provided truth as a defense.<sup>223</sup>

Kent called these acts “the highest, the most solemn, and commanding authorities, that the state or the nation can produce.”<sup>224</sup> He said, “[I]t seems impossible that [the Founders] could have spoken with so much explicitness and energy, if they had intended nothing more than that restricted and slavish press [in England], which may not publish any thing,

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216. *Id.* at 381.

217. *Id.* at 390–91.

218. *Id.* at 391.

219. *Id.*

220. *Id.* (emphasis added).

221. *Id.*

222. *Id.* (emphasis omitted).

223. *Id.* at 392.

224. *Id.*

true or false, that reflects on the character and administration of public men.”<sup>225</sup> Expanding on this sentiment, he added:

And if the theory of the prevailing doctrine in England, (for even, there it is now scarcely any thing more than theory,) had been strictly put in practice with us, where would have been all those enlightened and manly discussions which prepared and matured the great events of our revolution, or which, in a more recent period, pointed out the weakness and folly of the confederation, and roused the nation to throw it aside, and to erect a better government upon its ruins? They were, no doubt, libels upon the existing establishments, because they tended to defame them, and to expose them to the contempt and hatred of the people. They were, however, libels founded in truth, and dictated by worthy motives.<sup>226</sup>

Kent thus adopted, “as perfectly correct, the comprehensive and accurate definition of one of the counsel at the bar, that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals.”<sup>227</sup>

Kent’s opinion was a shockwave. It declared inapplicable the common law of libel in England precisely because the United States was based on a different kind of government requiring a different conception of freedom of the press. And it was hugely influential. Kent and Hamilton’s rule ended up being incorporated into several state constitutions—affirmative choices by those states to depart from what the common law had been towards something new.<sup>228</sup> While the rule might seem less than protective today, at the time, it was a giant leap forward and away from what the common law of libel demanded. Hamilton’s rule was “forward-looking then, regressive today, but in the surge of history, understandable.”<sup>229</sup>

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225. *Id.*

226. *Id.* at 392–93 (emphasis omitted).

227. *Id.* at 393–94 (emphasis omitted).

228. FREDERIC HUDSON, *JOURNALISM IN THE UNITED STATES, FROM 1690–1872*, at 753–57 (1873) (listing provisions of various state constitutions).

229. Morris D. Forkosch, *Freedom of the Press: Croswell’s Case*, 33 *FORDHAM L. REV.* 415, 439 n.97 (1965).



## C. Lewis v. Few

*Lewis v. Few* is a perfect example of the far reaching consequences that putting intent into play had on the common law of libel.<sup>230</sup> In 1809, Morgan Lewis—as it happens, the same Morgan Lewis who voted against Hamilton in *Croswell*—sued after William Few denounced Lewis’s “attempts to destroy the liberty of the press” at a public meeting about the upcoming election for governor and in the *American Citizen* newspaper.<sup>231</sup> By that time, Lewis had become Governor of New York, and Few charged Lewis with “hostility towards the republican cause.”<sup>232</sup>

Among other defenses, Few’s counsel sought an extension of Kent’s observations in *Croswell* about the importance of intent. He argued that the plaintiff must show that the words were false and that they were uttered with malicious intent to prevail.<sup>233</sup> He thus carried Hamilton’s argument a step forward by arguing that intent might matter even when the statement at issue is false. Pointing to a strand of the common law of England, counsel drew an analogy between the servant/master privilege that had been developing there and the governor/governed privilege in the United States: “Where words are spoken . . . *bona fide*, by a master, concerning the character of a servant, though the specific acts or crimes are charged, and which turn out to be false, yet no action lies.”<sup>234</sup> In such cases, “[t]he words must be proved to be malicious, as well as false.”<sup>235</sup>

In cases like the one before the court where the target of the alleged libel was a public official, Few’s counsel argued that, consistent with this principle from the common law, “[t]he people must be regarded as the sovereign or master, and the persons elected as their agents or servants.”<sup>236</sup> Continuing that line of reasoning, Few’s counsel argued, “It is essential, in an elective government, that the people should be at liberty, *bona fide*, to express their opinions of any public officer, or candidate for office.”<sup>237</sup> As such, for Lewis to prevail, he would have to prove both that the charge was false and that Few acted from bad motives.

Lewis’s counsel did not appreciate Few’s attempt to import the servant/master privilege into the context of libels on public officials and extend Hamilton’s rule even further. As he put it, “[T]he defence now set

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230. *Lewis v. Few*, 5 Johns. 1 (N.Y. Sup. Ct. 1809).

231. *Id.* at 4 (citation omitted).

232. *Id.* at 2 (citation omitted).

233. *Id.* at 13–14.

234. *Id.*

235. *Id.* at 14.

236. *Id.*

237. *Id.*

up, [that is, a showing that a charge was both false and malicious,] was never thought of [in *Croswell*, and it seemed] to have been reserved for the ingenuity of . . . defendant’s counsel here, to suggest this new doctrine for the first time.”<sup>238</sup> The People, Lewis’s counsel said, “may freely speak, and publish the truth, and the whole truth; but this cannot authorize them to publish *falsehoods* . . . concerning public candidates.”<sup>239</sup>

The court sided with Lewis. Thompson, the judge in *Croswell* who voted with Kent, delivered the opinion.<sup>240</sup> It was argued, Thompson wrote, that “being the act of a public meeting . . . and the publication being against a candidate for a public office . . . afford[ed] a complete justification” to the libel.<sup>241</sup> Essentially, the defendant was asking for a libel-free zone where allegations made against a public official at a public meeting “is beyond the reach of legal inquiry.”<sup>242</sup> To this, Thompson said, he could “never yield [his] assent.”<sup>243</sup> Thompson thus rejected the analogy to the servant/master privilege, writing that he could not find “any analogy whatever” to support the argument advanced.<sup>244</sup> To be sure, citizens had a “right to assemble, and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinions to others,” but, in doing so, they must not “transcend the bounds of truth.”<sup>245</sup> He added, “[T]here is a wide difference between this privilege, and a right irresponsibly to charge a candidate with direct, specific and unfounded crimes.”<sup>246</sup>

While he did not accept that a false charge uttered *bona fide* could be privileged, Thompson did accept that it could mitigate damages—a still nascent idea both in England and in the United States.<sup>247</sup> Although that issue was not before the court, Thompson wrote, “Every case must necessarily, from the nature of the action, depend on its own circumstances, which are to be submitted to the sound discretion of the jury. It is difficult, and perhaps impracticable, to prescribe any general rule on the subject.”<sup>248</sup> Thus, while Few did not win on liability, Thompson opened the door to reduced damages on remand—one of the earliest cases

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238. *Id.* at 20.

239. *Id.* at 20–21.

240. *Id.* at 28–37.

241. *Id.* at 35–36.

242. *Id.* at 36.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 37.

248. *Id.*

in the States to do so—based on the republican circumstances in which the libel was uttered.

*Lewis* was a bookend on these early cases. While the rule prevailing at common law was that even truth was no defense to a libel, *Lewis* and these other cases show early courts realizing that for a republican government to be successful, some of the more draconian aspects of libel law had to be relaxed. And while in a monarchical England it may well have made sense that the common law of libel was enforced with an iron fist when it came to libels on magistrates, i.e., public men, such rules made little sense in the United States, where the governors did not rule over the people but were agents of them. In this way, these cases remind us of what Justice Story once said: “The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted *only that portion which was applicable to their situation*.”<sup>249</sup> In the place of those parts left behind, early courts injected principles like truth and intent—principles that provided play in the joints between the common law’s speech-suppressing tendencies and a republican form of government that requires speech to work.

One cannot then read these cases and agree with Thomas’s and Gorsuch’s assertions that freedom of the press simply developed against a backdrop of the English common law of libel.<sup>250</sup> It simply is not the case, as Thomas claimed, that the “Court’s pronouncement that the First Amendment requires public figures to establish actual malice bears ‘no relation to the text, history, or structure of the Constitution.’”<sup>251</sup> These cases, and others like them, demonstrate that the law of libel in the United States developed against a backdrop of republican principles of freedom of the press under the First Amendment. Put differently, these cases show that freedom of the press diffused through the law of libel to enable self-government rather than develop around it.

Of course, *Clap*, *Croswell*, and *Lewis* are just three early cases among many. Many courts did impose the common law of libel as adopted in England on the newly minted American citizens. As one commentator lamented, “Our own judges seem to have forgotten that the founders of the government are not distinguished for their reception of the English common law but for their adaptation of the democratic leaning and tendency of the constitutional side of it to a new career of popular freedom

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249. *Van Ness v. Pacard*, 27 U.S. 137, 144 (1829) (emphasis added).

250. *McKee v. Cosby*, 139 S. Ct. 675, 680 (2019).

251. *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021).

and equal justice.”<sup>252</sup> Nevertheless, cases like *Clap*, *Croswell*, and *Lewis* demonstrate that there was no unanimity on this point as Thomas suggests.

True enough, none of these courts adopted *Sullivan*’s actual-malice rule—although counsel in *Lewis* essentially argued for it some 150 years before *Sullivan*. But these decisions display glimmers of the considerations about intent and falsity and republicanism that would come to the fore in *Sullivan* and, as we will see, long before *Sullivan* too. There is no reasonable argument that it was only the Supreme Court in the last half of the twentieth century that thought a conflict between libel law and freedom of the press existed. They have always chased each other’s shadows.

#### IV. PUBLIC-OFFICIAL LIBEL PLAINTIFFS

Turning to specifics, both Thomas and Gorsuch suggested that there is irrefutable evidence that the *Sullivan* Court made up, out of whole cloth, the actual-malice rule. As Thomas explained, *Sullivan* was a “policy-driven decision[] masquerading as constitutional law.”<sup>253</sup> Gorsuch made similar observations, albeit less strident. Both are ahistorical. As we have already seen, the *Sullivan* Court was not the first to consider the impact of a lack of fault in a libel case concerning public officials, even when the defendant could not defend his or her case on the grounds of truth.

In this section, we dig into more of these early cases, which run from the eighteenth century on into the nineteenth and can be divided into two classes. First, there are those cases that found that a defendant’s lack of actual malice might mitigate damages—much like Thompson suggested in *Lewis*. Second, there are those that went further and recognized a privilege in cases involving public-official plaintiffs whereby a defendant could escape liability so long as he had reasonable cause to believe an allegation was true—even where it turned out to be false. Each of these lines of cases, while not establishing the actual-malice rule as it exists today, are the precursors to it.

##### *A. Absence of Actual Malice in Mitigation*

By the late eighteenth century, libel law was rapidly developing in England. In 1792, Parliament adopted Fox’s Act, which gave power back to the jury to issue a general verdict. No longer was the jury, even in England, relegated to deciding only whether the defendant published the libel. The changes, however, were not limited to Parliament, as the courts

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252. Schofield, *supra* note 152, at 83.

253. *McKee*, 139 S. Ct. at 676.

in England also began liberalizing the common law of libel. A prime example is the case of *Knobell v. Fuller*.<sup>254</sup>

In *Knobell*, the defendant was a conservative daily news organization: *The Morning Post*.<sup>255</sup> The alleged defamation was that Knobell, along with a co-conspirator, had swindled money from friends and family of felons in exchange for securing pardons.<sup>256</sup> The co-conspirator was charged for the crime, but Knobell was not.<sup>257</sup> While the newspaper could not muster proof that the allegations against Knobell were true, it nevertheless sought to offer as mitigating evidence that there were “strong grounds of suspicion against” Knobell.<sup>258</sup> As defense counsel explained, “[T]hey might prove facts which showed there was cause of suspicion, and therefore proved that the defendants were not induced to publish this paper by reason of malice against the plaintiff.”<sup>259</sup> Instead, the evidence would show that they published “for the purpose of conveying information to the public, this being a concern of a public nature.”<sup>260</sup> This, counsel argued, should reduce the damages—even though it could not absolve the paper of guilt altogether.

Chief Judge James Eyre agreed, holding that evidence tending to show a belief in the truth of the allegations could be admitted to mitigate damages.<sup>261</sup> He thus admitted the evidence and allowed defense counsel to call two witnesses to demonstrate that Knobell was implicated in the scheme, although he turned out not to be a part of it.<sup>262</sup> The jury then found in favor of Knobell and awarded him 200 shillings.<sup>263</sup> While the press lost the battle that day, a war was won. *Knobell v. Fuller* established the rule—for the first time—that a journalist’s intent in publishing the news was relevant insofar as it might be offered to reduce damages. The value judgment made sense: of course there is a material difference between a defamatory statement that was a *mistake* and one that was an outright *lie*.

By 1803, the principle in *Knobell* found its way across the Atlantic. In *Kennedy v. Gregory*, decided by the Supreme Court of Pennsylvania, a schoolmaster sued after being labeled a drunk.<sup>264</sup> At the trial court, as in

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254. *Knobell v. Fuller* (1796) 170 Eng. Rep. 222, Append. 4, § xcii (UK).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at § xciii.

260. *Id.*

261. *Id.* at § xciii–xciv.

262. *Id.* at § xciv.

263. *Id.*

264. *Kennedy v. Gregory*, 1 Binn. 85, 86 (Pa. 1803).

*Knobell*, the defendant attempted to offer evidence that the charge was not fabricated.<sup>265</sup> Instead, he had been told by another that Kennedy had a reputation for drinking.<sup>266</sup> The court, however, did not permit the evidence, and the jury found in favor of Kennedy.<sup>267</sup>

The verdict did not survive the appeal though. Rather, two of the three justices found that the evidence of Kennedy's reputation should have been admitted: it was relevant that the defendant be able to produce evidence that he had been told that Kennedy had a reputation for drinking "to take off all presumption that the charge was a fabrication of his own."<sup>268</sup> As the court had in *Knobell*, the Pennsylvania Supreme Court recognized that there was a difference in fault as between a wholly fabricated charge and a charge made in reliance on another source, even if ultimately wrong.

Courts in Pennsylvania repeatedly allowed evidence showing that the defendant *believed* the charge even if he was ultimately mistaken. In 1806, a court found that the defendant should be allowed to "give evidence of circumstances which had induced a suspicion of felony" by the plaintiff.<sup>269</sup> And in 1808, the court agreed with William Duane, the firebrand publisher of the *Aurora*, who had argued for the application of the principle:

Can it be, that like damages should be given against two defendants, one of whom received his information from such sources as were entitled to a certain degree of credit, while the other devised it by his own wicked imagination? I think it cannot. Such evidence certainly goes to the degree of malice . . . .<sup>270</sup>

Nor was the principle limited to Pennsylvania. In *Larned v. Buffinton*, the defendant alleged that the plaintiff had stolen his horses.<sup>271</sup> At trial in 1807, the defendant argued that he should be allowed to submit evidence of his belief in the charge to mitigate damages.<sup>272</sup> The Massachusetts trial court, however, refused to hear it.<sup>273</sup> As in *Kennedy*, the ruling was reversed on appeal: "When, through the fault of the plaintiff, the defendant . . . at the time of speaking the words . . . had *good cause to believe they were true*, it appears reasonable that the jury should take into

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265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 87.

269. *Id.* at 90 n.a.

270. *Id.*

271. *Larned v. Buffinton*, 3 Mass. 546, 550 (1807).

272. *Id.*

273. *Id.*

consideration this misconduct of the plaintiff to mitigate the damages.”<sup>274</sup> Likewise, in South Carolina, a defendant could show “a ground of suspicion” for the charge to reduce damages.<sup>275</sup> The same rule was recognized in Connecticut.<sup>276</sup> In Ohio, damages could be mitigated by “[a]ny circumstance, therefore, tending to show that the defendant spoke the words under a mistake, or that he had some reason to believe they were true.”<sup>277</sup> In Indiana, “general rumors, or a general suspicion of the guilt of the plaintiff of the crime imputed to him by the defendant, may be given in evidence in mitigation of damages.”<sup>278</sup>

The thrust of this early doctrine is remarkably similar to that of today’s actual-malice rule: courts must consider a defendant’s state of mind at the time of publication in order to assess the degree of fault that accompanied the libel. And as the law developed, this idea, paired with a recognition of the social importance of statements about matters of public concern, would transform into a privilege closer to the one we know today, becoming a bar to liability. Thomas and Gorsuch, however, failed to wrestle with this early case law or the case law that developed shortly thereafter that barred recovery in public-official cases, even in cases of falsity, so long as the falsity was the result of an honest mistake.

#### *B. Absence of Actual Malice as a Bar to Liability*

Although the court in *Lewis v. Few* rejected Few’s argument in favor of privileged falsity, the analogy that Few’s counsel offered between the master/servant privilege and the governed/governor privilege was hard to shake. If the People are the masters of their government, and their representatives in government are their servants, the People should be privileged to discuss their servants’ conduct just as masters were privileged in statements about servants. But the idea, however sensible, was also radical. As we saw in Part V, courts in the early nineteenth century were struggling with how or whether they could honor the gaudy

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274. *Id.* at 553 (emphasis added).

275. *Buford v. McLuny*, 10 S.C.L. (1 Nott & McC.) 268, 271 (1818) (“A person may prove, in mitigation of damages, such facts and circumstances as show a ground of suspicion, not amounting to actual proof of plaintiff’s guilt.”); *see also* *Root v. King*, 7 Cow. 613, 636 (N.Y. Sup. Ct. 1827); *Gilman v. Lowell*, 8 Wend. 573, 583 (N.Y. Sup. Ct. 1832); *Beehler v. Steever*, 2 Whart. 313, 326 (Pa. 1837).

276. *Stow v. Converse*, 4 Conn. 17, 25 (1821) (“ground of suspicion of their truth, may be proved in mitigation of damages”).

277. *Wilson v. Apple*, 3 Ohio 270, 271 (1827).

278. *Sanders v. Johnson*, 6 Blackf. 50, 54 (Ind. 1841).

relics of the common law that made public discussion about public men dangerous in a system of government reliant on that very discussion.

Still, given time, courts would come to endorse Few's counsel's once-radical approach. As one legal review confirmed in 1889, "[T]he rules of the modern law governing the right of discussion of public men . . . gives large play to the expression of honest and candid opinion, even if this be at times mistaken and unjust."<sup>279</sup> To the extent that not all states subscribed to this approach, that review argued that change to the law "should certainly not consist in narrowing, but rather in still further widening its scope."<sup>280</sup>

As with an absence of actual malice in mitigation of damages, the master/servant privilege adopted in these cases also came from a leading case in England, *Weatherston v. Hawkins*.<sup>281</sup> In that 1785 case, Hawkins sent his servant, Weatherston, to buy a few books at the local market.<sup>282</sup> Hawkins, "more curious" than he sometimes was, looked over the servant's account "article by article, and in one, a book [he] well knew the price of, [he] found [the servant] had charged [him] one shilling more than it cost, and that shilling he kept in his pocket."<sup>283</sup> Hawkins then relayed this assessment in a letter to an acquaintance who was considering hiring Weatherston.<sup>284</sup>

Weatherston brought a defamation lawsuit based on the allegations. At trial, Hawkins did not attempt to show that the charge was true as, evidently, it was not, despite Hawkins's prior math, and the jury found in favor of Weatherston.<sup>285</sup> On appeal, Lord Chief Justice Mansfield, having heard from Weatherston's counsel, did not even let the defendant's barrister speak. Instead, he said:

I have held more than once that an action will not lie by a servant against his former master for words spoken by him in giving a character of the servant. . . . to every libel there may be a necessary and implied justification . . . . Words may . . . be justified on account of the subject-matter, or other circumstances."<sup>286</sup>

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279. Chase, *supra* note 42, at 367 (emphasis added).

280. *Id.* at 368.

281. Lewis v. Few, 5 Johns. 1, 35 (N.Y. Sup. Ct. 1809) (citing *Weatherston v. Hawkins* (1786) 99 Eng. Rep. 110 (KB)).

282. *Weatherston*, 99 Eng. Rep. at 110.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 112.



Where it was a master providing an assessment of a servant in response to another seeking a reference, he thought it should be privileged.<sup>287</sup>

As discussed, the logic of *Weatherston*, in the republican United States, would soon prove influential. Although Few's counsel in *Lewis* appears to have been the first in attempting to draw the analogy, he was not the last. In the 1830s, in *State v. Burnham*, the defendant in a criminal libel prosecution alleged that the lawyer for Strafford County was "intemperate" and "incompetent to the discharge of the duties of his said office."<sup>288</sup> This was not some offhand remark; the defendant printed two hundred copies of it and sent it to his fellow citizens.<sup>289</sup> At trial, the defendant argued that if he made the charges against the lawyer "in good faith, with pure motives, and upon probable grounds" to believe it, then it was irrelevant whether the charge was true.<sup>290</sup>

Unlike in *Lewis*, the court accepted the argument. As the Superior Court of Judicature of New Hampshire explained, "[I]t is not expedient that the errors, or foibles, or even the crimes of individuals, should be made the subject of written publication, *except for the purpose of answering some good end.*"<sup>291</sup> Elaborating on the exception, it found that Hamilton's rule—that freedom of press meant the freedom to publish the truth from good motives—was too narrow.<sup>292</sup> Instead, a defendant could excuse his conduct if, "upon a lawful occasion, [he] proceeded with good motives—*upon probable grounds*—upon reasons which were apparently good, but upon a supposition *which turns out to be unfounded.*"<sup>293</sup> In short, the court held for the first time that falsity may be privileged and a lack of actual malice might be a defense.

What were such lawful occasions? They included "removal of an incompetent officer, [preventing] the election of an unsuitable person, or, generally, to give useful information to the community . . . in order that they may act upon such information."<sup>294</sup> That is, the court sought to protect from liability allegations affecting a republican government. Recognizing that it "would be an idle and vain attempt, to endeavor to reconcile all the discussions in the books upon the subject," the court expressed its confidence that it had provided "sound practical rules, which, while they give no countenance to defamation, protect all persons in publishing, upon

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287. *Id.*

288. *State v. Burnham*, 9 N.H. 34 (1837).

289. *Id.* at 36.

290. *Id.*

291. *Id.* at 41 (emphasis added).

292. *Id.* at 43.

293. *Id.* (emphasis added).

294. *Id.* at 41–42.

lawful occasions, the truth from whatever motives, *and what they have reason to believe the truth*, if it is done with motives which will bear examination.”<sup>295</sup>

*Burnham*, like *Weatherston* before it, had staying power.<sup>296</sup> Some 30 years later, during the Reconstruction, the Superior Court of Judicature of New Hampshire doubled down. In *Palmer v. City of Concord*, the court explained:

[I]n this country every citizen has the right to call . . . attention . . . to the mal-administration of public affairs or the misconduct of public servants, if his real motive in so doing is to bring about a reform of abuses, or to defeat the re-election or re-appointment of an incompetent officer. If information given in good faith to a private individual of the misconduct of his servant is ‘privileged,’ equally so must be a communication to the voters of a nation concerning the misconduct of those whom they are taxed to support and whose continuance in any service virtually depends on the national voice.<sup>297</sup>

Other state courts adopted similar reasoning based either on the master/servant analogy in *Weatherston* or on a rapidly developing, related privilege in England: “If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications [‘made by a person in the discharge of some public . . . duty, whether legal or moral’] are protected for the common convenience and welfare of society.”<sup>298</sup> To offer just one other example, take the Supreme Court of Texas in *Express Printing Co. v. Copeland*: “Whatever pertains to the qualification of the candidate for the office sought is a legitimate subject for discussion and comment, provided that such discussion and comment is not extended beyond the prescribed limits.”<sup>299</sup> Those limits were that such discussion “must be confined to the truth, *or what in good faith and upon probable cause is believed to be true*.”<sup>300</sup> Elaborating on its rationale, it explained, “In our form of government the supreme power is in the people; they create offices and select the officers.”<sup>301</sup> It then posed a rhetorical question:

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295. *Id.* at 45–46 (emphasis added).

296. For cases decided from 1837 to 1868 see, for example, *Swan v. Tappan*, 59 Mass. (5 Cush.) 104 (1849); *Reynolds v. Tucker*, 6 Ohio St. 516 (1856); *Gassett v. Gilbert*, 72 Mass. (6 Gray) 94 (1856).

297. *Palmer v. City of Concord*, 48 N.H. 211, 216 (1868).

298. *Toogood v. Spyring* (1834) 149 Eng. Rep. 1044 (KB).

299. *Express Printing Co. v. Copeland*, 64 Tex. 354, 358 (1885).

300. *Id.*

301. *Id.*

“[A]re the people to be denied the right of discussion and comment respecting the qualification or want of qualification of those who, by consenting to become candidates, challenge the support of the people on the ground of their peculiar fitness for the office sought?”<sup>302</sup>

Courts in Iowa, Vermont, Minnesota, Michigan, Kansas, Rhode Island, Pennsylvania, and South Dakota all adopted similar rules in public official cases.<sup>303</sup> That these cases exist, in legions, nonetheless, should not be surprising. *Sullivan* itself noted the existence of a common law “privilege immunizing honest misstatements of fact”—an accurate assessment that belies Thomas’s assertion that the common law privilege “applied only when the facts stated were true” or Gorsuch’s statement that the controlling view of freedom of the press in the United States was that of Blackstone: “if he publishes falsehoods ‘he must take the consequence of his own temerity.’”<sup>304</sup>

In *Sullivan*, Brennan discussed one such case that adopted an actual-malice rule: the 1908 Kansas case *Coleman v. MacLennan*.<sup>305</sup> In *Coleman*, the *Topeka State Journal* published an article relating to certain school-funding transactions directed by a commission on which plaintiff, the state attorney general, sat. The Kansas Supreme Court posed the question as one of “utmost concern”: “What are the limitations upon the right of a newspaper to discuss the official character and conduct of a public official . . . ?”<sup>306</sup> Noting that the state constitution protected “liberty of the press,” the court observed that “[f]requently it is said that the expression

302. *Id.*

303. *Mott v. Dawson*, 46 Iowa 533, 537 (1877) (county board supervisor) (“if the words were spoken . . . without malice, in good faith, believing them to be true, and having reasonable cause as a prudent, careful man to so believe . . . the defendant is not liable”); *Shurtleff v. Stevens*, 51 Vt. 501, 511–12 (1879) (clergyman) (adopting principle that “[i]f fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society”); *see also Marks v. Baker*, 9 N.W. 678 (Minn. 1881) (city treasurer); *Miner v. Post & Trib. Co.*, 13 N.W. 773 (Mich. 1882) (police justice); *State v. Balch*, 2 P. 609 (Kan. 1884) (candidate for county attorney); *Kent v. Bongartz*, 22 A. 1023 (R.I. 1885) (police officer); *Briggs v. Garrett*, 2 A. 513 (Pa. 1886) (judge); *McNally v. Burleigh*, 39 A. 285 (Me. 1897) (deputy sheriff); *Boucher v. Clark Pub. Co.*, 84 N.W. 237 (S.D. 1900) (sheriff).

304. *Compare* *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 n.21 (1964), *with* *McKee v. Cosby*, 139 S. Ct. 675, 683 (2019), *and* *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021).

305. *Id.* (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)).

306. *Coleman*, 98 P. at 283.

was used in the sense it bears in the common law.”<sup>307</sup> This begged the question though: “The common law at what stage of its development?”<sup>308</sup>

“Certainly not,” the court said, when English settlers stepped foot on the eastern shores of the continent in 1607—fifteen years before the first newspaper would be published.<sup>309</sup> At that time, English law was the stuff of the Star Chamber and being “subservient to royal proclamations.”<sup>310</sup> Even after the Star Chamber was abolished in 1641, “Parliament assumed the prerogative respecting the licensing of publications.”<sup>311</sup> At this point through the end of the century, the liberty of the press in England was “more theoretical than actual on account of the harshness of the law of libel.”<sup>312</sup>

After reviewing the liberalization of defamation law through the eighteenth century, the court admitted:

[T]he English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation . . . . The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies.<sup>313</sup>

The common law of defamation, the court said, “is, as a whole, absurd in theory, and very often mischievous in its practical operation.”<sup>314</sup> “The result is,” it said, “that ‘liberty of the press’ is still an undefined term.”<sup>315</sup>

Still, “[c]ertain boundaries are fairly discernible within which the liberty must be displayed, but precise rules cannot be formulated in advance to govern its exercise on particular occasions.”<sup>316</sup> The “constitutional guaranty clearly” meant at least that there shall be no prior restraints and that the press shall be free of court censorship.<sup>317</sup> Early commentators said the guarantee meant nothing more, but “later commentators and later decisions maintain[ed] that it d[id] mean more.”<sup>318</sup> Quoting Judge Thomas Cooley, the court explained, “[I]t is nevertheless

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307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 284.

318. *Id.*

believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions.”<sup>319</sup> The freedom of the press, as Cooley saw it, implied:

a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their . . . scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals.<sup>320</sup>

But, the court said, there must be an exception when another interest is considered: “Where the public welfare is concerned, the individual must frequently endure injury to his reputation without remedy.”<sup>321</sup> Indeed, “[i]n some situations an overmastering duty obliges a person to speak, although his words bring another into disrepute.”<sup>322</sup> In the court’s opinion, one such occasion was speech regarding the qualifications of public officials:

Under a form of government like our own there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointive, and by becoming a candidate, or allowing himself to be the candidate of others, a man tenders as an issue to be tried out publicly before the people or the appointing power his honesty, integrity, and fitness for the office to be filled.<sup>323</sup>

While this could inconvenience public officials and occasionally injure their reputations, this injury was outweighed by “[t]he importance to the state and to society” to discuss public officials’ qualifications.<sup>324</sup>

Turning to the rule to be extrapolated from these principles, the court explained, as so many courts had held before it, “[W]e think a person may in good faith publish whatever he may honestly believe to be true . . . without committing any public offense, although what he publishes may in fact not be true, and may be injurious to the character of others.”<sup>325</sup> Without allowing for honestly mistaken statements, the “liberty of press

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319. *Id.*

320. *Id.*

321. *Id.* at 285.

322. *Id.*

323. *Id.*

324. *Id.* at 286.

325. *Id.* at 287.

[would] be endangered if the discussion of such matters must be confined to statements of demonstrable truth.”<sup>326</sup> As the court explained, “If . . . the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value.”<sup>327</sup>

*Coleman* was the intellectual capstone of early American cases that had transformed the common law rules in *Knobell* and *Weatherston* into safeguards for freedom of speech and of the press in the United States.<sup>328</sup> Together, these cases demonstrate that the common law of libel did consider a lack of actual malice as a defense to a defamation claim by a public official, even for false statements of fact—and did so precisely because of the chilling effect that unrestrained libel lawsuits could have on public discourse about political life. Thomas and Gorsuch are, thus, mistaken on multiple counts. First, common law privileges “on public questions and matters of public interest” were not “applied only when the facts stated were true.”<sup>329</sup> Second, the common law in the eighteenth and nineteenth centuries did not “deem[] libels against public figures to be, if anything, more serious and injurious than ordinary libels.”<sup>330</sup> These cases made it harder for such individuals to recover damages—not easier.

In 1888, *Newspaper Libel, A Handbook for the Press* hit the shelves. At a slim 300 pages, it billed itself as the first “convenient [legal] reference [for] newspaper offices.”<sup>331</sup> In the chapter “Political Libels,” the handbook advised its readers, “Among the various publications which are protected by the law of privilege . . . are those respecting public men and candidates for public office.”<sup>332</sup> Based on that, it instructed, “[I]f the charges are based upon some foundation in fact . . . and published in good faith, the publication is privileged, even though it contains false imputations upon the integrity of persons whose conduct is being considered.”<sup>333</sup>

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326. *Id.* at 289.

327. *Id.* at 290.

328. Not all courts agreed. See Eric M. Freedman, *American Libel Law 1825-1896: A Qualified Privilege for Public Affairs?*, 30 CHITTY’S L.J. 113, 115 (1982) (“Cases were decided each way, and it is difficult to judge which view was more widely held.”).

329. *McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring); *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (Gorsuch, J., dissenting).

330. *McKee*, 139 S. Ct. at 679.

331. SAMUEL MERRILL, *NEWSPAPER LIBEL: A HANDBOOK FOR THE PRESS* 3 (1888).

332. *Id.* at 208.

333. *Id.*

The actual-malice rule, then, did not break sharply from the common law of libel. It is not true, as Gorsuch wrote in *Berisha*, that there was one “accepted view” of libel for “two centuries” that allowed for the recovery of damages in all cases concerning “false publications.”<sup>334</sup> By the end of the nineteenth century, the precursor to the actual-malice rule was already a part of desk references for journalists. If anything, *Sullivan* was a product of the common law, a constitutionalization of an increasingly important doctrine meant to protect discussion about public officials. That is to say, *Sullivan*’s rule was a natural extension of what came before it. As the *Handbook for the Press* explained, the privilege was born of the very structure of American government: “When the American colonies united under a republican form of government, the writers for the press in this country considered all restraints removed . . . .”<sup>335</sup> Yet, again, for our purposes it suffices to say, contrary to Thomas and Gorsuch, that *Sullivan* does not “lack . . . historical support.”<sup>336</sup>

#### V. PUBLIC-FIGURE LIBEL PLAINTIFFS

Even if there is historical support for putting additional burdens on public officials, there is still the question of whether such burdens should be placed on public *figures*, who, the argument would go, lie further from the republican rationale for an actual-malice rule. The petition in *Berisha v. Lawson*, after all, attacked not the actual-malice rule under *Sullivan* but the rule as applied to public figures in cases like *Curtis Publishing Co. v. Butts*. In *Curtis Publishing Co.*, the Court did not attempt to base its extension of the actual-malice rule on history, but rather common sense. As Chief Justice Earl Warren wrote:

Increasingly in this country, the distinctions between government and private sectors are blurred. . . . 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. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions. . . . Our citizenry has a legitimate and substantial interest in the conduct of such

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334. *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting).

335. MERRILL, *supra* note 331, at 210.

336. *Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting).

persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’<sup>337</sup>

Yet, as with public officials, there is historical support for an extension of the actual-malice rule to public figures that goes beyond this common sense reasoning. In the common law doctrine of fair comment, for example, we see Warren’s very logic for extending the actual-malice rule. As Martin Newell’s treatise explained, “Every person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose.”<sup>338</sup> Traditionally, the doctrine was limited in several respects. It applied only to matters that “invite public attention . . . never attack[] the individual, but only his work . . . never impute[] or insinuate[] dishonorable motives . . . [and] never take[] advantage of the occasion to gratify private malice.”<sup>339</sup>

The contexts in which fair comment was allowed, however, tell us what early citizens understood to be topics of discussion that merited additional protection. In these cases, the law spoke neither of public officials nor public figures but rather *public men* and *public conduct* generally.<sup>340</sup> As one nineteenth century treatise said, “All political, legal and ecclesiastical matters [were] matters of public concern.”<sup>341</sup> Simply, “[a]nything that is a public concern to the inhabitants is a matter of public interest within the meaning of the rule.”<sup>342</sup> The doctrine thus covered: (1) “[m]atters concerning the administration of the government” and (2) “[m]atters pertaining to the administration of public justice” but also those relating to (3) “the management of public institutions” like “colleges, hospitals, [and] asylums”; (4) “appeals for public patronage,” like “artists, public writers, [and] lecturers”; (5) “the character and quality of public entertainments,” like “theatrical and musical performances”; and (6) “religious bodies.”<sup>343</sup>

In all of these matters, there was a common rationale: by moving into the public eye, one acquiesced to its gaze. As the same treatise explained in the context of public patronage, “[A] person [who] appeals to the public by writing letters to the newspapers, either to expose what he deems abuses

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337. *Curtis Publ’g Co. v. Butts*, 388 U.S. 160, 163–64 (1967) (Warren, C.J., concurring).

338. NEWELL, *supra* note 42, at 564.

339. *Id.* at 567.

340. *Id.* at 572.

341. *Id.* at 575.

342. *Id.*

343. *Id.* at 576–90.



or to call attention to his own particular grievances . . . cannot complain if he gets the worst of it.”<sup>344</sup> Another example: if a “medical man brings forward some new method of treatment, and advertises it largely as the best, . . . [h]e may be said to invite public attention.”<sup>345</sup> In short, “[w]hoever seeks notoriety or invites public attention is said to challenge public criticism; and he cannot resort to the law courts if that criticism be less favorable than he anticipated.”<sup>346</sup>

While the doctrine of fair comment was, ostensibly, limited to matters of opinion and did not extend to allegations against a public person’s private character, in several nineteenth century cases, courts extended the doctrine developed in early public-official cases to public figures to protect even false statements of fact. In *Press Co. v. Stewart*, for example, the plaintiff opened a typing school “profess[ing] to be a teacher of shorthand writing, type-writing, and phono-scribing.”<sup>347</sup> The offices he set up were “alluringly placarded with signs, and various devices in the way of circulars were scattered broadcast in the community calling attention to the merits of his system . . . .”<sup>348</sup> When an editor’s attention was piqued by the “extravagant nature” of the advertisements, he sent a reporter to the new business.<sup>349</sup>

Reversing the lower court’s decision to uphold the jury’s verdict in favor of the plaintiff, the Pennsylvania Supreme Court reasoned by analogy to cases adopting privileges in the public-official context and held that “a communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause.”<sup>350</sup> In such cases, malice would not be inferred. Instead, “[a]ctual malice must be proved before there can be a recovery.”<sup>351</sup> Realizing that it was extending the rule, the court said that it might be “asked why *this* article is so privileged.”<sup>352</sup> It was privileged not because the plaintiff was a public official (he wasn’t), but “because it was proper for public information.”<sup>353</sup> The plaintiff “was holding himself out to the world as a teacher and guide of youth [and] was seeking to attract them to his place by signs, placards, and advertisements, some of them, at least, of

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344. *Id.* at 583–84.

345. *Id.* at 584.

346. *Id.*

347. *Press Co. v. Stewart*, 14 A. 51, 52 (1888).

348. *Id.*

349. *Id.*

350. *Id.* at 53.

351. *Id.*

352. *Id.* (emphasis added).

353. *Id.*

an extraordinary nature.”<sup>354</sup> As a result, “[t]his gave him a *quasi* public character.”<sup>355</sup> It made sense to require the plaintiff to prove actual malice, because “[w]hether he was a proper person to instruct the young” was a “matter[] of importance to the public, and the Press was in the strict line of its duty when it sought such information, and gave it to the public . . . .”<sup>356</sup> The court added, “[I]f that information tended to show that the plaintiff was a charlatan, and his system an imposture, the more need that the public, and especially parents and guardians, should be informed of it.”<sup>357</sup>

Courts also extended this doctrine to titans of industry. In *Crane v. Waters*, an 1882 case out of federal court in Massachusetts, the court found that a newspaper article about a railroad baron was privileged as well.<sup>358</sup> There, the plaintiff alleged that the *Boston Daily Advertiser* had defamed him by suggesting he would run a particular railroad into bankruptcy.<sup>359</sup> The defendants, however, argued that the topic of the railroads was

one in which the public has an interest, and that in discussing a subject of that sort a public speaker or writer is not bound at his peril to see that his statements are true, but has a qualified privilege, as it has been called, in respect to such matters.<sup>360</sup>

The court agreed, finding that when the topic of discussion was “the public conduct and qualifications of a public man,” newspapers “are not held to prove the exact truth of their statements . . . .”<sup>361</sup>

In finding that the defendant could thus show that it published the statements believing them to be true even if they turned out to be false, the court explained, “inasmuch as the project was one which affected a long line of road, as yet only partly built, and the consolidation of several companies, it assumes public importance.”<sup>362</sup> It continued, “For this reason the character of the plaintiff, as a constructor and manager of railroads, seem to me to be open to public discussion when he comes forward with so great and important a project affecting many interests besides those of the shareholders of one road . . . .”<sup>363</sup> Thus, “the defendants . . . have the

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354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Crane v. Waters*, 10 F. 619, 619 (C.C.D. Mass. 1882).

359. *Id.*

360. *Id.* at 620.

361. *Id.* at 620–21.

362. *Id.* at 621.

363. *Id.* at 622.

qualified privilege which attaches to discussions of public affairs.”<sup>364</sup> In so holding, it relied not on the doctrine of fair comment but, like the Pennsylvania Supreme Court in *Stewart*, the analogy to cases adopting an actual-malice defense.<sup>365</sup>

In *Struthers v. Peacock*, an 1876 case, the plaintiff was an architect who had contracted with the city to provide certain services.<sup>366</sup> The *Philadelphia Bulletin* alleged that the architect breached its contract with the city by procuring subpar marble for public buildings.<sup>367</sup> Instructing the jury, the judge spoke at length about what he called a “public journalists” privilege.<sup>368</sup> Having explained to the jury libel and malice, the judge moved to the issue of “whether these articles . . . are [nevertheless] deprived of malice by being what is called privileged communications, and whether they are within the proper province of the defendants as public journalists.”<sup>369</sup> Noting that the defendants were “publishers of a public journal,” he explained that it was “their right, and perhaps even their duty, to call attention to and make comments upon the manner in which the public buildings were being erected.”<sup>370</sup> The defendants “were probably doing the public a service in calling attention to the way the work was being done,” and such discussion must “be exercised freely without being subject to a too strict limitation.”<sup>371</sup>

Importantly, this privilege applied even if the article at issue was false. As the judge said in *Struthers*, such articles do not lose their “privileged character by going at times somewhat beyond the limit of strict truth, or beyond what the writer may be able to prove.”<sup>372</sup> But “[e]ditors are not infallible any more than other men, and a fair margin must be allowed to them for want of absolute accuracy, and for the necessities and the circumstances under which journalistic writing has to be done.”<sup>373</sup> That is, some breathing space must be allowed for inquiries of the press into the public affairs of others.

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364. *Id.*

365. *Id.* (first citing *State v. Burnham*, 9 N.H. 34 (1837); then citing *Commonwealth v. Morris*, 3 Va. (1 Va. Cas.) 176 (1811); and then citing *Commonwealth v. Clap*, 4 Mass. 163 (1808)).

366. *Struthers v. Peacock*, 11 Phila. Rep. 287 (1876).

367. *Id.* at 290.

368. *Id.* at 290–93.

369. *Id.* at 292.

370. *Id.* at 293.

371. *Id.*

372. *Id.*

373. *Id.*

Admittedly, as with cases involving public officials, the courts were not unanimous in their protection of defendants who libeled public figures. In *Smith v. Tribune Co.*, an 1867 case, Gerrit Smith brought a libel lawsuit against the Tribune Company for alleging that he faked lunacy in order to avoid criminal charges stemming from his involvement in the raid at Harper’s Ferry.<sup>374</sup> In response, the Tribune argued that the libel was privileged because Smith “was a public man; that he professed to be a teacher and educator of the public; that he had been in the habit of delivering speeches and lectures from time to time, and made various publications under his own name and of which he was the recognized author . . . .”<sup>375</sup> The court disagreed, noting that the allegations related not to those matters but to feigning lunacy; his public conduct was immaterial.<sup>376</sup>

Still, we see evidence that public figures in Pennsylvania and Massachusetts, as well as Vermont and Maine, including clergyman, unelected but high-profile political bosses, and those contracting to provide services to the government, were required to carry a heavier burden as defamation plaintiffs than private figures were.<sup>377</sup> But what about celebrities? The absence of celebrities in these cases is likely attributable to the idea of celebrity, as we understand it today, arriving only in the last half of the nineteenth century with the likes of Sarah Bernhardt and Oscar Wilde—who were friends and some of the most famous individuals of the nineteenth century.<sup>378</sup> Celebrity was in its infancy, and courts had not yet begun to grapple with the implications that would follow.

Like *Lewis v. Few* before it, these cases demonstrate that since the mid-1800s, a plaintiff’s involvement in public affairs might affect her burden in a libel case, even if she was not a public official. The idea being that if her conduct affected public affairs, like a public official’s conduct did, she should have to carry the same burden as that public official. True, in extending the actual-malice rule to public officials in *Curtis Publishing, Co.*, the Supreme Court did not, as Thomas says, make “a sustained effort to ground [its] holding[] in the Constitution’s original meaning”—it relied instead on the obvious influence that public figures had over matters of

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374. *Smith v. Trib. Co.*, 22 F. Cas. 689, 690 (C.C.N.D. Ill. 1867) (No. 13,118).

375. *Id.* at 691.

376. *Id.*

377. *See, e.g.*, *Barr v. Moore*, 87 Pa. 385 (1878); *Shurtleff v. Stevens*, 51 Vt. 501, 511 (1879); *Bearce v. Bass*, 34 A. 411 (1896).

378. *See generally* Sharon Marcus, *Salomé!! Sarah Bernhardt, Oscar Wilde, and the Drama of Celebrity*, 126 P.M.L.A. 999 (2011).

public concern in the mid-twentieth century.<sup>379</sup> But the fact that the Court did not rely on history to support its finding does not mean that there is no support in history for it. Thus, while Thomas is not wrong about his characterizations of what the Court did in *Curtis Publishing Co.*, he is wrong in maintaining that the public-figure actual-malice rule “broke sharply from the common law of libel . . . .”<sup>380</sup>

## VI. ERRONEOUS RELIANCE ON ENGLISH AUTHORITIES

In arguing against the actual-malice rule, Thomas and Gorsuch eschewed this *American* history at the Founding and during the nineteenth century in favor of an understanding of the English common law *before* the Founding. In *McKee*, for example, Thomas cited Blackstone to demonstrate what a plaintiff traditionally had to prove to maintain a defamation action, the allowed defenses, the existence of criminal libel laws, and that libels against public officials were treated more seriously than other libels at common law.<sup>381</sup> He echoed Justice Byron White, who decades earlier said, “The men who wrote and adopted the First Amendment were steeped in the common-law tradition of England.”<sup>382</sup> Those men “read Blackstone, ‘a classic tradition of the bar in the United States’” and “learned that the major means of accomplishing his speech and press was to prevent prior restraints . . . .”<sup>383</sup> Gorsuch, too, relied on Blackstone in his dissent in *Berisha*: “[E]very freeman has an undoubted right to lay what sentiments he pleases before the public’ but if he publishes falsehoods ‘he must take the consequence of his own temerity.’”<sup>384</sup> It was this principle, he wrote, that “extended far back in the common law and far forward into our Nation’s history.”<sup>385</sup>

But one cannot read Blackstone in a historical vacuum. In his *Commentaries on the Laws of England*, Blackstone maintained that “[t]he liberty of the press . . . consists in laying no *previous* restraints upon publications.”<sup>386</sup> But that was hardly the *only* view of the liberty of the press—especially in the United States. Founders like Thomas Jefferson and James Wilson hated Blackstone. And while we focus on them in this

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379. *McKee v. Cosby*, 139 S. Ct. 675, 678 (2019).

380. *Id.*

381. *Id.* at 678–80.

382. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 381 n.14 (1974) (White, J., dissenting).

383. *Id.*

384. *Berisha v. Lawson*, 141 S. Ct. 2424, 2426 (2021).

385. *Id.*

386. 4 TUCKER’S BLACKSTONE, *supra* note 42, at \*151.

section, along with Blackstone's editor in the United States, St. George Tucker, they were not alone. As James Madison wrote in the Report of 1800, the Blackstonian idea that freedom of press means freedom from previous restraints "can never be admitted to be the American idea of it: since a law inflicting penalties on printed publications, would have a similar effect with a law authorizing a previous restraint on them."<sup>387</sup> Additionally, recent exhaustive scholarship has dispelled the prior consensus that Blackstone's view of freedom of the press was the prevailing one in the early United States.<sup>388</sup>

While Thomas and Gorsuch invoked Blackstone, neither inquired into whether his view of the freedom of the press was shared by the Founders. There is, after all, a difference between an awareness or even an admiration of an author and agreement with an author. This is especially true where Blackstone's *Commentaries* attempted to summarize the entire body of the English common law. For exactly that reason, Thomas has recognized that Blackstone should not always be seen as controlling. As he wrote in *Trump v. Mazars USA, LLP*, we need not rely on Blackstone if the law he summarized "had been a significant complaint of the American Revolution" and where the American experience "confirmed" a contrary precedent.<sup>389</sup> Applying this test, this Part asks whether reliance on Blackstone in the context of libel and freedom of the press should be considered authoritative.

In short, freedom of the press was a significant complaint of the Revolution. Arthur M. Schlesinger Sr. wrote in *Prelude to Independence* that in the run up to the Revolution, "[b]ristling controversial articles . . . signaled the change and inevitably brought the patriot prints into head-on collision with the English common law of seditious libel."<sup>390</sup> As we have already seen, American experience confirmed contrary precedent to that of England—especially when it came to their rejection of common law rules meant to protect public debate.<sup>391</sup> Even the Sedition Act, after all, allowed for truth as a defense to a seditious libel charge, unlike in England. As Judge Kent explained, unlike the English, "the people of this country

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387. JAMES MADISON, THE REPORT OF 1800 (1800).

388. 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); WENDELL BIRD, CRIMINAL DISSENT: PROSECUTIONS UNDER THE ALIEN AND SEDITION ACTS OF 1798 (2020).

389. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting).

390. ARTHUR M. SCHLESINGER SR., *PRELUDE TO INDEPENDENCE: THE NEWSPAPER WAR ON BRITAIN* viii (1st ed. 1957).

391. See *supra* Parts I–II.

have always classed the freedom of the press among their fundamental rights.”<sup>392</sup> Thus, reliance on Blackstone, who Jefferson said did “more towards the suppression of the liberties of man, than all the million[s] of men in arms of Bonaparte,” is misplaced.<sup>393</sup>

*A. The Founders Rejected Reliance on Blackstone*

Blackstone, born in 1723, was “stiff, stuffy, and pompous from childhood . . . .”<sup>394</sup> He was also a failure. He was a middling lawyer, thwarted in his academic aspirations and, early on, deemed unfit for professorship.<sup>395</sup> As a judge, “his rulings . . . were set aside more frequently than those of any other . . . .”<sup>396</sup> But above everything, he was persistent, prolific, and good at writing.<sup>397</sup> In 1753, still not a professor, Blackstone started informally lecturing students on the common law. Having been passed over for a professorship in the Roman civil law, he set out to make sense of the “huge, irregular Pile” that was the common law.<sup>398</sup> After five years, Oxford formalized his instruction, naming him the first professor of common law.<sup>399</sup>

Inspired by his own success, by 1765, Blackstone published his first volume of the *Commentaries* (on the rights of persons), closely tracking his lectures. He published the second (on the rights of things) in 1766, the third (of private wrongs) in 1768, and the fourth (of public wrongs) in 1769. By the time he finished the fourth volume, he had published a third edition of volumes one and two.<sup>400</sup> Before the time the first American edition appeared around 1771–1772, a thousand copies of his

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392. *People v. Croswell*, 3 Johns. Cas. 337, 391 (N.Y. Sup. Ct. 1804).

393. Letter from Thomas Jefferson to Horatio G. Spafford (Mar. 17, 1814), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-07-02-0167> [<https://perma.cc/7AGR-7ULX>].

394. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 15 (1996).

395. Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the Commentaries*, 104 VA. L. REV. 1359, 1370 (2018).

396. Alschuler, *supra* note 394, at 15.

397. Joseph W. McKnight, *Blackstone, Quasi-Jurisprudent*, 13 S.W. L.J. 399, 400 (1959).

398. *Letter from William Blackstone to the Earl of Reading*, 32 HARV. L. REV. 974, 976 (1919).

399. Alschuler, *supra* note 394, at 4.

400. John V. Orth, “Catch a Falling Star”: *The Bluebook and Citing Blackstone’s Commentaries*, 2020 U. ILL. L. REV. ONLINE 125 (2020).

*Commentaries* had circulated in the Colonies.<sup>401</sup> The earliest American edition introduced an additional 1,500 copies, with more than half sent to Massachusetts, New York, and Pennsylvania. Copies found their way into the hands of future President John Adams, future Supreme Court Justice James Wilson, and future Chief Justice John Marshall.<sup>402</sup>

Even if we accept that the Founders were familiar with Blackstone and his *Commentaries* at the time of the Founding, that familiarity should not be confused with endorsement.<sup>403</sup> Blackstone was a rabid Tory and no friend to the Founders' cause.<sup>404</sup> As a member of Parliament, he voted in favor and was a chief defender of the Stamp Act.<sup>405</sup> He denied "that Americans could appeal to the common law in defense of their rights . . . ."<sup>406</sup> He declared the Colonies "a conquered territory and thus subject to Parliament's authority."<sup>407</sup> And he believed that ultimate sovereignty resided in Parliament, *not* the People. So of course "lawyers of the founding generation . . . subjected Blackstone's work to sharp criticism."<sup>408</sup> These lawyers were devoted to making "their own law."<sup>409</sup>

### 1. Thomas Jefferson and Blackstone

Thomas Jefferson's disagreement with Blackstone began as early as 1776. After the Revolution, Jefferson demanded that the then-existing colonial Virginia laws be repealed and "adapted to our republican form of government."<sup>410</sup> A compatriot suggested that they adopt Blackstone and

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401. Minot, *supra* note 395, at 1362; Alschuler, *supra* note 394, at 5.

402. Minot, *supra* note 395, at 1374; PAUL HAMLIN, LEGAL EDUCATION IN COLONIAL NEW YORK 65 (1939).

403. There is reason to doubt the wide acceptance of Blackstone at the time of the Founding. Minot, *supra* note 395, at 1398 ("While they may have read the work and viewed it favorably, the full force of the *Commentaries*' influence would not be felt until subsequent generations [after the Founding].").

404. Alschuler, *supra* note 394, at 9.

405. Howard L. Lubert, *Sovereignty and Liberty in William Blackstone's Commentaries on the Laws of England*, 72 REV. POL. 271 (2010).

406. *Id.* at 272.

407. *Id.* (citation omitted).

408. Alschuler, *supra* note 394, at 2.

409. *Id.*

410. THOMAS JEFFERSON, PAUL FORD & MICHAEL ZUCKERMAN, AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743–1790, at 66 (Paul Leicester Ford ed., 1914).



purge “what was inapplicable, or unsuitable to us.”<sup>411</sup> But Jefferson disagreed because the end product would retain the “same chaos of law-lore *from which we wished to be emancipated*.”<sup>412</sup>

While Jefferson won that battle, he did not stem Blackstone’s acceptance in the young country—though he never stopped trying. For years, “Jefferson derided the *Commentaries* as dangerous for its . . . oversimplified view of law . . . .”<sup>413</sup> But more importantly, in Blackstone, Jefferson saw “a retreat from the ideals of the Revolution.”<sup>414</sup> By 1810, he lamented that young lawyers seemed to believe “that every thing which is necessary is in [Blackstone], [and] what is not in him is not necessary.”<sup>415</sup> A year later, he wrote that the country had been filled with “Blackstone lawyers . . . who render neither honor nor service to mankind.”<sup>416</sup> In 1812, he wrote that a student’s “indolence easily persuades him that if he understands that book, he is a master of the whole body of the law.”<sup>417</sup> In an 1814 letter, he said that the *Commentaries* had caused “the general defection of lawyers and judges from the free principles of government.”<sup>418</sup> That same year, he wrote that Blackstone was “making torities of those young Americans whose native feelings of independance do not place them above [Blackstone’s] wily sophistries . . . .”<sup>419</sup>

Jefferson did not fear the loss of liberty from force. But he feared “English books, English prejudices, English manners,” all of which

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411. Letter from Thomas Jefferson to John Tyler (June 17, 1812), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-05-02-0112> [<https://perma.cc/R22Y-CTWX>].

412. *Id.* (emphasis added).

413. Minot, *supra* note 395, at 1366.

414. *Id.* at 1397.

415. Letter from Thomas Jefferson to John Tyler (May 26, 1810), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-02-02-0365> [<https://perma.cc/YK9Z-33ZK>].

416. Letter from Thomas Jefferson to William C. Rives (Sept. 18, 1811), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-04-02-0143> [<https://perma.cc/4T7P-UT2R>].

417. Letter from Thomas Jefferson to John Tyler (June 17, 1812), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-05-02-0112> [<https://perma.cc/7JC6-9R5P>].

418. Letter from Thomas Jefferson to Thomas Cooper (Jan. 16, 1814), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-07-02-0071> [<https://perma.cc/D74A-YDHD>].

419. Letter from Thomas Jefferson to Horatio G. Spafford (Mar. 17, 1814), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-07-02-0167> [<https://perma.cc/FLN9-2JS4>].

undercut “the principles which severed us from England.”<sup>420</sup> Months before his death, he wrote to James Madison about plans for the appointment of a law professor at the University of Virginia, where he served as rector: “In selecting of our Law-Professor, we must be rigorously attentive to his political principles.”<sup>421</sup> Pointing to Sir Edward Coke, he said, “a sounder whig never wrote.”<sup>422</sup> But when

the honied . . . Blackstone became the Student’s Hornbook[,] from that moment that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. They suppose themselves, to be whigs, because they no longer know what whiggism or republicanism means.<sup>423</sup>

Unsurprisingly then, Jefferson did not ascribe to Blackstone’s limited view of freedom of the press either. Take first Jefferson’s transatlantic input on the Bill of Rights. Madison had, in June 1789, proposed to the House a list of amendments that would eventually become the Bill of Rights. One provided, “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments . . . .”<sup>424</sup> After Madison sent a copy to Jefferson in France, Jefferson wrote back suggesting several modifications (in *italic*). One related to the freedom of the press:

I like it as far as it goes; but I should have been for going further. For instance the following alterations and additions would have pleased me. Art 4. “The people shall not be deprived or abridged of their right to speak, to write *or otherwise* to publish *any thing but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with*

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420. *Id.*

421. Letter from Thomas Jefferson to James Madison (Feb. 17, 1826), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-5912> [<https://perma.cc/WRM3-KVWV>].

422. *Id.*

423. *Id.*

424. James Madison, Speech in the House of Representatives (1789) (partial transcript available at <https://www.loc.gov/exhibits/creating-the-united-states/interactives/bill-of-rights/speech/enlarge3-transcribe.html> [<https://perma.cc/Q27Z-ZMR7>]).

*foreign nations.*<sup>425</sup>

Although Madison's proposal was general in nature, Jefferson's was a specific rejection of the common law of libel and Blackstone's understanding of it. That specificity reveals Jefferson's more liberal view of freedom of the press. While Blackstone limited liberty of the press to freedom from prior restraint alone, Jefferson would have gone further and protected true speech from *punishment after publication*—and he would have done so as early as the 1780s.

Jefferson's fight against the Sedition Act of 1798 confirms his rejection of Blackstone's views of freedom of the press. In drafting the Kentucky Resolutions, Jefferson argued that the Act was unconstitutional, even though it nominally provided truth as a defense, which was itself more liberal than Blackstone's views and, on its face, consistent with Jefferson's view of the First Amendment. Controversy over the Act boiled down to whether Blackstone's understanding of freedom of press should be accepted. Federalist supporters in Congress argued that the Act was not a prior restraint and thus not an infringement on the liberty of the press under Blackstone. Jefferson's supporters, however, disagreed, arguing that freedom of the press in the United States meant something more than Blackstone's definition of it at common law.

For example, Virginia Representative John Nicholas, rising in opposition to the Act, argued, “[I]t is a manifest abuse of Blackstone's authority to apply it as it has been here applied [in defending the Act].”<sup>426</sup> As Nicholas said, “It must be remarked, in [Blackstone's defense], that the nature of their government justifies more rigor than is consistent with ours. . . . [H]is observations on this subject ought to be called a theory, and a theory adapted merely to his own country, and not a definition.”<sup>427</sup> But:

Very different are the circumstances in which his doctrine has been applied here. A restrictive clause of the Constitution of the United States [i.e., the First Amendment], by its application, is made to mean nothing, and when it is clearly the intention of the Constitution to put, at least, some acts of the press out of the control of Congress, by the authority of [Blackstone] all are

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425. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in *Founders Online*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-15-02-0354> [<https://perma.cc/BC4Z-W6J2>] (second emphasis added).

426. THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 3009 (1851).

427. *Id.*

subjected to their power.<sup>428</sup>

Democratic-Republicans like Nicholas lost that fight. They were outnumbered by their Federalist rivals in Congress who supported the Sedition Act in hopes of securing a second term for John Adams. Yet after Jefferson won that election, the Act expired on its own terms in 1801, and Jefferson pardoned those convicted under it: “I considered & now consider, that law to be a nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.”<sup>429</sup> While the Supreme Court never had the opportunity to assess the Act’s constitutionality, it declared some 150 years later, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”<sup>430</sup>

## 2. *St. George Tucker and Blackstone*

By the time St. George Tucker, a Revolutionary War veteran and “the first modern American law professor,” received a letter from Jefferson in 1793, he was already annotating Blackstone for Americans.<sup>431</sup> Without time to devise his own text before his first class after his appointment to professor, he turned instead to repackaging the *Commentaries* “and occasionally to offer remarks upon such passages . . . either because the law had been confirmed, or changed, or repealed, by some constitutional or legislative act of the *Federal Government*, or,” in the case of his students, “of the commonwealth of *Virginia*.”<sup>432</sup>

In the end, Tucker’s American edition of the *Commentaries* was the first “uniquely American” commentary.<sup>433</sup> His 800 pages of annotations and 1,000 footnotes was not a memorial to Blackstone but “an engagement of it in combat.”<sup>434</sup> Tucker was “troubled not so much by the content of

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428. *Id.*

429. Letter from Thomas Jefferson to Abigail Smith Adams (July 22, 1804), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/99-03-02-1294> [https://perma.cc/5TD7-K89E].

430. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

431. David T. Hardy, *Colloquy Essays: The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. 1527 (2009) (citing Craig Evan Klafter, *St. George Tucker: The First Modern American Law Professor*, 6 J. HIST. SOC. 133 (2006)); Alschuler, *supra* note 394, at 11.

432. 1 TUCKER’S BLACKSTONE, *supra* note 42, at vi.

433. Robert M. Cover, *Blackstone’s Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 70 COLUM. L. REV. 1475, 1476 (1970).

434. *Id.* at 1477.

the *Commentaries*,” but “by its jurisprudence and political philosophy.”<sup>435</sup> The Revolution was “justified by the repudiation of two basic British tenets: first, the rejection of British views concerning the nature and locus of sovereignty; second, the rejection of the British Constitution as a near-perfect, or even a relatively good, embodiment of political philosophy.”<sup>436</sup> Although “Blackstone did not create . . . the British orthodoxy of the eighteenth century,” “he did embody” it.<sup>437</sup> An American *Commentaries* was thus vital, because Americans had shed that orthodoxy through Revolution. The Colonies’ independence “produced a corresponding revolution not only in the principles of our government, but in the laws”—which, as a result, became “irreconcilable to the principles contained in the *Commentaries*.”<sup>438</sup>

The simplicity of the observation masks its persuasive force. Of course, the *Commentaries* established under one system of government should not control the meaning of a law under an entirely different kind of government. But this was exactly the battle Tucker had to wage. In Tucker’s view, from the Revolution onward, the *Commentaries* became less important as the United States and the United Kingdom continued their divergence. Instead, they became only “a methodical guide, in delineating the general outlines of the law in the United States, or at most, in apprizing the student of what the law *had been*.”<sup>439</sup>

As to freedom of the press, Tucker wrote that while the English had acquiesced to the mere absence of licensing laws as the defining characteristic of their freedom of the press, “the people of America have not thought proper to suffer the freedom of speech, and of the press to rest upon such an uncertain foundation, as the will and pleasure of the government.”<sup>440</sup> Those early Americans positively ratified a constitutional amendment protecting speech and the press. Rather than rely on the absence of laws infringing speech and press as in England, Americans declared that such laws are unconstitutional. That amendment stood, Tucker said, as a “barrier against the possible encroachments of the government.”<sup>441</sup> This principle could not have been more “strenuously asserted.”<sup>442</sup>

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435. *Id.*

436. *Id.* at 1477–78.

437. *Id.* at 1478.

438. 1 TUCKER’S BLACKSTONE, *supra* note 42, at iv–v (emphasis added).

439. *Id.* at v.

440. *Id.* at app. at 12.

441. *Id.* at 13.

442. *Id.*

Tucker wrote that the Sedition Act “excited more apprehension, and greater indignation in many parts of the U. States . . . than any other measure of the federal government.”<sup>443</sup> It was “supposed by many to amount to a most flagrant violation of the constitution.”<sup>444</sup> But, Tucker wrote:

[T]his exposition of the liberty of the press, was only to be found in the theoretical writings of the commentators on the *English* government, where the liberty of the press rests upon no other ground, than that there is now no law which imposes any actual previous restraint upon the press . . . .<sup>445</sup>

The English government, however, was much different than that prevailing in the United States, and thus claims about freedom of the press were necessarily different as well:

[I]n the United States, the great and essential rights of the people, are secured against legislative, as well as against executive ambition. They are secured, not by laws paramount to prerogative; but by constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great-Britain; but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensors, but from the subsequent penalty of laws. . . .

[T]he practice in America must be entitled to much more respect: being in most instances founded upon the express declarations contained in the respective constitutions, or bill of rights of the confederated states. That even in those states where no such guarantee could be found, the press had always exerted a freedom in canvassing the merits, and measures of public men of every description, not confined to the limits of common law.<sup>446</sup>

Thus, Tucker’s writing shows us that early Americans believed there was a difference between freedom of the press in England and freedom of the press in the United States. The reason for the difference was clear and echoed early cases on the subject: the republican government established after the Revolution required a broader understanding of freedom of the press to make that government work. Without that latitude, it would be too

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443. TUCKER’S BLACKSTONE, *supra* note 42.

444. *Id.*

445. TUCKER’S BLACKSTONE, *supra* note 42, at app. at 18.

446. *Id.* at 20–21.

easy for powerful political actors to weaponize libel law for political battles against opponents. But with it, public discussion about public affairs could occur without the overwhelming fear that participation in a republican government might end in criminal or civil liability.

### 3. *James Wilson and Blackstone*

James Wilson was one of the few Founders who signed both the Declaration of Independence and the Constitution, and he had more of an effect on the latter than anyone but Madison.<sup>447</sup> Like Jefferson, he viewed Blackstone as a “great supporter” of “systematic despotism.”<sup>448</sup> Wilson wanted to replace Blackstone and his Tory ideals and become his American equivalent.<sup>449</sup> He never succeeded. That distinction is more rightly Tucker’s. But in 1790, Wilson delivered a series of lectures much like Blackstone had before him.<sup>450</sup> For his first lecture, Wilson stood before students but also the “President of the United States, with his lady—also the Vice-President, and both houses of Congress.”<sup>451</sup>

Invoking Blackstone’s professorship at Oxford, Wilson posed a question, “Should the elements of a law education . . . be drawn entirely from another country—or should they be drawn, in part, at least, from the constitutions and governments and laws of the United States, and of the several States composing the Union?”<sup>452</sup> Put differently, should we be educating British lawyers or American ones? He argued for the latter, for an education based on a government where “the supreme or sovereign power . . . resides in the citizens.”<sup>453</sup> Ever the revolutionary, he explained that this sovereignty was embodied in the “constitutions and governments and laws of the United States, and the republics, of which they are

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447. Mark David Hall, *Notes and Documents: James Wilson’s Law Lectures*, 128 PENN. MAG. HIST. & BIOGRAPHY 63, 64 (2004).

448. *Chisholm v. Georgia*, 2 U.S. 419, 458 (1793).

449. Mark David Hall, *Bibliographical Essay: The History of James Wilson’s Law Lectures*, in COLLECTED WORKS OF JAMES WILSON (Kermit L. Hall & Mark David Hall eds., 2007).

450. 1 COLLECTED WORKS OF JAMES WILSON xx (Kermit L. Hall & Mark David Hall eds., 2007).

451. Letter from John Adams to Charles Adams n.2 (Dec. 4, 1790), in *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/04-09-02-0079> [<https://perma.cc/HFQ9-UF97>].

452. 1 JAMES WILSON, THE WORKS OF JAMES WILSON 13–14 (James Dewitt Andres ed., 1896).

453. *Id.* at 14.

formed”—all of which were “materially different” and “materially *better*” than that in England.<sup>454</sup>

Blackstone’s view of the law of England, then, “deserves to be much admired; but [j]ought not to be implicitly followed” in the United States.<sup>455</sup> Blackstone, through no fault of his own, was an intellectual captive of the English theory of things—an *un-American* theory—and, thus, far from “a zealous friend of republicanism.”<sup>456</sup> The only experiment in republicanism from which Blackstone could draw was England’s disastrous one under Oliver Cromwell. So it made sense that Blackstone would “feel a degree of aversion, latent, yet strong, to a republican government.”<sup>457</sup> And having grown up under one government, it was not surprising that that government “might steal imperceptibly upon [Blackstone’s] mind” and influence him in thinking that a republic is “its rival, and . . . enemy.”<sup>458</sup>

Wilson took this view of Blackstone to the bench of the Supreme Court. In 1793, in *Chisholm v. Georgia*, he wrote that Blackstone’s views on the unchecked power of the king were an “extensive principle, on which a plan of systematic despotism has been lately formed in England.”<sup>459</sup> Blackstone, he said, was “if not the introducer, at least the great supporter” of this despotism.<sup>460</sup> Rejecting the “principle . . . that all human law must be prescribed by a superior,” Wilson said the law in the United States was much different: “[L]aws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.”<sup>461</sup>

Still, it might be argued that Wilson essentially ratified Blackstone’s views on freedom of the press. In debates over the proposed constitution in the Pennsylvania convention, Wilson said:

I presume it was not in the view of the honorable gentleman to say there is no such thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country. What is meant by the liberty of the press is, that there should be no antecedent restraint upon

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454. *Id.*

455. *Id.* at 20.

456. *Id.* at 19.

457. *Id.*

458. *Id.* at 20.

459. *Chisholm v. Georgia*, 2 U.S. 419, 458 (1793).

460. *Id.*

461. *Id.*



it . . . .<sup>462</sup>

We can excuse Wilson's adoption of the Blackstonian definition of freedom of press, though. In that moment, he stood before opponents of the proposed constitution that was almost as much his as it was Madison's. Those opponents pressed him on why the new proposal did not contain a protection for the liberty of the press, and Wilson needed to parry those attacks.

Within a few years after he secured support for his constitution, however, he rejected the central tenants of libel law according to the Star Chamber, as restated by Blackstone. The first, that libels against public officials are necessarily worse than other libels. The second, the same one challenged by Jefferson: that truth, like falsity, could also be punished as libel. In his *Lectures on Law*, Wilson indicted the Star Chamber for "wrest[ing] the law of libels to the purposes of [public] ministers."<sup>463</sup> The first rule of law of the Star Chamber had been that "a libel against a magistrate, or other publick person, is a greater offence than one against a private man."<sup>464</sup> But, Wilson said, "This, in the unqualified manner here expressed, cannot be rationally admitted."<sup>465</sup> Instead, in this country, "[o]ther circumstances being equal, that of office ought to *incline the beam*, if the libel refer to his official character or conduct."<sup>466</sup>

#### *B. The Founders Rejected English Statutes Favoring Public Officials*

In addition to Blackstone, Justice Thomas also resorted to ancient authorities from England to support his view that the common law of libel treated libels against public officials more severely than others. While this may have been true in medieval England, the weakness in Thomas's argument is that he ignored the very thing that he said matters: the state of the law in England *at the time of the Founding*. When we examine this authority at that time, we discover that even the English had distanced themselves from these medieval statutes. Contrary to Thomas's argument, these ancient statutes actually support an argument that by the time of the Founding, no longer did the common law treat public-official plaintiffs different from any other plaintiff.

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462. ELLIOT'S DEBATES, *supra* note 3.

463. 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 73 (1804).

464. *Id.*

465. *Id.*

466. *Id.* at 73–74 (emphasis added).

The chief authority for Thomas's views on this point is tucked away in a footnote in his opinion in *McKee*. There, Thomas wrote, "In England, '[w]ords spoken in derogation of a peer, a judge, or other great officer of the realm' were called *scandalum magnatum* and were 'held to be still more heinous.'"<sup>467</sup> According to him, "such words could support a claim that 'would not be actionable in the case of a common person.'"<sup>468</sup> *Scandalum magnatum* was "recognized by English statutes dating back to 1275," but "had fallen into disuse by the 19th century and was not employed in the United States."<sup>469</sup> But Thomas maintained, "[T]he action of *scandalum magnatum* confirms that the law of defamation historically did not impose a heightened burden on public figures as plaintiffs."<sup>470</sup>

What is not found in that footnote is the specifics about *scandalum magnatum*'s long history, from its birth under Edward Longshanks to its eventual repeal. *Scandalum magnatum* is really three statutes—one from 1275 (more than 200 years before the arrival of the printing press in England), one from 1378, and one from 1388—all adopted centuries before the Glorious Revolution.<sup>471</sup> These statutes were set down during the reigns of kings either attempting to consolidate their power (Edward I) or trying desperately to maintain it (Richard II).<sup>472</sup> For example, the original statute read, "[N]one be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his people or the great men of the realm."<sup>473</sup>

Under the statutes, certain words that were otherwise not actionable as defamation at common law were subject to criminal prosecution if made against public officials like "prelates, dukes, earls, barons, and other nobles and great men of the realm."<sup>474</sup> That is, the statutes protected *the Crown* from criticism by doling out punishment on its behalf, and "set the peerage apart from the rest of English society."<sup>475</sup> While the statutes were meant to promote peaceful resolutions to disputes, they were nevertheless barbaric. Once Queen Elizabeth I, desiring that a critic be hanged, instead

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467. *McKee v. Cosby*, 139 S. Ct. 675, 682 n.2 (2019).

468. *Id.*

469. *Id.*

470. *Id.*

471. WILLIAM DAVID EVANS, A COLLECTION OF STATUTES CONNECTED WITH THE GENERAL ADMINISTRATION OF THE LAW 201–202 (1836).

472. FOLKARD, *supra* note 42, at 218.

473. *Id.* (emphasis not included).

474. *Id.*

475. *Holmes v. Holmes*, 64 Ill. 294, 296 (1872); John C. Lassiter, *Defamation of the Peers: The Rise and Decline of the Action for Scandalum Magnatum*, 22 AM. J. LEGAL HIST. 216, 216 (1978).

“had to be satisfied with having one of the man’s hands removed.”<sup>476</sup> Others would lose their ears.<sup>477</sup>

Up to this point, Thomas is correct that *scandalum magnatum* did treat the peerage differently than private individuals; it applied only to the former, but not the latter. But that is only part of the story. Although the oldest of the statutes dates to 1275, they were rarely used early on. Despite the peerage’s desire to wield *scandalum magnatum* to protect their positions of power, “from the start the courts were determined to prevent the abuse of the law by peers.”<sup>478</sup> Criminal prosecutions were not often pursued, and the first recorded civil action did not take place until 1497.<sup>479</sup> But there was no rash of cases after that. Active enforcement of the statutes did not exist for nearly another hundred years beginning in 1580 until the Restoration in 1660—and even then, the number of reported cases was a mere 18.<sup>480</sup>

True, after the Restoration, the peerage’s defensiveness in maintaining its privileges revived *scandalum magnatum* “as a reminder to their inferiors that the old order truly had been restored.”<sup>481</sup> But the peerage was too bold in their use of the statutes.<sup>482</sup> Courts began to recognize that the peerage used the “special protection they enjoyed from abusive language . . . [to] serve political as well as purely personal social ends.”<sup>483</sup> As England spun out of control politically from the exclusion crisis aimed at preventing the Catholic James, Duke of York, from taking the throne, so did actions under the statutes.<sup>484</sup> In response, the House of Commons in 1680 attempted to repeal the statutes, although it is unclear if the motivation was in direct response to the abuse of them.<sup>485</sup> The Lords, however, rejected the attempt—not keen, apparently, on giving up their privileges.<sup>486</sup>

Around that time, the future King James II, then the Duke of York, wielded the statutes to suppress political opposition.<sup>487</sup> He filed no fewer

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476. Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 671 (1984).

477. F.R. Scott, *Publishing False News*, 30 CAN. BAR REV. 37 (1952).

478. Lassiter, *supra* note 475, at 218.

479. *Id.*

480. *Id.* at 219–20.

481. *Id.* at 223–24.

482. *Id.* at 225.

483. *Id.*

484. *Id.* at 226.

485. *Id.*

486. *Id.*

487. *Id.* at 229.

than 10 cases against his opponents for outlandish sums of money.<sup>488</sup> Sir Francis Drake, a defendant in one, disposed of his estate and sailed to another country, “thinking it better to have his liberty in a foreign country than be laid up in his own for £100,000.”<sup>489</sup> And while these cases were part of a spike in the abuse of the statutes, they were viewed as “reflect[ing] the growing political disorders which England experienced in the last ten years of the reign of Charles II” rather than a doctrinal shift in the law.<sup>490</sup>

By the time James II ascended to the throne, the statutes “were used much less frequently.”<sup>491</sup> James II’s use of the statutes had coupled *scandalum magnatum* “to the Stuart cause.”<sup>492</sup> And like James II, they “had become too closely identified with him to survive his downfall [during the Glorious Revolution] unchallenged.”<sup>493</sup> After he was deposed, the House of Commons sought to reverse judgments in two cases under the statutes in 1689 and 1690.<sup>494</sup>

By the time King George I rose to the throne, “most peers were content to live without the protection of the statutes,” and the House of Lords offered to repeal *scandalum magnatum* altogether.<sup>495</sup> By 1703, “in the eyes of the law, a man’s . . . claim to knightly or noble status . . . was now less and less an acceptable criterion for determining whether he was entitled to damages . . . .”<sup>496</sup> According to one historian, while a “thin stream of cases can be traced through the eighteenth century,” the last recorded case took place in 1773, three years before the Revolution and almost 20 years before the First Amendment would be ratified.<sup>497</sup>

Although Parliament would not repeal *scandalum magnatum* until 1887, it was, for all practical purposes, dead letter before the founding of the country.<sup>498</sup> Scholars have marialed a bevy of fatal descriptors: “now

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488. *Id.*

489. *Id.*

490. *Id.* at 225.

491. *Id.* at 230.

492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.* at 232–33.

496. *Id.* at 234 (“the nobility preferr[ed] to waive their privileges in any action of slander, and to stand upon the same footing, with respect to civil remedies, as their fellow-subjects.” (quoting 1 WILLIAM O. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 326 (1824))).

497. *Id.* at 233, 235.

498. Statute Law Revision Act 1887, 50 & 51 Vict. c. 59 (Eng.); W. BLAKE ODGERS, THE LAW OF LIBEL AND SLANDER 74 (5th ed. 1912).

in a manner forgotten,”<sup>499</sup> “by lapse of time . . . become unnecessary,”<sup>500</sup> “obsolete,”<sup>501</sup> “long been obsolete,”<sup>502</sup> *et cetera*.<sup>503</sup> As one noted, “[t]hough they survived until 1887, the statutes of *scandalum magnatum* belong essentially to that age which accepted ‘degree, priority and place’ (to use Shakespeare’s phrase) as the unquestionable stamp of God’s creation.”<sup>504</sup>

In the early United States, to the extent they were remembered at all, the statutes were remembered as evidence of the Crown’s prior abuses and as repugnant to the new republican form of government created by the Founders. In that government, unlike that in which *scandalum magnatum* first became law, it was the People who were sovereign, not a king. *Scandalum magnatum*, after all, was adopted to protect the sovereign Crown from its subjects. It was meant to quash republican sentiment, not cultivate it. *Scandalum magnatum* then “ha[d] all the crudities of that savage era of monarchical autocracy in which it had its birth, still clinging to it.”<sup>505</sup> As one commentator explained, the statutes’ “significance was in their anti-democratic tendencies.”<sup>506</sup>

Thus, *scandalum magnatum* was abandoned in early America. In Maryland, the “antient statutes . . . of *scandalum magnatum*” did not “extend[] to the province.”<sup>507</sup> In Virginia, a leading commentator in the 1830s wrote, “[T]his offense is not recognized by our laws.”<sup>508</sup> Early courts were in agreement. In 1872, the Illinois Supreme Court explained

499. 3 HENRY JOHN STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* 474 (1844).

500. William Renwick Riddell, *Scandalum Magnatum in Upper Canada*, 4 J. CRIM. L. & CRIMINOLOGY 12, 14 (1914).

501. ODGERS, *supra* note 498, at 74; *see also* HENRY C. ADAMS, *A JURIDICAL GLOSSARY* 603 (1886) (noting that the statutes were “now obsolete”).

502. *See* SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 410 (3d ed. 1922).

503. FRANCIS LUDLOW HOLT, *THE LAW OF LIBEL* 178 (1818); *see also* RICHARD MENCE, *THE LAW OF LIBEL* 84 (1824).

504. Lassiter, *supra* note 475, at 235.

505. A.H. Robbins, Note, *The Action of the Government Against the New York World as a Revival of the Offense of Scandalum Magnatum*, 68 CENT. L.J. 135, 135–36 (1909).

506. Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433, 446 (2004).

507. WILLIAM KILTY, *A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND* 4–5 (1811).

508. 2 TUCKER’S BLACKSTONE, *supra* note 42, at 58.

that *scandalum magnatum* was “never recognized in this country.”<sup>509</sup> The North Carolina Supreme Court said in 1887, “[I]n this day and country there is no such thing as ‘*scandalum magnatum* . . . .’”<sup>510</sup> In 1890, the Massachusetts Supreme Judicial Court agreed, finding that the doctrine of *scandalum magnatum* “has never been adopted in Massachusetts.”<sup>511</sup> The Eighth Circuit said it best when it said that *scandalum magnatum* was “once the law,” but “[a] revolution intervened.”<sup>512</sup>

Even the treatises on which Thomas relied—Starkie and Newell—make clear that *scandalum magnatum* was not adopted in the States. Instead, it was outright rejected.<sup>513</sup> Newell rejected the idea that public officials were to be treated more leniently than private persons:

In practice a person holding a high office is regarded as a target at whom any person may let fly his poisonous words. High official position instead of affording immunity from slanderous and libelous charges, seems rather to be regarded as making his character free plunder for any one who desires to create a sensation by attacking it.<sup>514</sup>

Newell’s position was the same as Starkie’s before him: “In this country no distinction as to persons is recognized, and in practice, a person holding a high office is regarded as a target at whom any person may let fly his poisonous words.”<sup>515</sup>

In the end, as one early-twentieth-century law journal concluded, “the old common law offense of *scandalum magnatum* was left behind when our fathers planted the principles of civil liberty and equality.”<sup>516</sup> *Scandalum magnatum* had thus given way, in that journal’s estimation, “to the rule . . . that there can be no libel of the government or of government officials as such.”<sup>517</sup> And no longer was it any “greater wrong to falsely criticise the government than it is to speak evil of a private citizen.”<sup>518</sup> The law had long since rejected “Anglo-Saxon barbarism [that] affirmed the

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509. Holmes v. Holmes, 64 Ill. 294, 296 (1872).

510. Reeves v. Winn, 1 S.E. 448, 450 (N.C. 1887).

511. Sillars v. Collier, 23 N.E. 723, 724 (Mass. 1890).

512. Casey v. City of Cabool, Mo., 12 F.3d 799, 802 (8th Cir. 1993).

513. McKee v. Cosby, 139 S. Ct. 675, 682 n.2 (2019); see, e.g., KILTY, *supra* note 507, at 45; 2 TUCKER’S BLACKSTONE, *supra* note 42.

514. NEWELL, *supra* note 42, at 201.

515. FOLKARD, *supra* note 42, at 217 n.1.

516. Robbins, *supra* note 505, at 136.

517. *Id.*

518. *Id.*

contrary and the old Tower of London [that] witnessed the suffering of men who dared to raise their voices against the king.”<sup>519</sup>

The freedom of the press that Thomas and Gorsuch espouse is not an originalist one; it is a monarchist’s one, predating the Founding and purporting to import into the First Amendment today common law rules long ago rejected by the Founders and early courts. This approach, however, violates Thomas’s own instruction that what matters for the purposes of an originalist inquiry is the “founding era understanding.”<sup>520</sup> Indeed, Thomas’s view ignores that there was a Revolution, and that no small complaint of that Revolution was England’s abuses of prosecutions of early American printers. It also ignores everything that happened between 1789 and 1868 when the Fourteenth Amendment made the First Amendment applicable as against the States. Thomas’s failure to deal with this history draws into question his supposed commitment to it.

## VII. OTHER PROBLEMS

Thus far, this Article has focused on the big picture issues: Was there an *American* understanding of freedom of the press and libel different from that of the English? And if there was, what were their differences? This Article has argued that there was a difference. In the eighteenth and nineteenth centuries, the Founders, legislatures, and courts adapted the common law of libel to a republican form of government. This resulted in differences in how the law treated public officials and public figures as opposed to private figures, but not in the way Thomas and Gorsuch argue. This Part cleans up some of the remaining issues.

First, we address one of the remaining historical arguments offered by both Thomas and Gorsuch. In *McKee*, Thomas argued that before *Sullivan*, the Court “consistently recognized that the First Amendment did not displace the common law of libel.”<sup>521</sup> The Court, he wrote, repeatedly placed libel into the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”<sup>522</sup> Put differently, “We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified.”<sup>523</sup> Gorsuch adopted Thomas’s position in

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519. *Id.*

520. *Rogers v. Grewal*, 140 S. Ct. 1865, 1871 (2020) (Thomas, J., dissenting from denial of certiorari).

521. *McKee v. Cosby*, 139 S. Ct. 675, 680 (2019) (Thomas, J., concurring).

522. *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

523. *Id.* at 682.

*Berisha* as well, writing that “from the very founding,” the law of defamation was “almost exclusively the business of state courts and legislatures.”<sup>524</sup>

The claim that the Court did not “begin meddling” until 1964 is not accurate. In 1907, in *Patterson v. Colorado*, a publisher argued that the contempt conviction for a libel on the Colorado Supreme Court violated his rights under the First and Fourteenth Amendments.<sup>525</sup> Affirming the lower courts, Justice Holmes did not trouble himself with the First Amendment. Rather, he merely assumed it:

We leave undecided the question whether there is to be found in the [Fourteenth] Amendment a prohibition similar to that in the [First]. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the states, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is ‘to prevent all such previous restraints upon publications as had been practised by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.<sup>526</sup>

Justice Harlan, however, disagreed. As far as he saw it, “[I]t would seem clear that, when the [Fourteenth] Amendment prohibited the states from impairing or abridging the privileges of citizens of the United States, it necessarily prohibited the states from impairing or abridging the constitutional rights of such citizens to free speech and a free press.”<sup>527</sup> He would go further and recognize that:

the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man’s liberty, and are protected against violation by that clause of the [Fourteenth] Amendment forbidding a state to deprive any person of his liberty without due process of law.<sup>528</sup>

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524. *Berisha v. Lawson*, 141 S. Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369–70 (1974)).

525. *Patterson v. Colorado*, 205 U.S. 454, 458–59 (1907).

526. *Id.* at 462.

527. *Id.* at 464 (Harlan, J., dissenting).

528. *Id.* at 465.



Turning to the merits, Harlan noted that in that case, the Court adopted in dicta Blackstone's view of the First Amendment.<sup>529</sup> Harlan, though, could not "assent to that view."<sup>530</sup> Instead, because the First Amendment was applicable to the States, those States could not through "legislative enactments or by judicial action, impair or abridge them."<sup>531</sup> Thus, the contempt finding, he believed, "was in violation of the rights of free speech and a free press as guaranteed by the Constitution."<sup>532</sup>

Years later, after the Court finally found that freedom of the press was incorporated as against the States, the Court in 1940 took a case to answer the question of whether the First Amendment had any effect on the common law of libel.<sup>533</sup> In that case, *Schenectady Union Publishing Co. v. Sweeney*, the publisher posed precisely the conflict that Thomas asserts had never been thought of prior to *Sullivan*: "These guarantees [under the First Amendment] bespeak more than a prohibition of 'previous restraints'; a statute imposing subsequent punishment which has the effect of trammelling or embarrassing unduly the expression of views on matters of public interest is likewise unconstitutional."<sup>534</sup> The publisher argued, "it can make no *constitutional difference* that the penalty in question is imposed through processes denominated civil rather than criminal."<sup>535</sup> On the contrary, "[f]or in respect to the seriousness of the threat to free expression, the restrictive effect on the communication of ideas, and the penalty in prospect or actually imposed, civil liability is not less and may well be more grievous than liability for a fine."<sup>536</sup> After Justice Jackson recused himself, the Court by equal division affirmed the lower court ruling in favor of the plaintiff.<sup>537</sup> Thus, by 1942, there were four justices who likely believed that the First Amendment might influence the resolution of a public-official libel case.

Thomas also asserts that the Court did not "meddle" in libel law between 1791 and 1964. This, too, demonstrates very little. As Lee Levine

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529. *Id.* (emphasis omitted).

530. *Id.*

531. *Id.*

532. *Id.*

533. *Schenectady Union Pub. Co. v. Sweeney*, 316 U.S. 642 (1940).

534. Brief for Petitioner at 33, *Schenectady Union Pub. Co.*, 316 U.S. 642 (No. 745).

535. *Id.* (emphasis added).

536. *Id.*

537. *Schenectady Union Pub. Co.*, 316 U.S. at 642; *see also* Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania at 31–32, *Phila. Rec. Co. v. O'Donnell*, 51 A.2d 775 (Pa. 1946) (pressing argument that punitive damages in libel case violated the First Amendment).

and Stephen Wermiel observed, that the Court did not reach the issue until 1964 was neither “surprising, [n]or particularly persuasive.”<sup>538</sup> Without incorporation of the First Amendment against the States until the 1920s, there would have been few occasions—save reviewing defamation cases from Washington, D.C. and federal territories (which, admittedly, did exist)—where the Court could have addressed the conflict between the First Amendment and the common law of libel.

For the same reason, reliance on pre-incorporation sources asserting that libel judgments do not infringe on freedom of speech is also unpersuasive. Both Thomas and Gorsuch, for example, rely on Justice Story, who, in 1825, wrote that “[t]he liberty of speech, or of the press, . . . are not endangered by the punishment of libellous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation.”<sup>539</sup> But in 1825, this was trite. It was a perfectly accurate statement of law, as the First Amendment’s protections for each were applicable only to the national government. The ratification of the Fourteenth Amendment abrogates Story’s observation.

Thomas is on no more solid footing in citing the Court’s statements in post-incorporation cases to the effect that state libel law was not limited by the First Amendment. While Thomas quotes the 1931 case *Near v. Minnesota ex rel. Olson* for the dicta that “common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions,” this statement is not so unequivocal when read in context.<sup>540</sup> The Court in *Near* quickly qualified its unnecessary dicta: “In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment.”<sup>541</sup>

In fact, in *Near* one can find early indications of a sensitivity to speech relating to public officials. At issue was the constitutionality of a Minnesota statute that empowered the State to enjoin “a malicious, scandalous and defamatory newspaper, magazine or other periodical.”<sup>542</sup> In considering an appeal from the publishers of *The Saturday Press*, the Court announced, “The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise.”<sup>543</sup> Recognizing that the liberty of speech and the press was not

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538. Levine and Wermiel, *supra* note 20, at 23.

539. *Dexter v. Spear*, 7 F. Cas. 624 (C.C.R.I. 1825) (No. 3,867).

540. *McKee v. Cosby*, 139 S. Ct. 675, 680 (2019) (Thomas, J., concurring) (quoting *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715 (1931)).

541. *Near*, 283 U.S. at 715.

542. *Id.* at 701–02.

543. *Id.* at 707.

an “absolute right,” it observed that “the power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured.”<sup>544</sup> To determine the nature of the liberty assured, it was necessary to understand “the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.”<sup>545</sup>

Notably, the Court took specific aim at the statute being “directed not simply at the circulation of scandalous and defamatory statements with regard to *private citizens*, but at the continued publication by newspapers and periodical of charges *against public officers* of corruption, malfeasance in office, or serious neglect of duty.”<sup>546</sup> In doing so, the statute did not afford to the defendants a number of defenses they would otherwise have to civil and criminal libel charges concerning public officials, including the defense in a prosecution of libel for publication “honestly made, in belief of its truth, and upon reasonable grounds for such belief, and consist[ing] of fair comments upon the conduct of a person in respect to public affairs.”<sup>547</sup> This is the same actual-malice-like defense recognized generations earlier in cases like *Burnham* and later in *Coleman*.

The Court then turned to the question in the case: “[W]hether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed.”<sup>548</sup> The Court answered this question not by simply invoking Blackstone. Instead, it explained, “The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally *although not exclusively*, immunity from previous restraints . . . .”<sup>549</sup> Freedom of press in the United States had “broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration,” like that during the Sedition Act.<sup>550</sup> Quoting Madison, the Court said, “In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures *of public men* of every description which has not been confined to the strict limits of the common law.”<sup>551</sup> And while this new liberty came with abuse, “it is better to leave a few of its noxious branches to their

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544. *Id.* at 707–08.

545. *Id.* at 708.

546. *Id.* at 710 (emphasis added).

547. *Id.* at 710 n.3 (quoting MINN. STATS. 1927 §§ 10112, 10113 (1927)).

548. *Id.* at 713.

549. *Id.* at 716 (emphasis added).

550. *Id.* at 716–17.

551. *Id.* at 718 (emphasis added).

luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.”<sup>552</sup>

*Near* then, far from undercutting *Sullivan*, forecasts its result through its recognition that restraints on speech relating to public officials are especially noxious for their anti-democratic effect. In so recognizing, it thought it important that the statute at issue contained no exception for statements made with the honest belief that they were true. In other words, *Near* assesses the statute not merely as a prior restraint but as an especially pernicious kind of prior restraint that operated to shield public officials from public examination and criticism. *Near* also did not premise its result on whether the defamatory charges sought to be abated were true or false. Rather, the Court concluded, “The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.”<sup>553</sup> *Near*’s logic is thus strikingly similar to those nineteenth century cases reviewed at length in Part IV.

There are also reasons to question Thomas’s and Gorsuch’s pragmatic concerns. Starting with Gorsuch, the very premise of his objection to the actual-malice rule suffers from internal inconsistencies. On the one hand, he argued in *Berisha* that the Court strayed by departing from the original meaning of the First Amendment at the time of the Founding. On the other hand, he suggested that ideas about the First Amendment in *Sullivan* should be revisited to respond to a changing world. If our understanding of the First Amendment should be limited by the Founders’ understanding, then it is unclear why the particularities of our current media climate (or the import of the changes since *Sullivan*) should matter in determining the protection offered, if any, by the First Amendment.

Setting that aside, each of Gorsuch’s arguments against the actual-malice rule depend on the interaction of three things: (1) how the actual-malice rule developed after *Sullivan*, (2) how the economics of news changed since *Sullivan*, and (3) how the media ecosystem evolved since *Sullivan*. Unlike in 1964, he argued, “today virtually anyone in this country can publish virtually anything for immediate consumption

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552. *Id.*

553. *Id.* at 723. Thomas also invoked the well-known language from *Chaplinsky v. New Hampshire* about defamation not being a class of speech protected by the First Amendment. *McKee v. Cosby*, 139 S. Ct. 675, 681 (2019) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). But this language is *obiter dictum*. *Chaplinsky* had nothing to do with the law of defamation, and this statement did not answer the question *Near* expressly left open.

virtually anywhere in the world.”<sup>554</sup> As a result, the value of news had been diluted.<sup>555</sup> As traditional publishers failed, they were replaced by less reputable “24-hour cable news” and websites that “monetize anything that garners clicks.”<sup>556</sup> This incentivized what was left of the reputable publishers to publish not the truth but what competed with the new entrants.<sup>557</sup> To make matters worse, while Gorsuch argued that the Court had adopted the actual-malice rule to protect “*some* false information,” in the intervening years “the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability” as evidenced by the relatively few libel judgments secured by public plaintiffs.<sup>558</sup> In short, “the distribution of disinformation—which costs almost nothing to generate” and risks nothing either—“has become a profitable business while the economic model that supported reporters, fact-checking, and editorial oversight has deeply eroded.”<sup>559</sup>

If this were all true, Gorsuch would be right that, perhaps, it would be time to rethink the actual-malice rule. But Gorsuch provided nothing more than assumptions. First, he assumed that because disinformation exists—and certainly it does—that its existence makes others less likely to aim to tell the truth too. But he provided no evidence for this assertion. And, in fact, it is contrary to the very purpose of the news: telling truthful stories about matters of public concern. Second, he assumed that because times are tight for many news organizations, they have given up on telling the truth. But he provided no evidence for this statement either. Third, he assumed that the lack of libel judgments means that actual malice has turned into something of an immunity. But he ignored another more obvious reason for the lack of such judgments: generally, news organizations are not in the business of publishing known falsehoods. Once each of these assumptions is knocked down, Gorsuch’s conclusion that “[i]t seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy” or that “ignorance is bliss” is little more than judicial puffery.<sup>560</sup>

Gorsuch and Thomas also lamented that, with the internet, private citizens could become public figures overnight, making *Sullivan* applicable to a much larger group of plaintiffs than was ever possible in

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554. *Berisha v. Lawson*, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting).

555. *Id.*

556. *Id.*

557. *Id.* at 2428.

558. *Id.*

559. *Id.* (internal quotation marks omitted).

560. *Id.*

1964. As Gorsuch put it, “Individuals can be deemed ‘famous’ because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most.”<sup>561</sup> This is a sleight of hand though. Although at times the Court has described public figures as those having “general fame or notoriety,” it has never required *national* fame or notoriety in order to be considered a public figure; instead, it has required “general fame or notoriety *in the community*” or that the plaintiff, while not of general fame or notoriety in the community, has “voluntarily inject[ed]” herself into a controversy.<sup>562</sup> At any rate, that unfamous people might be considered public figures is entirely consistent with the common law. The teacher offering typing classes in nineteenth century Philadelphia was not famous; nor was the railroad baron. But both were declared to be public figures based on their involvement in public affairs.

Nor does Gorsuch ever explain why news organizations that do try their best to get it right should forfeit the actual-malice rule simply because disinformation peddlers exist. In a way, Gorsuch’s argument endorses a kind of heckler’s veto: because bad actors exist, the law abiders must give up long-recognized First Amendment protections. This argument also seems to conflict with Gorsuch’s own general concerns about the current economy of news. One would think that the media being in such a precarious spot financially, as Gorsuch repeatedly points out, would be reason to keep the *Sullivan* rule, not to throw it out. *Sullivan*, after all, was a case about the *Times* risking bankruptcy.

Certainly, purposeful disinformation is a problem, but the actual-malice rule does not, as Thomas and Gorsuch appear to believe, “insulate those who perpetrate lies from traditional remedies like libel suits.”<sup>563</sup> *Sullivan* does not protect lies; it protects, as the common-law rule before it, falsehoods published under the honest belief at the time of publication that they were true. In recent libel lawsuits filed against a raft of conservative talking heads over bunk claims about election interference and, specifically, Dominion Voting Systems’ role in it, commentators recognized that “there is pretty good evidence that will allow a jury to find actual malice by those defendants.”<sup>564</sup> Thus, defamation liability remains a powerful weapon against *lies*.

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561. *Id.* (citation and internal quotation marks omitted).

562. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351–52 (1974) (emphasis added).

563. Berisha, 141 S. Ct. at 2425 (Thomas, J., dissenting).

564. Tucker Higgins, *Dominion and Smartmatic have serious shot at victory in election disinformation suits, experts say*, CNBC (Feb. 24, 2021), <https://www.cnbc.com/2021/02/24/dominion-smartmatic-defamation-cases-credible-experts.html> [<https://perma.cc/EQL9-BE5Q>].

Finally, Thomas said that “it is unclear why exposing oneself to an increased risk of becoming a victim [of libel] necessarily means forfeiting the remedies legislatures put in place for such victims.”<sup>565</sup> But this is sophistry. As we have seen, for more than 200 years courts have accepted that, for public officials and public figures, increased criticism is the cost of doing business. It is eminently sensible to demand from the person who seeks public admiration that they accept the risk of public condemnation. Otherwise, the law becomes nothing more than a subsidy for the rich, powerful, and famous, insulating them from any and all criticism however harsh while they run roughshod over broader public interests.

#### CONCLUSION

*Sullivan* is under attack—both as a matter of history and for pragmatic concerns. But neither attack supports discarding *Sullivan*. Fundamentally, the originalist argument should be rejected because it is decidedly ahistorical and *un-American*. No small part of the Revolution stemmed from attacks on the freedom of the press in the Colonies. The government adopted thereafter—one where the governed were at once the governors—required a system for the exchange of ideas that protected *the People* in their criticism of their agents in government. This would come to include those, who while not themselves public officials, wielded power over the resolution of questions of public importance. The history of libel in this country is really a history of republican thought.

To posit then, that today we should think about freedom of the press in the same way that the English thought about it before the Revolution, that we should equate the freedom of the press under the First Amendment to the freedom of the press at common law, is to cede back basic ideals over which the Founding generation went to war. It ignores the teachings of James Wilson and Thomas Jefferson, as well as St. George Tucker who argued in 1803 that freedom of the press, as compared to England, stood on “very different . . . footing . . . in the United States, where it is made a fundamental article of the constitutions.”<sup>566</sup> As the Delaware high court wrote in *Rice v. Simmons* in rejecting overwrought reliance on the common law of England in 1838:

[N]o one can investigate the law of libel without feeling an invincible repugnance to admit in their full extent some of the old cases. . . . It cannot be that we are bound to run into the same absurdities [as in England]; that, at this day, and in this country,

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565. *Berisha*, 141 S. Ct. at 2425.

566. 1 TUCKER’S BLACKSTONE, *supra* note 42, at app. at 19.

the opinions of black letter judges, however learned; the judgments of star chamber courts, so often subservient to state purposes; and the whole law of slander, *scandalum magnatum* and all, must, in the absence of legal enactments, be regarded by our courts as the law of this state; without considering the great advances that civil liberty has made throughout the world, and that the liberty of speech and of the press is now a very different thing from what it was in the ages from which these precedents are drawn.<sup>567</sup>

Nor is there reason to believe that removing the protections of the actual-malice rule will confront the serious problems that do face the news industry or our broader mass-communication ecosystem. If anything, overturning *Sullivan* would seem likely to worsen matters, to chill reputable news organizations while doing little to deter bad actors operating anonymously on the internet. These bad actors are often difficult to find—as many operate outside the United States. And one can question whether it would make practical sense for plaintiffs to spend substantial sums litigating claims over those they can find only to end up with a judgment against an extraterritorial, likely judgment-proof bad actor.

*Sullivan* does not need to be overturned. It serves, for news organizations and private citizens alike, exactly the functions it was meant to in 1964. If Thomas and Gorsuch really are concerned with disinformation peddlers and are looking for solutions, rather than overrule *Sullivan* perhaps it is time to breathe life into the Press Clause whereby the actual-malice rule would apply only to defendants that are *bona fide* news organizations and journalists—micro-local, local, and national. Sure, this would involve the Court in the problem of deciding who is the press and who is not, but such an approach would be more tailored to the ill that it is supposedly trying to address. While Gorsuch argues that “[t]he liberty of the press’ has never been ‘confined to newspapers and periodicals’; it has always ‘comprehend[ed] every sort of publication which affords a vehicle of information and opinion,’” this has never strictly been true—at least not in the libel context.<sup>568</sup> In both *Gertz v. Robert Welch, Inc.* and *Philadelphia Newspapers v. Hepps*, the Court spoke in terms of rules required when media defendants were defendants in a case.<sup>569</sup> The same can be done for the actual-malice rule across the board, thereby protecting *bona fide* news

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567. *Rice v. Simmons*, 2 Del. (2 Harr.) 417, 428–429 (1838).

568. *Berisha*, 141 S. Ct. at 2424 (Gorsuch, J., dissenting) (quoting *Lovell v. City of Griffin*, 303 U.S. 444 (1938)).

569. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).



organizations and journalists and leaving disinformation peddlers open to liability.

There are serious issues facing how we communicate today. The marketplace of ideas has been corrupted using the same technological advances in communication that Gorsuch laments. More fundamentally, there is reason to question whether the marketplace-of-ideas theory ever provided an accurate portrayal of how truth and falsity interact. It turns out that the marketplace of ideas, like any marketplace, is susceptible to monopolies and counterfeits and is filled with bad actors and shady enterprises acting with ulterior motives. When the marketplace is awash in lies and flooded with knowing falsehoods, it seems like the last thing one should do is to rip away protections for the honest brokers, those who are only trying to speak the truth the best they can with the information they have been able to gather.