The First Amendment Degraded: Milkovich v. Lorain and a Continuing Sense of Loss on its 20th Birthday

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For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it. Thomas Jefferson, Letter to William Roscoe (1820).

We consider this case against the backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. . . . [E]rroneous statement is inevitable in free debate and must be protected. NYTimes v Sullivan, 376 US 254 (1964) at p. 270-271.

The basis of the contention for a more liberal indulgence lies in the modern conditions which govern the collection of news items and the insistent popular expectation that newspapers will expose, and the popular demand that they shall expose, actual and suspected fraud, graft, greed, malfeasance, and corruption in public affairs and questionable conduct on the part of public men and candidates for office without stint, leaving to the people themselves the final verdict as to whether [factual] charges made or opinions expressed were justified,” Coleman v MacClennan, 98 P 281 (Sup. Ct., Kansas per Judge Burch, 1908) at 286, emphasis added.

Criticism of so much of another’s activities as are matters of public concern is privileged if the criticism, although defamatory, (a) is upon (i) a true or privileged statement of fact, or (ii) upon facts otherwise known or available to the recipient as a member of the public. Restatement (First) of Torts, Section 566 (1938), emphasis added.


We are not persuaded that . . . an additional separate constitutional privilege for “opinion” is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case thus becomes whether a reasonable fact-finder could conclude that the statements in [defendant’s] column imply an assertion that [plaintiff] perjured himself in a judicial proceeding. . . . This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Milkovich v Lorain Journal Co., 497 US 1 (1990) at p. 21.

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I. Introduction

Exactly 20 years ago, the Supreme Court handed down a decision whose narrow question belied its broader effect on the First Amendment. In *Milkovich v Lorain Journal Co.*, Chief Justice Rehnquist for the majority held that defendants to defamation actions would not be protected by a finding that their statement was “opinion” as opposed to “fact”. Given the linguistic difficulty of dichotomizing statements that way, the Court declined to exonerate otherwise defamatory utterances just because the speaker might place the words “I think” or “In my opinion” before such contentious words as “Jones is a liar,” “Smith is a thief,” etc. The few commentators on the case, both at the time and on other anniversaries of *Milkovich* since then, agreed that the narrow holding made good sense, not only as a matter of language but also of common law precedent and of First Amendment doctrine. Although significant state courts, such as New York’s, went on to afford protection to opinions under their own constitutions, *Milkovich’s* clarification of some confusion in the lower federal courts on this issue was seen as salutary.


2. After a flurry of immediate scholarly attention, which shall be cited piecemeal throughout this Article, there have been several retrospectives, see e.g., M. Eric Eversole, Note, *Eight Years After Milkovich: Applying a Constitutional Privilege for Opinions Under the Wrong Constitution*, 31 IND. L. REV. 1107 (1998); Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467 (1994).

DEPAUL L. REV. 583, 614 (1992) (citing such approaches as New York’s in *Immuno*.)
This Article springboards from an acceptance of the dissolution of the fact/opinion dichotomy to a far broader inquiry about the implications of *Milkovich* for key First Amendment principles. I contend that the decision precisely reverses the Constitutional logic of breaking down the distinction between fact and opinion: instead of worrying that opinions might hide factual falsehoods – as the Court does in *Milkovich* – the First Amendment confidently expects informed listeners to interpret even false factual statements as nothing more than the opinion of the speaker. I argue that the 1990 reasoning thus utterly deflates the aspirations of one of its purported precedents, *NY Times v Sullivan* and expands a trend already present in some post-*Sullivan* cases: to strip the Warren Court’s masterpiece bare of all but its well-known “actual malice” holding, namely that a public official suing for defamation must prove that the speaker knew the statement was false or uttered it with reckless disregard for its truth or falsity. Especially at risk under Justice Rehnquist’s reasoning in *Milkovich* is the First Amendment’s faith in the audience, in listeners’ ability to decide for themselves – without judicial guidance or protection – both the meaning and the import of a statement, particularly a statement about matters of public concern. I argue that the 20 year-old precedent joins with other cases before and since to create the image of a passive audience, capable of gathering but not assessing new information and needful of the paternalistic hand of judges to avoid the pitfalls of ordinary human communication. We are still suffering in 2010 from *Milkovich*’s pessimistic bypath.

Lost to us today, I argue, is the notion of the interpreting audience that pervades the pages of *Sullivan*. With its roots in the excellent common law sources cited by the Warren Court, this focus on the audience needs to be revived in every generation. The First Amendment, on this view, encourages audiences as much as speakers. For this internet age, where the acquisition of raw data has become a universal hobby, but where audiences are often assumed to be incapable of digesting the data in any but the most simplistic ways, this Article also seeks to reinvigorate the citizen interpreter, one who can parry through thought and action, both the sheer mass of data and the piling on of huge amounts of corporate dollars.⁵

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⁵See my brief discussion of the recently decided *Citizens United v. Federal Election Comm’n*, 175 L. Ed. 2d 753, 558 U.S. ____ (2010), infra, Part VII at n. 124. I cast a vote for the outcome on the basis this entire Article’s reasoning, and therefore my endorsement of the extension to corporate dollars of free political speech has nothing to do with the corporate speaker’s rights and everything to do with the First Amendment aspiration that audiences can field and interpret for themselves all public discourse. Nonetheless, critics of the new case may well fear the audience’s ability in 2010 to weigh – as opposed to – receive – information: “Over the past year, Americans have spent an average of 11.8 hours a day consuming information, sucking up, in aggregate, 3.6 zettabytes of data and 10,845 trillion words,” William Falk, “Should Old Articles Be Forgot,” *NY Times*, Op Ed, 12/29/09, p. A31. A far more conservative monthly estimate is IT Facts’s 13.5 hours of
internet usage, March 16, 2008, http://www.itfacts.biz/americans-spend. But data acquisition for its own sake does not guarantee careful political balancing as is also indicated by the increasing trend to choose sites already aligned with the citizen’s pre-conceived interpretations; see e.g., John Harwood, “If Fox is Partisan, It is Not Alone,” http://www.nytimes.com/2009/11/02/us/politics. For an interesting take on the downside of mere data, see also Geoffrey Hartman, SCARS OF THE SPIRIT (2002), 85-103. Data acquisition is in the service of “simple themes” as opposed to interpretive thought; see also “The Muddled Selling of the President,” NY Times, 1/31/10 at Wk1.
In setting *Milkovich* as dramatically opposed both to *Sullivan* and the common law, the Article re-constructs a citizenry that zestfully learns about, and reflects upon, matters of public importance and then reverses the flow of discourse that it considers false or otherwise ill-advised. I endeavor to re-capture *Sullivan’s* insistence – now long since abandoned – that factual falsehoods play a special and protected constitutional role in moving audiences to assess and improve the informational flow on matters of public concern. The Article, in so doing, endeavors to answer such influential critics of *Sullivan* as Robert Post (from the left) and Richard Epstein (from the right). In different ways, these critics – who do not spill much ink on *Milkovich’s* dubious doctrine – have lost sight of the acquisitive interpreter and her self-protecting citizen role.

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7 Prof. Post does highlight the rhetorical slipperiness of the *Milkovich* majority: “Chief Justice Rehnquist’s [opinion] is rhetorically adept. . . . But the argumentative structure of the opinion is obscure, making it difficult to discern a crisp course of reasoning.” See Post, supra note 6 at 612. I return to this key aspect of the Chief’s performance in Part II, infra, having written about his rhetorical legerdemain in a different Constitutional context; see Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982). My article was cited on the floor of the Senate by then Senator Joseph Biden in an attempt to block Rehnquist’s ascent to Chief. 132 CONG. REC. S12781 (daily ed. Sept. 15, 1986) (statement of Sen. Biden).
The Article proceeds by reverse chronology through three paradigmatic First Amendment cases beginning with a thorough discussion of *Milkovich*. Next, *Milkovich’s* most influential precedent, *Gertz v Robert Welch*[^8], is shown to have departed from the basic First Amendment spirit of *Sullivan*, so that the move made 20 years ago becomes almost inevitable once we understand that the seminal Warren Court aspirations had already been abandoned. Then *Sullivan* and its explicitly emphasized common law roots in the privilege of fair comment on matters of public concern are contrasted to the approach in the later cases. Here, the common law so vital to the 1964 decision is foregrounded in three varieties: English cases providing a privilege to libel where audiences are assumed to have a sufficient interpretive capacity; the first and second Restatement of torts in the U.S.; and American state court “majority rule” decisions that for awhile departed from the Restatements’ interpreting audience model but then were corrected by *Sullivan’s* formal elevation of the “minority” approach within the states regarding the privilege. Remarkably, this formal co-holding of the 1964 decision has been utterly lost to mainstream First Amendment analysis almost from the start[^9], and *Milkovich* compounds the confusion. The Article then contextualizes the highly relevant *Sullivan*-progeny cases on hyperbole and exaggerated speech, and it concludes by expanding on its central notion of the *interpreting audience*, the conjuration for the year 2010 of an aggressive, publicly oriented listener and speaker who is not distracted by gossip, satire, or the onslaught of raw data for its own sake but rather seeks to understand and contextualize information with the aim of becoming a more knowledgeable and active citizen.

II. *Milkovich* Rehearsed

A dispute that preoccupied the Cleveland suburbs of Mentor and Maple Heights, Ohio for many months originated when two high school wrestling teams started to brawl during a scheduled match. Differences of opinion quickly ensued as to whether the Maple Heights High School coach Milkovich had goaded his team to fight the other wrestlers or – in his version – had ordered them to return to the bench and cease the extracurricular hostilities[^10]. A persistent critic of Coach Milkovich was Lorain County Newspaper sports reporter Diadiun. After the coach formally testified at a School Board hearing into the fracas, Diadiun wrote a column in which he opined that Milkovich had lied to the Board about his role in the incident. Among the reporter’s allegedly


[^10]: Interview by Peter Alscher with Michael Milkovich, former wrestling coach of Maple Heights High Sch., in Cleveland, Ohio. (Apr. 30, 2003) (on file with author).
defamatory statements, which also implicated Maple’s Superintendent of Schools Scott, were the following:

I was among the 2000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing. . . . so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board. Any resemblance between the two occurrences [sic] is purely coincidental. . . . Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.\textsuperscript{11}

\textsuperscript{11}Milkovich v Lorain, 497 US 1, supra note 1, at 7.
The lawsuit bounced back and forth for more than a decade from a variety of Ohio court First Amendment decisions to two separate denials of certiorari by the United States Supreme Court. Finally, the Ohio courts having dismissed the complaint because the column was constitutionally protected “opinion,” the Supreme Court reversed. The majority decision by Chief Justice Rehnquist essentially found that facts are difficult to separate from opinions; that audiences need to be wary when the latter hide factual falsehoods; and that in any case there was never meant to be a blanket First Amendment protection of “opinions”.

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12 The Ohio Court of Appeals first reversed a lower court and found that plaintiffs had met the difficult Sullivan “actual malice” burden (see supra note 4 and accompanying text), *Milkovich v Lorain*, 65 O App 2d 143, 416 NE2d 662 (1979), certiorari denied, 449 US 966 (1980, Brennan, J. dissenting). On remand, both Ohio lower courts found for Diadiun, this time emphasizing that the column’s “opinions” were fully protected as such by the First Amendment, but the Ohio Supreme Court re-instated the case (finding the column to be “factual” in nature), 15 O 3d 292 at 298, 473 NE2d 1191 at1196-97 (1984), certiorari denied, 474 US 953 (1985). However, the Ohio Supreme Court reversed itself and saw the column as “opinion” in the collateral case brought by Scott, *Scott v News-Herald*, 25 O 3d 243, 496 NE2d 699 (1986), a case followed by the lower court decision on appeal 20 years ago, *Milkovich v Lorain*, 46 O App 3d 20, 545 NE2d 1220 (1989). See generally, Case Comment, *Milkovich v Lorain Journal Co: The Balance Tips*, 41 CaseW. Res. 613 (1991).

13 The dissenting opinion by Justice Brennan joined only by Justice Marshall, has been found wanting by many commentators because it essentially “agrees with the majority opinion in rejecting [an absolute exemption for ‘opinions’]”, Case Comment, supra note 12 at 22, and disagrees only with the majority’s finding that Diadiun had implied an unstated false factual basis for his conclusion about Milkovich. On the terms of this Article, the dissent basically joins forces with the majority’s idea that the audience always needs judicial help when any factual falsehood can be ferreted out by a plaintiff and a scrutinizing judiciary. Still, the dissent quite significantly stresses the audience in finding that “No reasonable reader could understand Diadiun to be impliedly asserting – as fact – that Milkovich had perjured himself,” 497 US 1, supra note 1 at 22 (Brennan, J. dissenting). As I shall discuss, *infra* note 93 and accompanying text., this dissenting language comports with the “hyperbole” cases such as *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6 (1970) [hereinafter *Bresler*] and attempts – albeit weakly – to redeem the “interpretive audience” concept I stress throughout this Article. What had been central to the Warren Court and to Justices Brennan, Marshall, and Stewart in particular, however, has been almost thoroughly compromised.
Key to understanding the speech act Milkovich claimed to be libelous is its context: virtually everyone in the community who saw Diadiun’s column already knew about the event. It was a classical English/American common law and First Amendment “matter of public concern”. Regarding libel cases brought against utterances in this context, the law had for a century and a half granted significant latitude to defendants whose remark – otherwise false and tending to lower the plaintiff’s reputation – concerned issues already accessible and of great citizen interest to the intended audience of the remark. The idea, ensconced in England and America long prior to the constitutionalizing of the tort of libel, seems to be subtly nuanced from the obvious goal of encouraging the speaker to debate key issues; as important as that liberalization of libel law had been, the goal was even greater of

14 See RESTATEMENT (FIRST) OF TORTS § 566 (1938) (summarizing the cases by protecting “expressions of opinion upon known or assumed facts”). Known facts meant any statement for which the speaker provided a full factual predicate (true or false); “assumed” facts applied to the key category of matters of public concern. For the latter, see especially RESTATEMENT (FIRST) OF TORTS § 606(1): “Criticism of so much of another’s activities as are matters of public concern is privileged if the criticism, although defamatory, (a) is upon (i) a true or privileged statement of fact, or (ii) upon facts otherwise known or available to the recipient as a member of the public.” Emphasis added. Sullivan elevated (a)(ii) above (a)(i) through its use of Coleman v. MacLennan, 98 P. 281 (Supreme Court of Kansas, 1908). The key phrase “available to the recipient as a member of the public” adequately encapsulates the long tradition of what I call here the “interpreting audience.” See discussion infra Part IV. See especially therein Part IV.B.3, and Odgers, Digest of the Law of Libel and Slander, 4th edition (UK, 1905), infra note 58. The RESTATEMENT (SECOND) OF TORTS § 566 (1977) is fully in accord, categorizing as “pure opinion” statements made on fully revealed facts and listing the fair comment privilege (for which it however has no separate section) as pure opinion.

15 See Sullivan, supra note 4; despite a mis-step in Gertz, supra note 8, to which I return, infra Part III, more recent cases have made clear that statements on matters of public concern always get greater First Amendment protection, see Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (requiring a private figure plaintiff to prove falsity if suing upon a matter of public concern); Dun & Bradstreet, Inc. v. Greenmoss Builders Inc., 472 U.S. 749 (1985) (implying that little or nothing of the First Amendment continues to control in the absence of a public concern utterance, where a private figure sues a non-media defendant).

16 See FIRST RESTATEMENT, headnote, supra n. 14 and further discussion infra Part IV and at note 74.

17 Among the important early English cases defining the privilege was litigation involving book reviews, referenced briefly in Post, The Constitutional Concept of Public Discourse, supra note 6 at 627 notes140-42 and accompanying text. For a far more extensive discussion of these cases, see infra, Part IV, discussion at notes 47-50, and 59.
encouraging the audience to be actively acquisitive of knowledge where public issues were involved. No single remark added to the verbal turmoil could so manipulate the knowledgeable audience as to divert it from its own consistent search for the truth. On the contrary, factual falsehoods, by provoking informed citizens, goad them to re-examine the issue and to move the discourse correctly forward.

Seen this way, Diadiun’s column and its allegation that Milkovich was a “liar” would be ratcheted down to relative insignificance compared to the wealth of information and comment already available to an audience presumptively trusted to do its own homework about the fracas. Some lower courts had so found, including in a collateral case in Ohio, brought on roughly the same facts by Maple Heights school superintendent Scott. Despite their finding that Milkovich was a private figure, the Ohio courts protected the libelous reporter largely because they assumed informed audiences to his column were perfectly capable of fielding its inaccuracies. The public discourse stakes required a defendant-favorable approach given, as they saw it, the state of constitutional and common law.

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18 Scott v. News-Herald, 496 NE2d 699 supra note 12 (Ohio 1986) (finding that even though the plaintiff was a private figure, the statement’s context protected it from actionability).

19 The immediate lower court decision reversed by the Chief was the Ohio appellate opinion in the case, Milkovich v. News-Herald, 545 N.E.2d 1320, supra note 12 (Ohio Ct. App. 1989).
The US Supreme Court reversed. It decided to utilize the dispute to focus on a
single troubling sub-set of the rhetorical context cases sounding in libel. Were the lower
courts correct, Chief Justice Rehnquist asked in his majority opinion, when they
specifically exonerated Diadiun and the newspaper by finding the column to be
“opinion” as opposed to “fact”? Although this narrowing of the categories of context-
based libel jurisprudence under common law and First Amendment precedents was of
course legitimate and even perhaps necessary to correct some erroneous assumptions
about the pristine nature of opinion statements, the analysis of Diadiun’s remarks and
the Court’s conclusion that Milkovich could proceed with his case threaten the fabric of
respect for the audience woven into years of common law and First Amendment
jurisprudence.

After taking a shot at the thorny distinction linguistically examined by the
common law in prior decades\(^{20}\), the Court decided that there was no sufficient First
Amendment reason, when libel cases are brought, to immunize statements that appear
to be opinion as opposed to fact.\(^{21}\) In so doing, the Court explicitly sought to console
the First Amendment community by citing (although distinguishing) what it saw as
sufficient precedential protection for speakers under *Sullivan* and its progeny.

\(^{20}\)Given the sophistication of the common law’s linguistic struggle with fact and opinion,
Rehnquist’s analysis is either accurate but fairly rudimentary, e.g.,: “If a speaker says, ‘in my
opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that
Jones told an untruth,” *Milkovich*, 497 U.S., *supra* note 1 at 17-18, or misleading, given the
precedents on matters of public concern especially: “Even if the speaker states the facts upon
which he bases his opinion, if those facts are either incorrect or incomplete [sic], or if his
assessment of them is erroneous, the statement may still imply a false assertion of fact.” *Id.*, at
19. The common law rule is best understood as protecting – absent some kind of malice – a
factual falsehood, as long as it is fully articulated to the audience. *Accord* Harry Kalven, *The
New York Times Case: A Note on the Central Meaning of the First Amendment, supra* note 9 at
195: “It is arguable that the fair-comment privilege has been awkwardly put in the [majority-rule]
common-law decisions and that what is really involved is the degree to which the underlying
facts are disclosed when the opinion is expressed and the inference drawn.” *See* both
*RESTATEMENTS, supra* note 14.

\(^{21}\) *Milkovich*, 497 U.S. at 19.
As we shall now see, the Court – correct in setting straight at least a small part of a confusing dictum in its 1974 *Gertz* case\(^{22}\) – made the following highly questionable analytical moves under the First Amendment: 1. It effectively reversed the reasoning of *Sullivan* by fearing factual falsehoods “masked” as opinions when *Sullivan* in fact protected most factual falsehoods and implicitly saw them as statements informed audiences would understand to be just the opinion of the speaker; 2. It failed to see that its precedents dealing with “hyperbole”\(^ {23}\)

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directly related to the issue before it, instead of occupying a discrete separate “box” apart from the issues in *Milkovich*; hence it missed (probably wilfully) its best opportunity to test the effect upon audiences of speech in certain overheated or debate-inspiring contexts; 3. It badly misconstrued the common law of fair comment on matters of public concern that *Sullivan* had deliberately invoked to protect the *factual falsehoods* in that case; in this, perhaps its most crucial “mistake”, *Milkovich* either over-ruled *Sullivan* while always pretending to preserve it or – at best – stripped its reasoning down to the well-known actual malice rule and that alone; 4. It furthered a skeptical and patronizing view of the audience’s capacity to field potential libels on its own and without the intervention of courts, thus reversing a profound and long-standing contribution of common law and First Amendment thought; and 5. It set state and federal courts to the task – still ongoing – of reconciling pre-*Milkovich* cases with the

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24 Perhaps distracted by the Chief’s dexterous rhetoric, see *supra* note 7 and *infra* text at note 77, even authoritative readers of this tradition miss or downplay greatly the place even (and sometimes especially) falsehoods hold in testing the audience that the tradition had previously deemed trustworthy. *See e.g.*, Post, *The Constitutional Concept of Public Discourse*, *supra* note 6 at 605 (understanding what he calls the “curious and muddy distinction between fact and opinion,” but then accepting without much consistency the idea that “false statements of fact are particularly valueless,” *id.* at 613); Post, *Review Essay*, *supra* note 5 at 550: “Not that untrue statements of fact have inherent First Amendment value” (relying on the very dichotomy created by *Gertz* that Rehnquist undermines in *Milkovich*). But *Sullivan* explicitly adopted the common law minority rule protecting “honest misstatements of fact,” 376 U.S. at 279-83 and nn. 20-21, and integrated almost all of *Coleman*, 98 P. 281, *supra* note 14, e.g.: “In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office.” *Sullivan*, 376 U.S. at 281-82. (Professor Post, however, also accepts the skepticism explicit in *Gertz* -- but not extended beyond that case -- to “the whole idea” of courts defining “matters of public concern.” See Post, *The Constitutional Concept of Public Discourse*, *supra* note 6, at 668-86 (and this even though Post approvingly cites the common law approach originating in the book review cases, *id.* at 627-29). *See also* discussion *infra* note 72 and Part VI, where I will discuss this paradox briefly. Professor Post gives surprisingly short shrift to the minority rule of *Coleman* at *The Constitutional Concept of Public Discourse*, *supra* note 1, at 627 n. 44), and in his later *Review Essay*, *supra* note 6, at 544. For his part, Professor Epstein similarly disparages through the extreme brevity of his treatment the crucial common law source of constitutional doctrine, and this is even more provocative because he concludes that the common law would largely have sufficed to resolve the conflict in *Sullivan*! Epstein, *Was Times Wrong?*, *supra* note 6, at 795.

fear of audiences the Court expounded in its majority decision.

III. The Use and Abuse of Gertz in Milkovich

*Gertz v Robert Welch,* exactly a decade after *Sullivan,* handed down a comprehensive re-assessment of the First Amendment regarding the law of libel. A whole new mix of justices started to fiddle with the master case of 10 years before and provided a precedent this Article sees fulfilled in *Milkovich:* pay lip service to (and retain the narrow holding of) *Sullivan,* while essentially debunking the rest of that precedent. Interestingly, Chief Justice Rehnquist, a relative newcomer to the *Gertz* Court of 1974, correctly perceives in his *Milkovich* opinion one – but only one – of the *Gertz* errors. In a famous – or, better, infamous – dictum, *Gertz* threw off the following dubious remarks:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.\(^{28}\)

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\(^{26}\) *Supra,* note 8.

\(^{27}\) *Supra,* note 4.

\(^{28}\) *Gertz,* *supra* note 8 at 339-340. Geoffrey Stone, in a fine recent book about other aspects of the First Amendment – and without commenting on the concluding sentence of the dictum cited above – refers to its opening gambit as “perhaps [the Court’s] single most important sentence on the freedom of speech,” **GEOFFREY R. STONE,** **PERILOUS TIMES: FREE SPEECH IN WARTIME FROM**
Judges across the country inferred the following syllogism from the *Gertz* dictum: a defamatory utterance is actionable only if it contains a statement of fact that is proven false; opinions (*Gertz*' “ideas”) cannot be proven false; therefore opinions – no matter how derogatory – can never be actionable. By the time *Milkovich* was decided, “every federal circuit and the courts of at least 36 states and the District of Columbia had held that opinion is constitutionally protected.”

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29 ROBERT S. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §4.2.3 (The Practising Law Institute 1999)
The leading case was *Ollman v. Evans*\(^{30}\) which tried to provide guidelines so that courts might distinguish opinion statements from factual assertions and then move to immunize the former. The liberal desire to protect opinions and castigate facts as though they were separable was (as we have seen) not really consistent with the common law’s urge to protect and occasionally conflate both;\(^{31}\) a rich mine worked to finer or grosser effect in the Chief’s *Milkovich* opinion.

*Ollman* scrutinized statements as to their “full context”, their “verifiability”, and their specific language’s “common usage and meaning.” *Ollman*’s fourth additional factor is particularly important, as it endeavors to re-establish in this new, somewhat artificial, fact-opinion bifurcated world the idea of *faith in the audience*:

\[\ldots\] .4. the broader context or setting in which the statement appears. Different types of writing have . . . widely varying social conventions which signal to the reader the likelihood of a statement’s being either fact or opinion\(^{32}\).

Other courts during the *Gertz* to *Milkovich* era also emphasized this idea of the audience’s ability to figure out from context how to understand language that might (otherwise) seem literally factual and defamatory. These courts varied slightly if at all from *Ollman*’s manner of separating opinion from fact; the Ninth Circuit in *Underwager*\(^{33}\), covered almost identical ground but adds an unfortunate concluding emphasis that hints at the fact-aversion of the Supreme Court during that confusing period:

First, we look at the statement in its broad context, which includes the general tenor of the entire [statement], the subject of the statements, the setting, and the format . . . Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

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\(^{30}\)750 F2d 970 (DC Cir, 1984, *en banc*).

\(^{31}\)See, e.g., *Restatement of Torts* §606-10 (1938); *Restatement (Second) of Torts* §566 cmt. b and illust. in cmt. c (1977). See discussion *supra* note 12; see also *infra* Part IV.

\(^{32}\) *Ollman, supra* note 30 at .

\(^{33}\) *Underwager v Channel 9 Austral*, 69 F3d 361 (9th Cir. 1995).
Underwager’s final prong shows the baleful legacy of the Gertz dictum. For, despite its opening flourish—a trap for the unwary—Gertz on the whole had not furthered what would ordinarily be understood as Sullivan’s “liberal” First Amendment agenda. Yes, criticism of public officials and— as the case law had already long held—public figures—was protected by Sullivan’s “actual malice” rule. But as opposed to the mechanical rule, the heart and soul of the great case were falling by the wayside, and the key departure lay in two aspects of the dubious dictum that gave rise to Underwager and its sister cases in the lower federal courts: 1. A perceived distinction between fact and opinion strongly privileging the latter and dubious about the former; and 2. The implication that any statement seemingly containing a factual element (i.e. most expository human discourse) was to be distrusted and its content closely scrutinized against any possible falsehood. Many lower courts embraced the first element here, hence finding an audience-sensitive tool to protect “opinions”. In the process, however, they left alive and well the other part of the Gertz dictum: “There is no constitutional value in false statements of fact.”

Yet Sullivan precisely had held that the challenged ad’s factual errors contributed to the kind of debates needed on issues of public concern:

The question is whether [the advertisement] forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent. Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker. . . . If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.

Furthermore (and concurrently), it had drawn from American common law cases the rule that factual falsehoods on matters of public concern were equally as protected as were opinions and comments, or Gertz’ “ideas”.

Thus there were paradoxical outgrowths of the Ollman era. On one hand, courts liberally protected—while they still had the toy that Milkovich grabbed from their judicial

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34 Among many decisions grasping to maintain the Sullivan tradition during the Gertz to Milkovich period, see Deupree v. Iliff, 860 F.2d 300 (8th Cir. 1988); Janklow v. Newsweek Inc., 788 F.2d 1300 (8th Cir. 1986); Yiamouyiannis v. Thompson, 764 S.W.2d 338 (Tex. App. 1988); Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681 (4th Cir. 1989) (drawing heavily on Ollman v. Evans, construing Virginia law).

35 See Curtis Pub’g Co. v. Butts, 388 U.S. 130 (1967). See also infra note 123.

36 Gertz, supra note 8 at 339-40. The seismic shift has been minimized in the scholarship. See, e.g., Post, The Constitutional Concept of Public Discourse, supra note 6, at 605; Epstein, Was Times Wrong?, supra note 6.

37 Sullivan, supra note 4 at 270. And see discussion, infra, Part IV (B) (2).
hands—any statement that looked like an “opinion”; on the other hand, they furthered in that very process a debilitating distrust of statements that could not be thought of as other than “factual.” In so doing, particularly regarding utterances on matters of public concern, courts fell into the *Gertz* dictum trap by gradually eliminating *Sullivan’s* protection of factual falsehoods, which were seen not only as benign and inevitable in all zesty debates but also useful to knowledgeable audiences within that context. Only actual malice, rare and very hard to prove, would curtail the willingness of courts to tolerate both opinion and factual sloppiness where vigorous debate was mandated, the very rule from *Coleman* that was constitutionalized.\(^{38}\)

\(^{38}\) *Coleman*, *supra* note 14 at 287.
When Milkovich corrected the first Gertz dictum mis-step, the Court should have gone all the way – particularly since it purported to safeguard Sullivan and certain audience-sensitive progeny - and corrected the second indefensible statement: “There is no constitutional value in false statements of fact.”

But this is seemingly not what the Chief wanted. Distrustful of the audience’s ability to field most factual falsehoods, the Court lamentably continued the momentum from Gertz and insisted that all utterances about matters of public concern henceforth be scrutinized to detect the possibility of some factual falsehood lurking under the surface of an apparent opinion.

It is time to develop further the strong speech-protective common law tradition explicitly seized by Sullivan to protect not only opinions but false statements of fact as well. This tradition, emphasized quite differently by prominent commentators like Post and Epstein, stresses actual or presumed audience foreknowledge as key to libel suit actionability: where the speaker either provides a factual predicate for the libelous utterance or the audience is assumed to have such knowledge or to be capable of attaining it easily – especially regarding matters of public concern - opinions are protected. The next step, taken in Sullivan, was to protect even false statements of fact where – again – the audience was presumed responsible for attaining a knowledge base adequate to offset the last marginal falsehood thrown at it by a speaker adding to the cauldron of debate – as, say, in Milkovich – on matters of public concern.

IV. Sullivan’s Neglected Second Holding and its Common Law Faith in the Interpreting Audience

A. The Plaintiff-Friendly Common Law of Defamation and


40 Both commentators will be examined further, infra Part VI. See Post, supra notes 1, 6, and Epstein, supra note 6; See also Richard A. Epstein, Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism, 52 STAN. L. REV. 1003, 1014 et. seq. (2000). Interestingly Epstein’s well-spirited respect for Harry Kalven (who was both of our colleagues at the University of Chicago for all too brief a period) also misses Kalven’s delight in the usages of the common law within the great 1964 Supreme Court case. See Kalven, supra note 9.

41 RESTATEMENT (SECOND) OF TORTS, supra note 14. See also FIRST and SECOND RESTATEMENT, supra note 14 (citing both these points).

42 Sullivan, supra n. 4 at 280 (taking up as a First Amendment rule the minority American common law position on matters of public concern from Coleman v. MacLennan, supra n. 14, that “[a]n oft-cited statement of a like rule, which has been adopted by a number of state courts, is found in the Kansas case of Coleman v. MacLennan . . .”). See also infra Part IV (B).
1. Ordinary Defamation Suits

The common law of defamation, as significantly reflected for example in the lower courts of Alabama whose ruling provoked constitutional scrutiny in *Sullivan*, was remarkably helpful to plaintiffs, especially where their suit sounded in written libel as opposed to spoken slander. The burden of proof at least at the outset of the case was satisfied by a showing of a defamatory utterance of and concerning the plaintiff and published to at least one person besides the plaintiff. With some exceptions generally sounding in slander cases, there was no requirement to show fault of any kind, damages of any kind, or even the falsity of the utterance. Defendant was vouchsafed merely a “justification,” namely a showing that the utterance was substantially true, a burden imposed on the speaker and not his target.

2. In Certain Subject Areas, Defendant is Nonetheless Protected

Long before *Sullivan*, however, British and American judges (or, occasionally, legislators) had framed broad exceptions for libel utterances that aimed at subject matters already known or knowable to their audiences. As to core political speech – utterances having to do with public officials or government policies – many authorities listed such comments as non-defamatory, holding that every individual has a right, and not merely a privilege, to make them. Similarly, strong protection was given to vituperative literary criticism.

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43 *Prosser & Keeton, Torts, 5th Edition* (1984) at 771-78. On the general subject of this paper, this Fifth Edition, which of course could not have foreseen *Milkovich*, fairly confidently assumed that “the constitutional privileges are likely to encompass all pure opinions [e.g. those upon a fully stated factual predicate or regarding the privilege of fair comment], even those that have heretofore been regarded as false and actionable that would make the expression of pure opinions non-actionable.” *Id.* at 813.
44 *Id.* at 787-802. An exception for many slander (as opposed to libel) cases existed, but even here courts presumed damages for many merely slanderous utterances. *Id.* at 788.
45 *Id.*, at 839 *et seq.*
46 “Fair reports are privileged, while fair comments, if on matters of public interest, are no libels at all.” Oggers, *Digest of the Law of Libel and Slander, 4th edition* (UK, 1905) at 185.
47 See, e.g., Lord Ellenborough’s decision in *Tabart v Tipper*, 1 Camp. 351 (KB, 1808), in which he is quoted as saying “it is not libelous to ridicule a literary composition, or the author of it, in as far as he has embodied himself within his work; and that if he is not followed into domestic life for the purposes of personal slander, he cannot maintain an action for any damage he may suffer in consequence of being thus rendered ridiculous.” *Id.* at 354. For a brief survey of these early English book review cases, see Post, *Constitutional Concept,* supra note 6, at 629 See also, “Fair
Remarkably similar in analysis and effect is the much more recent American case of *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994), where the DC Circuit held inactionable a book review: “When a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author’s work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation”.

Comment,” 8 Texas LR 41 (1929-30), at 44-50.
No doubt, of course, that vitriol and exaggerated criticism poured upon a
government official or a published book might well have a detrimental effect on a
plaintiff’s reputation; just as often (to this day) political commentators or reviewers of
books may harm themselves more than the subject reviewed by extreme and negative
statements. Those interested in finding out for themselves needed merely to refer to the
data freely available. After all, a political issue or a book under review is optimally
indicative of what we more generally call a “matter of public concern”: it is a self-
contained universe of all the information the interpreting audience will ever need. They
will make up their minds not through litigation but through investigation. The courts can
step aside and let the “marketplace of ideas” resonate and work its will.

Well into the 20th century, there was debate in the UK and the US about whether
comments on matters of public concern were so to be encouraged that – even if false
and defamatory – they might be thought of as the speaker’s “right”. But by the end of
the 19th century, the common law in both countries largely saw comments on publicly
important matters to provide a qualified privilege to defendants who could not “justify”
their defamatory utterances by proving their substantial truth. The privilege of “fair
comment,” which in England has been embodied statutorily, was generally called the

48 The later constitutional-level term used of course by Justice Holmes dissenting in Abrams v.

49 See, eg, South Betton Coal Co. V North-Eastern News Association, 1 QB 133 (Court of
Appeal, 1894) at 143. See also, eg., Dix W. Noel, “Defamation of Public Officers and
Candidates,” 49 Columbia L Rev 875 (1949), at 877: “There is controversy as to whether fair
comment is to be regarded as privileged defamation or as entirely outside the scope of actionable
defamation.” Note, however, that the “right-not privilege” approach – now generally discarded –
was a double-edged sword for some defendants, and perhaps particularly those who could not
prove the factual predicates on which they laid their “right” to comment, at which point for many
authorities, the “right” disappeared altogether; see, e.g. RESTATEMENT (FIRST), supra note .
14 at cmt. b: “It was the first, or pure, type of expression of opinion to which the privilege of fair
comment on matters of public concern was held to apply. [However, s]ome courts and
commentators took the position that the true explanation of the defense of fair comment was not
that the statement was made on a privileged occasion but that, not being actually a false
statement of fact, it could not be a defamatory communication. The first Restatement of Torts set
out the principles of the privilege of fair comment in Sections 606-10; it did not espouse this
position.” The “right” in other words ended exactly where the majority
privilege jurisdictions placed it prior to Sullivan at the first appearance of a factual error. See
also discussion at infra, note 83.

50 See, e.g., Dix. W. Noel , supra n. 49 at 878. A leading British book review case, after
finding little practical difference between the right and the privilege, opted for the latter; see
McQuire v Western Morning Newspaper, 2 KB 100 (1903) at 112. See also Prosser, supra n.43,
at 824.

51 Fair Comment. In an action for libel or slander in respect of words consisting partly of
allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail
privilege of fair comment on matters of public concern.\textsuperscript{52} A non-justifying defendant asserting this privilege might prevail (despite the inability to “prove” substantial truth) unless the plaintiff defeased the privilege by showing one form or another of “malice”.\textsuperscript{53}

\textsuperscript{52} See \textsc{Restatements (First and Second) of Torts}, supra notes 14,31.

\textsuperscript{53} \textsc{Prosser}, supra note 43, at 832-35.
However, a major issue remained to be settled, one that in a real sense awaited *Sullivan* for its ultimate resolution: did the privilege of fair comment help a defendant who based his “comment” (or opinion) on a fully stated but ultimately false factual predicate? Although all authorities seemed to concur that “harmless” or “minute” factual errors did not obliterate the privilege, a real split occurred – especially in the United States – as to whether factual falsehoods closely tied to the defamatory opinion either would be protected (the “minority rule”) or would utterly destroy the privilege *ab initio* (the “majority rule”).

B. *Sullivan’s* Second Holding, All but Forgotten in *Milkovich*

1. The Old Way: Factual Falsehoods Actionable

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54 See *South Betton Coal*, *supra* n. 49 at 144, among many authorities.
55 See discussion, *supra*, at notes 14 and 24.
If the privilege created by common law had been understood to give safe harbor to the kinds of utterances litigated in *Sullivan*, for example, Prof. Epstein would have been correct when he suggested in a famous article published a score of years after that case, that the Warren Court over-reached by not relying on available common law privileges. But in one such area scanted by Prof. Epstein although absolutely crucial to an eventual understanding of the First Amendment (and *Milkovich*’s warping of doctrine to narrow its protections), a majority of American states had – prior to *Sullivan* – dis-protected factual falsehoods predating defamatory opinions. Although in England, there was always voice for the idea that the audience should be trusted on matters of public importance to work its way through to the truth, as long as the full factual record (true or with some significant errors) was stated by the speaker or known generally, even in the early book review cases the privilege disappeared if

56 Epstein, suprana note 5, at 791. Epstein locates two narrow areas in which the N.Y. Times Court might have less intrusively reversed the Alabama courts: (1) a result he could have applauded because the civil rights component of the case called for at least some constitutional-level scrutiny, and (2) the lower court’s abuse of the “of-and-concerning” test and its permissive awards both of general and punitive damages against the Times, id. at 787-94. The Supreme Court was mindful of both these problems below; however, it explicitly sought resolution of the more portentous common law question discussed throughout this Article and especially in this Part. Perhaps remarkably enough, in his brief discussion of relevant common law privileges, Professor Epstein minimizes fair comment, the one of course most at play in *Sullivan*, suprana note 4, at 785-86. For the implications of Epstein’s various forays into *Sullivan*and its progeny, see infra Part VI.


58 See, eg. Odgers, Digest of the Law of Libel and Slander, 4th edition (UK, 1905), suprana note 14: “Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion [Milkovich, avant la lettre, but leading to an opposite conclusion about the audience’s interpretive function?]. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that ‘such conduct is disgraceful,’ this is merely the expression of his opinion, his comment on the plaintiff’s conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables the readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth.” Id. At 192-3. Note, of course, that in *Milkovich*, as in *Sullivan*, the full factual predicate has been set out by defendant, albeit making some errors. *Sullivan* understood that the errors should be part of the evidence weighed by the audience about the defendant’s ultimate judgments; the 20 year old case fell off from that idea.

59 Bk review cases redux: going outside the book meant trouble, cites compare in the book review cases those who would not permit the reviewer to depart substantially from details
defendant departed from a virtually error-free factual basis for the comment or opinion. Since this meant that the privilege still required largely what the separate defense of proving truth had already imposed on defendants, going beyond a fully accurate factual base to springboard to a defamatory comment usually eliminated the defendant’s privilege. So the mainstream common law approach to the privilege of fair comment on matters of public concern eventually did not protect comments based upon false statements of fact, and it was this so-called American “majority rule” that prevailed in the courts of Alabama against the Times. If the Sullivan had not corrected this and explicitly adopted the “minority rule” of Coleman, almost all the First Amendment juice – both doctrinal as to matters of public concern and aspirational as to zesty debate and knowledgeable audiences – would have been sapped from the decision. It would not have done anywhere near the same work if, on the analysis offered by Prof. Epstein, only the “of and concerning” and “damages” components of the Alabama judgments had been corrected.

The advertisement in Sullivan – famously or infamously depending on one’s perspective – was replete with factual falsehood. Unable to “justify,” the

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60 See, eg, the form of the wording of the 1952 English statute cited, supra at note 51, suggesting at the end that the defendant still must prove at least the factual basis relevant to the alleged defamation.

61 The majority rule in effect replicated for matters of public concern the traditional necessity for a defendant to “justify”– to prove the substantial truth of the statement. It is to this version of the rule – and not Sullivan’s correction of it, that Rehnquist cites in Milkovich, supra n. 1, at 18-19.

62 In Coleman, 98 P. 281, supra note 14, defendant newspaper had misstated certain facts about plaintiff, who was running for public office though he was not a public official. Judge Burch, paradoxically foreshadowed Chief Justice Rehnquist by seeing no bright line distinction between fact and opinion; however he concluded – and Sullivan constitutionalized his rule, see supra note 22 and accompanying text, – that the absence of such a bright line meant that factual statements eventually seen to be false should be protected where audiences have the capacity to figure things out themselves.

63 Epstein, supra note 5. See Part VI for political implications of Epstein’s missing this point in his later analysis of libel law in Was Times Wrong?, supra note 39, at 1012-17.

64 Such factual falsehoods include the following: the students sang the National Anthem, not the reported “My Country, ‘Tis of Thee”; nine students were expelled for demanding service at a lunch counter, not for the reported leading of the demonstration; most of the student body protested the expulsion by boycotting classes, not the reported the entire student body refusing to re-register for classes; the dining hall was not padlocked as reported; Dr. King was arrested four times, not the reported seven times; the police attempted to find those responsible for bombing Dr. King’s house, not the reported
Times’ lawyers tried out the privilege of fair comment on matters of public concern. But on the understanding of the common law – faulty as we shall see – not only in Alabama but most American courts as well – no privilege was available even upon stated (but false) factual premises. Thus, in the courts below, the newspaper had no central free speech argument to make. This had to be corrected, and there was no need to write on a blank slate.

2. Understanding Sullivan’s common law: articulated false statements of fact protected

When the Warren Court handed down the Sullivan decision, it had a wealth of common law defamation knowledge and case-law at its disposal, and it used these tools well. The Court did not need to address the troubling issue of whether facts and opinions were easily separated for free speech purposes (this awaited the infamous Gertz dictum and the strange speech-limiting logic of the dissolution of the dichotomy in Milkovich), for there simply was no getting around the record below: the newspaper had predicated its critique of Alabama’s law enforcement on several directly relevant factual errors. Would this erroneous predicate be protected as much as the comment or opinion on the civil rights movement that formed the heart of the advertisement? (Reporter Diadiun’s factual errors in Milkovich later were explicitly made vulnerable to a jury award.) Much of the common law sophistication as to the nature of language, and as to the way even seeming defamation loses its sting in some contexts where knowledgeable audiences can deflect the power of literal language – much of this fortuitous

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65 Id. at 267.
66 Harry Kalven recognized this and celebrated it in his The New York Times Case: A Note on the Central Meaning of the First Amendment, supra note 8, at 191, 195 and n.18.
67 See supra, note 64.
melding of First Amendment and long-standing rules of defamation has been lost in the years following Sullivan; but it was essential to the reasoning and to the holding of that case. Because the High Court’s personnel shifted so radically within 10 years of the decision, Gertz\(^{68}\) paid homage to the great case by limiting that holding to the famous one everybody knows: a defamation plaintiff who is a public official must prove that the allegedly defamatory utterance was made either with knowledge it was false or with reckless disregard for its truth or falsity.\(^{69}\)

When Milkovich went out of its way to console the First Amendment defense bar that it was not tampering with the Sullivan holding, it disingenuously preserved only the first “actual malice” rule while severing the equally vital protection of factual falsehood in public debates that Sullivan had constitutionalized. Missing altogether, despite the nature of the fact/opinion question and its utter proximity to the rest of the Sullivan case, was the second holding in the seminal Warren Court opinion, the one that took up the common law of Kansas and raised its “minority” rule on matters of public concern to the status of a First Amendment icon: Sullivan held, factual falsehoods as well as comments or opinions are protected unless the defendant’s malice is proven.\(^{70}\)

3. The Integration by Sullivan of the Audience-Trustung Free Speech Tradition

\(^{68}\) Gertz, 418 U.S. 323 at 339-40.
\(^{69}\) N.Y. Times, 376 U.S. at 279-280.
\(^{70}\) See, e.g., text at supra n. 37.
The key to understanding the pre-Milkovich, fully constitutionalized minority common law rule returns us, again, to the audience to potentially defamatory utterances. The common law, first, in deciding whether “opinions” could ever be actionable, concluded negatively if the opinion was “pure”, i.e. if it was based on fully disclosed or ascertainable facts – false or true – or on a fully ascertainable record, such as a book under review or a matter of general public concern within a given community, such as Coach Milkovich’s obsessed Cleveland suburb. It permitted opinions to be actionable only if the opinion was based on undisclosed factual predicates. These latter are called “mixed opinion” statements, and the problem with them is precisely and solely that the audience has no knowledge on which to judge the opinion, because some or all of the speaker’s factual predicate for it has been withheld. Once the speaker reveals the factual predicates – and irrespective of the truth or falsity of such predicates – the statement is protected. The audience is capable now of judging the full statement. Nothing has been left out. It was not relevant to those re-stating the law of libel, particularly as to matters of public concern, whether the factual predicate was false or true: the audience would do the interpretive work:

Criticism of so much of another’s activities as are matters of public concern is privileged if the criticism, although defamatory, (a) is upon (i) a true or privileged statement of fact, or (ii) upon facts otherwise known or available to the recipient as a member of the public.

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71 RESTATEMENT (SECOND) OF TORTS SECTION 566, supra notes 14,31 at cmt. b; see also PROSSER, supra note 7.

72 Id. For example, the RESTATEMENT (SECOND) OF TORTS offers this actionable hypothetical: “A writes to B about his neighbor C: ‘I think he must be an alcoholic.’ A jury might find that this was not just an expression of opinion but that it implied that A knew undisclosed facts that would justify this opinion.” Id. at cmt. c, illus. 3. For a post-Sullivan but pre-Milkovich case following this approach and allowing further libel action for a statement upon undisclosed facts, see Falls v. Sporting News Publ’g Co., 834 F.2d 611 (6th Cir. 1987). This case remains consistent with Sullivan and the audience policies therein.

73 Id. at cmt. c, illus. 4: “A writes to B about his neighbor C: ‘He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.’ The statement indicates the facts on which the expression of opinion was based and does not imply others. These facts are not defamatory and A is not liable for defamation.” Note that this example is almost identical to the situation in Milkovich that produced the climactic statement “Milkovich is a liar.”

74 RESTATEMENT (FIRST) OF TORTS, supra note 14, emphasis added. Accord, in celebrating Sullivan, Prof. Kalven, supra notes 9 and 66, who had his ear to the pulse of this great audience-reliant tradition: “. . . what is really involved is the degree to which the
Many American courts misunderstood this authoritative essence of the common law privilege and went on to require *factual truth*, precisely the requirement already present in the defense of justification (and hence adding nothing at all to the defendant's arsenal). Sullivan – far from, finding fully revealed yet false factual predicates to be harmful or even regrettable, reinstates the best wisdom from the common law: audiences do the work, and factual falsehoods instigate in them even further research and an even greater zeal to correct the present record.

At least since the early 19th century English cases on literary criticism, there should have been little doubt that the judges reduced the probability of successful libel suits because they expected informed readers of book reviews to do the work themselves of testing the reviewer’s statements, no matter how outrageous or even false. (In much the same way as I write these words in the Fall of 2009, the “town hall meetings” on Health Care have produced inflated and often false rhetoric; yet the town hall meeting is a quintessential First Amendment medium, and no listener on health care is presumed not to have the ability to field even factually erroneous statements on such an expansive and public matter.)

However, a majority of American courts gradually came to misunderstand something about the privilege, and – deliberately or negligently – Chief Justice Rehnquist reasserts the misunderstanding in Milkovich, a misunderstanding that was by then not only of common but also of constitutional dimension:

It is worthy of note (says the Chief, disingenuously) that at common law, even the privilege of fair comment did not extend to a “false statement of fact, whether it was expressly stated or implied from an expression of opinion.”

The statement, at a crucial juncture in the opinion, disregards rhetorically two crucial aspects of the “common law” it cites: first, common law judges utilizing the privilege had divided on whether it also protected factual falsehoods; second, Sullivan had dipped down into a key strand of that very “common law” to protect fully revealed if ultimately inaccurate factual predicates for comments on matters known to the audience. The Milkovich opinion artfully admits the first...

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75 See supra discussion notes 17 and 47.
76 Compare in this audience-confident sense, Bresler, supra n. 13, the factual falsehood of which arose from a town hall meeting and was protected as hyperbole. See infra Part V and, e.g., discussion of town hall meeting context at infra notes 85 et seq.
77 Rehnquist’s restatement of prior law is typically double-tongued. See supra, notes 7 and 24. The minority rule, constitutionalized by the very precedent he purports to retain, fails to appear and is violated by the discussion and the holding. See Weisberg, “How Judges Speak,” supra n. 7 for a detailed analysis of a similar distortion of a different aspect of libel law in the earlier case of Paul v. Davis, 424 U.S. 693 (1976). He does not choose to rely on Milkovich being a private figure and hence needing to show less than Sullivan malice; rather he fully depends on a “majority” approach to the privilege on matters of public concern that he knows had been rebuffed forever in that seminal earlier case. This is somewhat akin to Rehnquist’s citing Iago’s infamous statement to Othello on reputation without revealing something just as obvious: Iago is one of Shakespeare’s most deviously articulate villains! Milkovich, supra n. 1 at 11.
78 See id. at 18-19.
while negating the latter:

[D]ue to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of “fair comment” was incorporated into the common law as an affirmative defense to an action for defamation. “The principle of ‘fair comment’ afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.” 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956) footnote omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. See Restatement of Torts, supra, § 606. “According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion.” Restatement (Second) of Torts, supra, § 566, Comment a. Thus under the common law, the privilege of “fair comment” was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech. 79

A more forthright exposition from the latter passage to the situation before the Milkovich courts should have thoroughly rehearsed the minority rule that exists in Rehnquist’s formulation only by negative pregnant, i.e. by the mention of the “majority rule” and that rule alone. But where there is a majority rule, as we have seen exemplified already as to the fact/opinion conundrum regarding matters of public concern, there is also a minority rule. No decision preserving Sullivan as a precedent should have overlooked its adoption -- as a matter of constitutional law -- of that very minority rule: 80

We consider this case [Sullivan] against the backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open... Erroneous statement is inevitable in free debate and must be protected. 81

Instead, the Chief’s conclusions roll back the clock to the pre-Sullivan and Coleman 82 “majority” rule, re-instating what Sullivan had changed, so that, as per

79 Id. at 13-14. (internal citations included within the text).
80 See supra notes 41-48 and accompanying text.
81 N.Y. Times, 376 U.S. at 270-271 (citing Coleman v. MacLennan, supra n. 14).
82 See id. at 254.
the discarded rule: 1. the common law privilege of fair comment does not protect utterances on matters of public concern containing at least one express false statement of fact; 2. more generally, opinions lacking such a false factual predicate may still imply a false statement of fact and hence be unprotected; and 3. on matters of public concern, the audience should not be presumed capable of finding the full factual record and hence deflecting the defamatory effect of either “1” or “2” above. These assertions, nested in an opinion ostensibly safeguarding Sullivan’s First Amendment reasoning, negligently or wilfully re-instated the Alabama courts’ approach to freedom of speech when Sullivan first brought his lawsuit.

Part V. The “Hyperbole Cases” Wrongfully Distinguished

\[83\] Milkovich, supra note 1, at pages 14 and 20.
A. Rehnquist’s Neglect of the Audience in the Hyperbole Cases

Perhaps no First Amendment doctrine more explicitly relies on what I have called the “interpreting audience” than a series of post-\textit{Sullivan} cases sounding in hyperbolic or utterly unrealistic utterances accused of being defamatory. \textit{Milkovich} wrongfully distinguished these cases from the one at hand, and badly compartmentalized them, hence reducing their value to vital First Amendment discourse. Although, of course, they did not involve the \textit{precise} fact-opinion dichotomy resolved in \textit{Milkovich}, their logic should have protected reporter Diadiun’s statement on grounds fully related to that dichotomy. So while the Chief’s rhetoric re-assures by purportedly safeguarding \textit{Sullivan} and these progeny cases, supposedly providing sufficient "breathing space" for freedom of expression,\textsuperscript{84} his focus for the Court on detecting any possible factual component that can be proven false cabins if not eliminates the hyperbole exemptions. The majority -- as it hand with \textit{Sullivan} itself -- thus strips the hyperbole precedents of much of their meaning.

In \textit{Greenbelt vs Bresler},\textsuperscript{85} the word “blackmail” was used on the floor of a town hall meeting during a fiery debate on plaintiff’s request for a zoning variance so he could build commercial property. The town looked like it would give him the variance in exchange for other property he owned. “Blackmail!” shouted a person at the meeting, and the remark was reported in two consecutive articles by the local newspaper.

Now “blackmail” — like reporter Diadiun’s “lying under oath” — looks like the primal eldest sin against defamation plaintiffs: the (false) accusation of a serious crime. But Justice Stewart had more faith in the audience than his future colleague and eventual chief. After running through the (then) boilerplate about the constitutional \textit{usefulness} of false statements of fact,\textsuperscript{86} The Court dismissed Bresler’s complaint on First Amendment grounds as follows:

It is simply impossible to believe that a reader who reached the word “blackmail” in either article would not have understood exactly what was meant: It was Bresler’s public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with

\textsuperscript{84} \textit{Milkovich}, supra n. 1 at 19 (citing language from \textit{Philadelphia Newspapers v. Hepps}, 475 U.S. 767 (1986)).

\textsuperscript{85} \textit{Bresler}, supra n. 13.

\textsuperscript{86} \textit{Id.} at 10.
the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler’s negotiating position extremely unreasonable.\textsuperscript{87}

\begin{flushright}
\textsuperscript{87}Id. At 14.
\end{flushright}
Three years later, in a comparable case arising during a labor dispute, Justice Marshall found that the “ordinarily heated” stuff of strikes and unrest protected even more extensive attacks on character. Defendants had labeled plaintiffs “scabs” and then embellished by citing Jack London’s scurrilous definition, which involved treachery and worse:

Vigorous exercise of [the labor] right “to persuade other employees to join” [internal cite omitted] must not be stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact . . . [S]tatements of fact or opinion relevant to a union organizing campaign are protected by Section 7 [of the NLRA] even if they are defamatory and prove to be erroneous.

In such a context, the Court found (citing Bresler and the then still operative Rosenbloom v. Metromedia, Inc.) that it “is similarly impossible to believe that any reader of the [defendants’ newsletter] would have understood the newsletter to be charging the appellees with committing the criminal offense of treason . . . [as opposed to a] lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.”

These cases explicitly give full faith and credit to the audience to do its own interpretive work and to sort the wheat from the chaff, whether in the domain of fact or opinion. Although he retains these cases, the Chief’s Milkovich rationale never explains why the audience can “do the work” with rhetorical hyperbole cases, yet cannot engage in the same discerning process with statements regarding matters of public concern. Even the dissenting justices’s confidence in the audience to interpret on their own public concern utterances is, at best, mixed.

89 Id. at 277-78.
90 Id. at 280.
91 403 U.S. 29 (1971), cited in Letter Carriers, 418 at 281. Rosenbloom had too short a life. Another disastrous move made in Gertz, 418 U.S. 323, was to overrule the plurality opinion holding even private figure plaintiffs to the N.Y. Times burden where the utterance was on a matter of public concern.
92 Letter Carriers, supra note 23, at 285-86.
93 Milkovich, supra n. 1, dissent at 18-19 The dissent at least recognizes the close connection to Diadiun’s sports column of the hyperbole cases and then tries to add a new protected category of expression by calling Diadiun’s utterance “conjecture”, id. at p. 34. The dissent makes its major point perhaps in stressing the audience’s sensitivity to the context and tone of Diadiun’s column: “Diadiun’s assumption that Milkovich must have lied at the court hearing is patently conjecture. . . . Diadiun not only reveals the facts upon which he is relying
but he makes clear at which point he runs out of facts and is simply guessing. . . . Furthermore, the tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage” Id., at p. 29. Yet the two-justice dissent is ultimately disappointing, see supra n. 13, because it accepts fully the majority’s process of searching for and then making actionable anything that might look like a factual falsehood, id at p. 25. This means, simply, that all nine Milkovich justices agreed that the more realistic-sounding an utterance – see, eg, infra note 95 – is found to be, the more the audience will need a court’s patronizing protection to uncover some factual falsehood within it. This is, as I have been arguing, not only bad doctrine but also a fundamental reversal of Sullivan, which never saw potential or actual error as scary to an informed listener.
The *Milkovich* majority also explores and distinguishes a variation on the hyperbole precedents, *Falwell vs Hustler*. In that case, – authored by Chief Justice Rehnquist – the absence of “factual” material in an ad parody was held to prevent the plaintiff from satisfying his *Sullivan* malice burden in a suit sounding in intentional infliction of emotional distress. That case marked a subtle departure from the mainstream hyperbole doctrine, which was less interested in whether there was a realistic sounding factual component to the utterance that could be proven false then it was in the audience’s ability to interpret within certain contexts the meaning of both factual and non-factual statements. Even given this important and unfortunate move towards “factual policing” – as I call it – the Chief might have better explained why a reasonable audience can discount *Falwell’s* crude Campari ad (“You never forget your first time”) as parody, but cannot interpret for themselves the believability of statements made in Diadiun’s article regarding a matter with which the whole community was conversant.

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94 *Falwell*, 485 U.S. 46. The ad-parody portrayed Falwell sleeping with his mother in an outhouse under the rubric “You never forget your first time.”

95 Interestingly, *Hustler v. Falwell* at one point hints at the audience-interpreter’s powers: but these are limited to the reader’s ability to interpret the advertisement as a parody, not an assertion of fact. For the shifting, fact-skeptical First Amendment conjured by *Hustler* begins to draw a fearful line wherever an utterance might be seen as attempting to convey “facts”, instead of trusting the audience to use the context to parry even realistic and factually false statements. *See* Brief of the Law & Humanities Institute as Amicus Curiae Supporting Petitioners, *Hustler Mag. v. Falwell*. The LHI brief, co-authored by the present writer, sought a rule protecting not only wildly unbelievable imaginative depictions but also realistic expressions of the imagination that more likely gave the appearance of communicating “facts”. To this day, realistic films and novels, for example, do not enjoy constitutional protection, see *Bindrim v Mitchell*, 92 Cal App3d 61 (Cal App, 2d Dist, 1979), *cert. denied*, 444 US 984 (1979), *rehearing denied*, 444 US 1040 (1980), though audiences recognize that even clearly identifiable plaintiffs are unlikely to be harmed through the medium of imaginative expression, however “realistic”.

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Milkovich finds that the statements made in the article were not "the sort of loose, figurative, or hyperbolic language" that would find constitutional protection. 96 In order to do this, the majority shifts from an audience based analysis to one predicated on Diadiun’s intention: the defendant, says the Court "seriously maintain[ed]" that Coach Milkovich committed perjury during his questioning. 97 But this analysis as to intention transmogrifies Justice Stewart’s audience-sensitive approach to “blackmail” or Justice Marshall’s similar sense of “scab” into a scary communication (“liar” – or even “liar under oath”) that the audience simply cannot field without judicial assistance; Milkovich also limits Rehnquist’s own reasoning in Falwell, where the question for the courts was whether the statements made would “reasonably [be] interpreted as stating actual facts.” 98 Although this formulation fatally stigmatized factual utterances, it at least had the merit of focusing less on the intention of the writer than the ability of the audience to interpret the statements.

In Milkovich, then, there is considerably less deference to the audience than in the Bresler- Falwell precedents. The majority is flatly uninterested in the audience’s own fore-knowledge of the Cleveland-area dispute. Presuming a defamatory intent, and looking only at the uncontextualized word “liar,” the Court finds an absence of “loose, figurative, or hyperbolic language.” 99 It progresses to the provability of factual-seeming words like “liar,” hence redirecting analysis of statements or misstatements of fact away from audience cognition towards a “plain meaning” determination of whether a statement or word can be verifiably false. This is inconsistent with all earlier Supreme Court doctrine – even including the Chief’s own contribution – which welcomed even factual falsehoods to the debate once in the interpretive hands of a knowledgeable audience.

B. Milkovich’s Move Towards “Quality Control” and “Fact Policing”

The constitutional value of a robust, wide-open, public debate and its acceptance of even false statements of fact depend largely on the First Amendment community’s judgments at any given time about both the speaker’s freedom of speech and the audience’s ability to listen, to interpret, and to re-engage in public debate. There is no theoretical difference between an audience that can distinguish rhetorical hyperbole and an audience that participates in a robust debate on public matters of concern—the audience is the same. Furthermore, an audience that already has a knowledge base has the informed ability to judge for itself the merit of each new related utterance. Yet we have seen Milkovich to strip earlier doctrine clean by adopting a patronizing judicial

96 Milkovich, supra n. 1, at 21.
97 Id.
98 Id. at 20 (citing Hustler Mag. v. Falwell, supra n. 94, at p. 54).
99 Id. at 21.
control over the vast majority of utterances -- those do not indulge in fantastical or exaggerated speech.

_Milkovich_ makes judgments about the “quality” of contentious speech;\(^{100}\) however, this is inconsistent with _Sullivan_’s notion that the audience, and not the courts, should make such judgments. Policing false statements of fact, what had for a quarter century or more been left to the interpreting audience, had become perhaps the most important function of the courts relative to freedom of speech.

As we have seen, Chief Justice Rehnquist’s pervasive methodology in _Milkovich_ is to pigeonhole the Court’s leading First Amendment precedents and to put them in a “lock-box” as though they had little or nothing to do with the free speech issues central to the case at hand. Thus _Sullivan_ is relegated virtually to its narrow (if admittedly key) “actual malice” rule, while bottled and corked are all its common law juices about the audience and its ability to field factual falsehoods as well as defamatory opinions. Similarly and in some ways more surprisingly still, the leading cases on hyperbole\(^{101}\) and intrinsically non-factual utterances\(^ {102}\) are diminished and their obvious audience-related lessons for the instant case unexplored or ground down.

VI. The Citizen Value Behind the Interpreting Audience Approach: An Answer to Post and Epstein

A. Why Projecting False Statements into the Public Discourse Enhances Both Citizen and Community

1. A tradition of speech as “venting”

The struggle at common law and within free speech (and First Amendment) theory and doctrine to preserve a valued place for factual falsehood goes back to Milton and Mill.

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?\(^{103}\)

\(^{100}\) _Milkovich_, 497 U.S. at 16. Professor Epstein also adopts this fallacy. See infra, n. 106.


\(^{102}\) _Falwell_, supra n. 94; see also _Pring v. Penthouse Int’l Ltd._, 695 F.2d 428 (10th Cir. 1983).

\(^{103}\) JOHN MILTON, AREOPAGITICA (1644). See also JOHN STUART MILL, ON LIBERTY 78 (Michael B. Mathias ed., Agora Publications 2003) (1859): “We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it
would be an evil still.” Although Mill (unlike Milton) speaks pervasively of opinions, it is clear that factual falsehoods are embedded in the generalized liberal argument: “Very few facts are able to tell their own story, without comments to bring out their meaning,” id. 80. As though reflecting the then-developing common law of fair comment on matters of public concern, see supra notes 14-18 and Part IV, Mill sees the reciprocity between a factual predicate (true or false) and the “story” derived from that base in the form of an opinion (right or wrong).
Of course 20th century history has put us on our guard about truth’s capacity to withstand and defeat factual falsehood, or indeed other kinds of verbal falsity.\textsuperscript{104} The liberal speech orthodoxies are challenged by models of a kinder and gentler discursive universe in which falsehoods are punished and everyone just feels a lot better. Nonetheless, it is of the utmost importance, in my view, both to resist incursions on the traditional welcoming of the statements we abhor and to be very skeptical that communal hatred arises largely through the liberation of speech acts as opposed to negative values that are inculcated in people early in their lives and need little verbal prodding thereafter. Some prejudicial inculcation is ethnic and religious, and if one were to hope for improvement through regulating falsehoods, one would have to start with texts that are too “sacred” to censor. But the main point remains that it is better to deal with hateful speech (and certainly with the more venial categories of speech we have seen in these cases) than to suppress it and let wrong ideas simmer until they reach physically violent dimensions.\textsuperscript{105}

The notion that “bad” speech should generally be uncensored and that audiences normatively discount the effect of speech in figuring things out is part of our founding heritage. Thomas Jefferson spoke of criticism of government as the cheapest way for leaders to absorb and deflect words used against them (hence his antipathy to anything like Seditious Libel statutes and his very probable admiration for Sullivan, which he might have authored himself):

This formidable [verbal] censor of the public functionaries, by arraigning them at the tribunal of public opinion, produces reform peaceably, which must otherwise be done by revolution.\textsuperscript{106}

2. Speech as a “Cloudy Medium”

\textsuperscript{104} See, e.g., Frederick Schauer, \textit{Free Speech, a Philosophical Enquiry}, reprinted in \textsc{John H. Garvey and Frederick F. Schauer, The First Amendment: A Reader} 67-68 (2d ed. 1996).

\textsuperscript{105} As a scholar both of the Holocaust and of the First Amendment, I am convinced that Hitler and his allies in various European countries came to power because of ingrained attitudes inflamed by economic crisis or professional weakness and not by the latest speech acts of bad men, no matter how pernicious. \textit{See Richard Weisberg, Vichy Law and the Holocaust in France} (1996); recent attempts to paper over long-standing underlying attitudes of racial or ethnic hatred by regulating peacemeal some hateful speech acts are badly misguided.

\textsuperscript{106} Letter to Noah Webster (1790), \textit{cited in Garvey and Schauer, supra} note 92, at 7. As Thomas Emerson later restated this view – predicated on the cheapness of speech as the reason to liberate it: “[E]xpression is normally conceived as doing less injury to other social goals than action.” \textit{Toward a General Theory of the First Amendment, cited in id.} at 50.
Furthermore, our Framers had a precise view of the effect of language on *audiences* that they articulated early. In Federalist 37, Madison discusses the difficulty of communicating facts and opinions regarding the proposed Constitution even to audiences rationally disposed to hear them. The problem, however, lay not with the audience but instead with the confusing nature of language itself:

Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the *cloudy medium* through which it is communicated.\(^\text{107}\)

Audiences would figure things out, but on far less than perfect information. This theory, which pre-figures similar modern and post-modern approaches to language this Article can do no more than reference,\(^\text{108}\) holds speech out both as cheap in some sense and indeterminate in all senses.

Judges, on these views of language, should fear not one whit a citizen-audience’s response to defamatory speech acts. Such a fear, everywhere identifiable from *Gertz* through *Milkovich*, assumes both that somehow language can be clarified and placed into boxes to make it more or less palatable and that

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audiences are incapable of determining meanings appropriate to a speech act context without assistance from judges and even from Constitutional Law.

Instead, the citizen conjured in the first four head-notes to this Article should be trusted to reach “the final verdict” on the accuracy and the expediency of a statement. In 2010, we do not need constitutional doctrine that drives people into a passive sense that they cannot do as well as experts or judges in clarifying through contextual interpretation the inevitably “cloudy medium” of language.

B. Profs. Post and Epstein: Fearful of Speech, Skeptical of the “Interpretive Audience”

Some superb constitutional thinkers have lost their way, in my view, on the basic inspirational elements of Sullivan and its progeny and have either accepted either those “false prophets” – Gertz and Milkovich – or would retreat to ancillary areas of common law doctrine while sleighting those areas this Article (through Sullivan) has emphasized. I have argued throughout against their positions on the doctrinal level, piece by piece. But more globally, I believe their positions construct a citizen-audience incapable of figuring things out on its own.

For Prof. Epstein, the constructed citizen-audience is a passive receiver of information needing firmer rules (mostly plaintiff-favorable) to find its way to truth or falsehood:

Indeed, it is not surprising that the plaintiff’s level of frustration is so great in defamation cases precisely because of the frequency with which the defendant avoids the only issue that matters to the plaintiff – falsehood, which could allow rehabilitation of the plaintiff’s reputation. [cite omitted] The public, too, is a loser because the present system places systematic roadblocks against the correction of error.109

The citizen-listener in fact disappears from Epstein’s analysis after a very quick and dismissive mention of “a third party” to the defamatory utterance itself.110 He does allow, as to group libel, that the audience “will know or at least intuit” the falsity of a statement made about a class of persons.111 Inexplicably, this faith in the informed listener (or just maybe the intuitively sound listener) does not carry over to the mainline tradition of cases we have been discussing.

109 Epstein, Was Times Wrong?, supra note 6 at 814.
110 Id. at 785.
111 Id., at 793.
So it falls to a strongly enforced set of legal rules to assure a higher quality of speech – “the best kind of public debate”\textsuperscript{112}. This is decided by the rule makers. But instead, we might better rely less on quality than on quantity (particularly in an internet age), and trust the citizen-listener to know, learn more, correct, and decide.

\textsuperscript{112} Id. at 799. See discussion \textit{supra} note 100.
Prof. Post’s citizen-listener is different from Prof. Epstein’s, but his skepticism towards the audience–trusting Sullivan model is just as palpable. Sullivan/Coleman’s identification of factual falsehood as a key element in discussing matters of public concern troubles Post greatly, and he gives the tradition short shrift. Defamatory falsehoods, for Post, can destroy individuals and communities, which are often incapable of self-protection and hence need the occasional help of legislators and courts. This top-down punishing of discourse deemed to be threatened is served by Prof. Post’s support for the majority rule on the privilege of fair comment on matters of public concern, which in that form “subordinated [public] discourse to community notions of propriety and decency.”

There is no room for factual falsehood in this vision, and there is a consequent downplaying of the role of the interpreting citizen, similar to the diminution we have seen in Gertz, and then Milkovich.

Post wants a kinder, gentler world of words. He seems to want to make speech “better,” but, unlike Epstein, his polestar is less restoring the individual plaintiff’s reputation by punishing falsity than it is instilling “community norms” of “constructive public debate.” To this extent, he is a worthy representative of those who, comparatively to American traditions, balance speech with notions of community, equality, and especially dignity. Those noble abstractions vie with the individual’s unlimited right to speak aggressively and sometimes falsely, and this creates a First Amendment “paradox,” at least for Prof. Post:

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113 See discussion supra note 24. Professor Post also wonders if courts have a good grasp on how to identify matters of public concern at all, reflecting a mis-placed skepticism that began in the disastrous Gertz case, supra n. 8; see Post, The Constitutional Concept, supra note 6, at 679. But there is little evidence that judges across the centuries have had real difficulty spotting what counts for a community as public discourse as opposed to what is merely trash-talk, gossip, or some other form of merely privatized verbiage.

114 Post, The Constitutional Concept, supra note 6, at 685. Post interestingly and predictably, admires the group libel decision in Beauharnais. [Cite (probably Id.)]

115 Id. at 629.

116 Gertz, supra note 8 and discussion supra Part III.

117 See discussion in Part IV.B.

118 Id. at 604-605.

119 See, e.g., the emphasis on “dignity” in the European Convention on Human Rights, art. 10; Universal Declaration of Human Rights, art. 19; sections of the Canadian Charter. I have tried to suggest earlier in this Section that dignity, as especially conceived post-World War II, will not be reconstructed through regulation of speech, no matter how bad or false or hateful. Dignity will arise through rehabilitation of underlying attitudes learned early, often from texts that will never be censored, some Biblical in proportion.
The real problem with contemporary doctrine is . . . that it fails to articulate with sufficient clarity what is actually at stake in the definition of public discourse. We need to establish a domain of public discourse that is amply sufficient to the needs of democratic self-governance, but that is also reasonably sensitive to competing value commitments, to the pre-existing social norms that define the genre of public speech, and to the social consequences implied by the paradox of public discourse. . . . The first amendment preserves the independence of public discourse so that a democratic will within a culturally heterogeneous state can emerge under conditions of neutrality, and so that individuals can use the medium of public discourse to persuade others to experiment in new forms of community life. The ultimate dependence of public discourse upon community life, however, suggests that this neutrality and freedom is always limited, for the very boundaries of public discourse must be located in a manner that is sensitive to ensuring the continued viability of the community norms that inculcate the ideal of rational deliberation. 120

The paradigmatically reformist voice found in this passage constructs an ideal of “community” while deflating at the same time a confident picture of the individuals within the community. The audience-citizen cannot have a debate inclusive of factual falsehoods because these may disrupt the values of tolerance and dignity. My re-direction from the individual speaker to the audience, however, reinserts precisely the notion of “community” that I believe resolves Post’s paradox. Sullivan/Coleman’s is a community not of relatively passive speech-consumers, but instead of thoughtful, interpretive speech activists. This community, debating as a community, easily parries the kinds of false speech especially feared by Post (his specific referent is the distasteful ad parody in Falwell121); if mainstream readers, particularly grouped together as an audience, cannot contextualize falsehoods generated by overheated, opinionated speech, then most challenging speech acts, including all varieties of imaginative expression, would be seen as intolerable threats.122

More generally, Prof. Post’s “paradox” disappears once Sullivan’s audience-trusting First Amendment values are re-invigorated. Faith in the audience to absorb and weigh public speech is entirely consistent with “community,” and not at loggerheads with it.

Conclusion and Parting Glimpses at Curtis Publishing and Citizens United

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120 Post, The Constitutional Concept, supra note 6, at 683-84.
121 Supra, n. 94, 485 U.S. 46.
122 See discussion of realistic fiction, supra, n. 95.
The combination of Sullivan and the common law it drew on so accurately and inspirationally suffices decades later to help construct and motivate an alert and acquisitive citizen, one who – using any and all technologies and even those unforeseeable to judges of an earlier era – aggressively seeks information, interprets it, and is not easily distracted by exaggeration of opinion or falsity of fact. Together with a community of such listeners and readers, this citizen reaches out to gain new information and to add its voice to the mix of facts and opinions about matters of public concern. Impatient, too, with the early and overhasty move to impose Sullivan’s malice test on “public figures,” hence liberating speech about celebrities as though this were as important as speech about public officials (and public matters generally), this citizen community will gradually re-direct its interpretive energies to the business of being a self-governor and not a passive and helpless recipient of information.

Such a norm, present at some times and absent at others, aspires to a First Amendment jurisprudence protective not only of speakers and their targets but also of citizens whose duty it is to interpret public speech, a key responsibility of the self-governed. On this view, a legitimate opposition to the explosive outcome in Citizens United might well resist protecting corporations as speakers; but once the audience is foregrounded, as throughout this Article, such fears are offset: the audience-interpreter should easily parry even the most massive influx of corporate propaganda.

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124 See supra note 5.