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What Would Justice Brennan Say to Justice Thomas

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Justice Clarence Thomas's broadside against *New York Times v. Sullivan*[1] would most likely not have fazed Justice William J. Brennan Jr., the author of that landmark decision. Indeed, because Thomas relies on arguments made and rejected decades earlier, Brennan would likely say he had heard it all before, both from the unsuccessful plaintiff in *Sullivan* itself and from his successors in the roughly 30 cases decided by the Supreme Court that collectively constitute *Sullivan*'s progeny.[2]

On February 19, in a concurring opinion from the denial of a petition for a writ of certiorari, Thomas, who has served on the Supreme Court since replacing Justice Thurgood Marshall in 1991, released a 14-page attack[3] on *Sullivan* that reads as if he had just now discovered that the Court had limited the reach of state defamation law in the name of the First Amendment.

Brennan, the author of *Sullivan*, served on the Court from 1956 to 1990 and died in 1997.[4] Were he still alive, there are many points Brennan could make in response to Thomas's assertion that *Sullivan* ought to be reconsidered and overruled. These include the overwhelming academic consensus applauding the decision both at the time and thereafter; the impressive body of precedent it has spawned in the now 55 years since it was decided; the proper role of original intent in free speech analysis; the history of seditious libel in the United States and its dispositive significance in divining that intent in *Sullivan*; the case's role in defining "the central meaning of the First Amendment" that has guided the Court's First Amendment jurisprudence for more than half a century; and the limited nature of the past criticisms of *Sullivan* on which Thomas purports to rely, much of which he wrenches from the context in which they were actually made.

Let's begin with the academic reaction to *Sullivan*, authored by arguably the most important First Amendment scholars of that or any era. Shortly after it was decided, the legendary Harry Kalven Jr. wrote the definitive analysis of *Sullivan* in the *Supreme Court Law Review*, an article that is still widely considered among the most important academic analyses of the First Amendment every published.[5] Kalven unequivocally pronounced Brennan's opinion for the Court in *Sullivan* to be "the best and most important it has ever produced

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in the realm of freedom of speech."[6] Alexander Meiklejohn, perhaps the most important free expression scholar in our history, characterized Brennan's opinion as nothing less than "an occasion for dancing in the streets."[7] And much of Brennan's analysis was inspired by the highly respected Herbert Wechsler, the Columbia Law School professor who argued the case for *The Times* in the Supreme Court. Much of this is chronicled in Pulitzer Prize–winner Anthony Lewis's definitive work on the case, *Make No Law*, in which he explains the genesis and aftermath of the decision and concludes that *Sullivan* succeeded in "lay[ing] down the fundamental rules of our national life. It made clearer than ever that ours is an open society, whose citizens may say what they wish about those who govern them."[8]

Thomas's opinion largely ignores all of this, treating *Sullivan* as some sort of jurisprudential aberration—as he puts it, a "policy-driven decision[ ] masquerading as constitutional law."[9] Nothing could be further from the truth. In fact, *New York Times v. Sullivan* has become one of the foundational pillars of freedom of speech in the United States. Its articulation of the "central meaning of the First Amendment," encapsulated in Justice Brennan's frequently repeated description of our nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,"[10] has influenced virtually all of the Supreme Court's subsequent First Amendment jurisprudence, including decisions that Thomas has enthusiastically joined such as *Citizens United v. FEC*.[11]

Beyond the decision's importance for freedom of expression more broadly, *Sullivan* adopted the actual malice standard for defamation lawsuits by public officials, later extended to public figures. This means that a public figure cannot recover damages for defamation without proving that the harmful statements at issue in the case were "calculated falsehood[s]," that is, that they were published despite the defendant's actual knowledge that they were false or probably false.[12] This, too, has become an important part of the fabric of First Amendment law, widely accepted in subsequent rulings.[13]

The actual malice standard was not, as Thomas describes it, a "policy-driven approach to the Constitution." It was, rather, a decidedly mainstream exercise in constitutional analysis, which honored both the Court's previous recognition that "libel" is not protected by the First Amendment and its concomitant obligation to determine the definitional contours of that category of unprotected speech.[14] Indeed, the Court had previously engaged in analogous exercises in so-called definitional balancing to identify the boundaries of other unprotected categories, including everything from "obscenity" to "fighting words."[15] Brennan's decision in *Sullivan* to define unprotected "libelous" speech about public officials as encompassing only calculated falsehoods injurious to their reputations, a decision endorsed by five other members of an otherwise unanimous Court, was actually a more speech-*restrictive* formulation than the approach favored by the three remaining justices, who, relying on a literal reading of the constitutional text (an approach that Thomas typically favors), would have declared *all* defamation actions brought by public figures to be precluded by the First Amendment.[16]

Thomas issued his opinion while agreeing with the Court's decision to deny a petition for certiorari in a libel case against Bill Cosby, the comedian imprisoned for sexual assault. The petition was filed by Katherine McKee, who, after accusing Cosby of rape, filed a defamation action charging that Cosby's attorney released a letter damaging her character and distorting her background. The U.S. Court of Appeals for the First Circuit affirmed a trial judge's decision that McKee was a limited-purpose public figure and was unable to carry her burden of proving actual malice.[17]

Although the issue was not placed before the Court by McKee's petition, and although he wrote that he agreed with the Court's decision not to hear her case, Thomas used the Court's denial of certioriari as a vehicle to announce his view that the Supreme Court should reconsider *Sullivan*, overrule it, eliminate the actual malice standard, and return full control over libel law to the states. "The States," Thomas wrote, "are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm."[18]

Precisely the opposite was the case, however, when the Court decided *Sullivan* in 1964, and there is every reason to believe that, but for *Sullivan* and its progeny, an analogous effort by public officials and public figures to weaponize the law of defamation would be successful today. As Brennan's opinion in *Sullivan* described, and as Anthony Lewis chronicles in great detail in *Make No Law*,[19] the advertisement published by *The New York Times* that was the focus of the case never mentioned by name the plaintiff, L.B. Sullivan, the Montgomery, Alabama, commissioner of public affairs. The Alabama courts imputed the advertisement's criticism of the conduct of the Montgomery police force to Sullivan, who had ultimate supervisory authority for its operations.[20] At the same time, as Brennan's opinion also noted, the newspaper faced multiple other libel suits in the Alabama courts by other public officials concerning the same advertisement.[21]

Alabama law at the time heavily favored the libel plaintiff, imposing a relatively modest burden of proof on the person suing and a heavy burden on the defendant to, among other things, prove that the challenged statements were true. The state courts found the ad to be libel per se because it contained a number of relatively minor errors, concluded that the ad was about Sullivan because some

of his witnesses testified at trial that they understood its criticisms to be a reflection on him, and therefore presumed damage to his reputation, all in accordance with the common law of Alabama.[22] The only option for *The Times* was to prove the truth of the misstatements contained in the ad, which it could not do, both because there were errors and because the newspaper was not responsible for the content.[23]

As Lewis documents, Sullivan's suit, the others filed against *The Times*, and still others filed against other national media outlets then attempting to cover the civil rights movement in Alabama were not motivated by a desire to recover damages for actual reputational harm so much as to dissuade the press from reporting to the nation about a subject of palpable public concern.[24] Simply put, the damage awards sought (and in many cases awarded) in multiple lawsuits aimed to make it too expensive for newspapers and television networks to continue reporting about civil rights. As Brennan wrote for the Court in *Sullivan*, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[25]

It is against this backdrop that, after more than a quarter century on the Court, Thomas chose this moment in our history to call for *Sullivan* to be overruled. He writes at a time when the president of the United States has dubbed critics of his official conduct "enemies of the people" and has called for the libel laws to be "opened up" in the manner Thomas has now endorsed.[26] He writes at a time when an unprecedented number of public officials and powerful public figures, from Sarah Palin to Joe Arpaio to an assortment of Russian oligarchs, have brought defamation actions against *The Times* and other national media.[27] Make no mistake, but for *Sullivan* and its progeny, such lawsuits would—as Brennan wrote in *Sullivan*—deter "critics of official conduct . . . from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[28] What was true in 1964 remains true today: The libel law regime that Thomas apparently favors "dampens the vigor and limits the variety of public debate" and is demonstrably "inconsistent with the First and Fourteenth Amendments."[29]

Which brings us to Thomas's curious and decidedly selective discussion of original intent. Neither *Sullivan*, nor any of its progeny, Thomas asserts, "made a sustained effort to ground their holdings in the Constitution's original meaning."[30] These words simply cannot be squared with Brennan's opinion in *Sullivan* itself, four full pages of which are devoted to the Framers' intent as gleaned from the most analogous historical experience—the controversy surrounding the Sedition Act of 1798.[31]

As Brennan explained, seditious libel was a concept under English common law that an individual could be punished for criticism that brought ridicule or disrepute on the king and his ministers, even if (indeed, as Thomas notes, including when) the criticism was true.[32] There is substantial evidence—all recounted in Brennan's opinion—indicating that the proponents of the First Amendment, Madison foremost among them, intended the free speech and press guarantees to prohibit punishment for seditious libel in the United States, i.e., to prohibit libel suits against public officials for criticism of their performance of their official duties. When Congress, despite this apparently clear intent, nevertheless passed the Sedition Act in 1798, which opened the door to numerous prosecutions for statements critical of President Adams and his administration, Madison and Thomas Jefferson led protests against the law in Virginia.[33] When Jefferson became president in 1801, he put action behind his convictions and pardoned those who had been convicted of seditious libel.[34]

Brennan not only traced this history at length in *Sullivan*, he canvassed the most authoritative assessments of its constitutional significance, all of which, including most especially the published views of Justices Holmes, Brandeis, and Jackson, reflected "a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[35] This consensus—reflecting the considered judgment of "the court of history"—was and remains especially significant because, as Brennan also noted, "the Sedition Act was never tested" in the Supreme Court.[36]

Thomas, in contrast, rejects the significance of both this consensus and the historical record on which it is based, largely on the grounds that (1) both the criminal and common law of libel continued to exist without constitutional challenge following the controversy surrounding the Sedition Act and (2) several justices noted, in the years before *Sullivan*, that "libel" was not protected by the First Amendment.[37] None of this is surprising, or particularly persuasive, however, especially because the First Amendment was not held applicable to the states until 1925, *Sullivan* was the first case in which the Court undertook to assess the application of the common law in a manner analogous to the law of seditious libel and none of the judicial statements that Thomas quotes purported to speak to that issue. And, as noted, Brennan *did* recognize the need to tread carefully and deliberately, displacing only so much of the common law that could not be reconciled with the First Amendment's documented antipathy to seditious libel.

Two other points are worth noting when assessing the significance of Thomas's professed allegiance to original intent. First, notably missing from his own discussion of the relevant history is any discussion of the John Peter Zenger seditious libel trial in 1735. It is well accepted that the Zenger prosecution was a significant factor in solidifying the Colonies' antipathy toward the Crown that ultimately led to the Revolution as well as the new nation's insistence on a Bill of Rights that guaranteed its citizens the freedom of speech and of the press. One would have thought that the dramatic example of the Zenger trial, which had "set the colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities," would be worth a mention in Thomas's assessment of the historical record, especially because the quoted language in this sentence was written by him in his concurring opinion in *McIntyre v. Ohio Elections*

Commission.[38]

Second, despite the fact that Brennan's opinion in *Sullivan* relies on the best evidence of the Framers' intent, it cannot be seriously questioned that Thomas's narrow focus on such an inquiry is of limited utility in interpreting the First Amendment. Although the First Amendment was ratified in 1791, the Supreme Court did not begin to decide cases requiring judicial consideration of its meaning for more than another 125 years.[39] Almost nothing in our First Amendment precedent, including decisions Thomas has written and joined, has turned on what the freedom of speech meant to James Madison, who drafted it, or to the first Congress, which approved it. To cite just one recent example, it is difficult to imagine that the Framers believed the First Amendment restricted the ability of local governments to enact ordinances regulating outdoor signs displaying nonpolitical messages, yet Thomas had no difficulty writing an opinion for the Court holding just that in *Reed v. Town of Gilbert.*[40]

Finally, much of Thomas's historical critique of *Sullivan* relies on and quotes the work of the late Justice Byron White. White, who served on the Court from 1962 to 1993 and died in 2002, joined Brennan's *Sullivan* decision, as well as several of its progeny, but later became a vocal critic of the Court's 1974 decision in *Gertz v. Robert Welch, Inc.,* which held that the First Amendment precludes private persons involved in matters of public concern from recovering in a defamation action without demonstrating the defendant's fault.[41] This aspect of the Court's decision in *Gertz* has nothing to do either with defamation actions brought by public figures or with the actual malice standard and, as a result, White's criticisms of that decision, many of which are taken out of their context and then quoted by Thomas, provide no support for his own critique of either *Sullivan* itself or the actual malice standard it articulated. To be sure, White later indicated he believed *Sullivan* had been wrongly decided (despite the fact that he had joined in Brennan's opinion), but the fact remains that his historical critique in *Gertz* was directed at a very different target.[42]

For his part, Brennan was well aware of, and concerned about, the doubts that White *did* ultimately express about *Sullivan.* It was for this reason that, three years later, Brennan paid particular attention to the Court's deliberations in *Hustler Magazine, Inc. v. Falwell.*[43] In that case, writing for a unanimous Court (although White concurred only in the judgment), Chief Justice Rehnquist unmistakably reaffirmed *Sullivan*, going so far as to hold that public figures cannot circumvent either *Sullivan* or its actual malice standard by framing their cause of action as some other tort.

Throughout his long tenure on the Supreme Court, William J. Brennan Jr. understood the importance of, as he put it, "counting to five."[44] We suspect that, just as he was both relieved and gratified that, in *Falwell*, the entire Court effectively repudiated White's criticisms of *Sullivan*,[45] he would be equally heartened that not a single justice (much less the required additional four) saw fit to join in Thomas's opinion in *McKee.* ■

Endnotes

1. 376 U.S. 254 (1964).
2. *See, generally*, Lee Levine & Stephen Wermiel, The Progeny: Justice William J. Brennan's Fight to Preserve the Legacy of New York Times v. Sullivan (ABA Press 2014) [hereinafter The Progeny].
3. McKee v. Cosby, No. 17-1542 (U.S. Feb. 19, 2019) (Thomas, J., concurring).
4. *See* S. Stern & S. Wermiel, Justice Brennan: Liberal Champion (Houghton Mifflin Harcourt 2010).
5. *See* Harry Kalven Jr., *The* New York Times *Case: A Note on the Central Meaning of the First Amendment*, 1964 S. Ct. L. Rev. 191 (1964).
6. *Id*. at 194.
7. *Id*. at 221 n.125.
8. Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment 8 (Penguin Random House 1991).
9. McKee v. Cosby, No. 17-1542, slip op. at 2 (U.S. Feb. 19, 2019) (Thomas, J., concurring).
10. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
11. 558 U.S. 310 (2010).
12. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).
13. *See, generally*, The Progeny, *supra* note 2.
14. Chaplinsky v. New Hampshire, 315 U.S. 563, 571–72 (1942).
15. *See id*. (fighting words); Roth v. United States, 354 U.S. 476 (1957).
16. *See* New York Times v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., joined by Douglas, J., concurring); *id*. at 304 (Goldberg, J., concurring).
17. McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017), *cert. denied*, No. 17-1542 (U.S. Feb. 19, 2019).
18. *McKee*, No. 17-1542, slip op. at 14.
19. *See* Lewis, *supra* note 8.
20. *Sullivan*, 376 U.S. at 256.
21. *Id*. at 278, n.18.
22. *Id*. at 260–64, 267.
23. *Id*.
24. *See* Lewis, *supra* note 8, at 34–45.
25. 376 U.S. at 278.
26. *See, e.g*., Michael Grynbaum & Eileen Sullivan, *Trump Attacks* The Times*, in a Week of Unease for the American Press,* N.Y. Times, Feb. 20, 2019; Hadas Gold, *Donald Trump: We're Going to "Open up" Libel Laws*, Politico, Feb. 26, 2016.
27. *See, e.g*., Palin v. New York Times Co., 264 F. Supp. 3d 527 (S.D.N.Y. 2017); Deripaska v. Associated Press, No. 2017-0913 (ESH) (D.D.C. Oct. 17, 2017); Arpaio v. New York Times Co., No. 1:18-cv-02387 (D.D.C.) (complaint filed Oct. 18, 2018).
28. 376 U.S. at 279.
29. *Id*.
30. McKee v. Cosby, No. 17-1542, slip op. at 14 (U.S. Feb. 19, 2019) (Thomas, J., concurring).
31. 376 U.S. at 273–77.
32. *McKee*, No. 17-1542, slip op. at 7.
33. *Sullivan*, 376 U.S. at 273–77.
34. *Id*.
35. *Id*. at 276.
36. *Id*.
37. *McKee*, No. 17-1542, slip op. at 6–10 (citing cases).
38. 514 U.S. 334, 361 (1995) (Thomas, J., concurring in judgment).
39. *See, e.g*., Schenck v. United States, 294 U.S. 47 (1919).
40. 135 S. Ct. 2218 (2015).
41. 418 U.S. 323 (1974).
42. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 771 (1985) (White, J., concurring in judgment).
43. 485 U.S. 46 (1988).
44. Stern & Wermiel, *supra* note 4, at 196.
45. *See* The Progeny, *supra* note 2, at 307.

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