ACTUALLY . . . A RENEWED STAND FOR THE FIRST AMENDMENT ACTUAL MALICE DEFENSE

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"The American Way of Life is free because it is what we Americans freely choose—from time to time—that it shall be." Alexander Meiklejohn[1]

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INTRODUCTION

As a candidate for president in 2016, Donald Trump's campaign promises to "open up" libel law to make it easier for plaintiffs to seek and collect damages from media entities caused tremendous consternation and significant hand-wringing among First Amendment lawyers, scholars, and journalists.[2] A leader vowing to make it easier to punish the press through legal action—tort or criminal—harkens back to a time when seditious libel was still a viable cause of action and a prosecutable offense.[3] The threat also gives rise to the image of a dictatorial

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1. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 98 (1948).

2. Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 22, 2016), https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866.

3. *See, e.g.*, Act of July 14, 1798, ch. 74, 1 Stat. 596.

authoritarian bent on suppressing criticism and opponents or controlling the press or media.

Since 1964's landmark decision *New York Times v. Sullivan*, the public and the press have had constitutional protection to criticize both public officials (our leaders and government officials)[4] and public figures (people who have achieved prominence in their communities).[5]

Today, *Sullivan* is a pillar in First Amendment jurisprudence and a model of the American conception as a haven for free speech, free press, and free flow of information.[6] The constitutionalization of American libel law in 1964 may have been an outgrowth of the expansion of civil liberties during the Cold War, but it has become part of the fabric of American law and the role of First Amendment protections in fueling debate and protecting speakers.[7]

With a decisively anti-press president in the White House who frequently invoked defamation lawsuits when he was a private citizen and a headline-seeking public figure, branding promotor, and reality television personality, there have been open calls to overturn *New York Times v. Sullivan*.[8] Though overturning *Sullivan* is not within the president's constitutional, legal, or practical authority,[9] his rhetoric and extreme criticism sends the wrong message to the public and the rest of the world. Furthermore, overturning well-established precedent is not commonplace or a favored practice on the Supreme Court, but it is also not unheard of.

Sullivan has been praised and criticized over the decades as it has indemnified the press and speakers in a variety of cases.[10] Some recent

4. *See* 376 U.S. 254, 269, 282–83 (1964).

5. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351–52 (1974).

6. *See* INTERNATIONAL LIBEL & PRIVACY HANDBOOK, at xv (Charles J. Glasser Jr. ed., 2d ed. 2009) [hereinafter GLASSER, INTERNATIONAL LIBEL]. "In essence, the U.S. model is based on the press-friendly moral engine that drives American media law. As a democracy, constitutionally derived rights (like the right to speak freely) transcend other rights rooted in common law or statute." *Id.* at xvi.

7. *See* LEE LEVINE & STEPHEN WERMIEL, THE PROGENY 33 (2014).

8. Gold, *supra* note 2; Nick Penzenstadler et al., *Donald Trump: Three Decades 4,095 Lawsuits*, USA TODAY, https://www.usatoday.com/pages/interactives/trump-lawsuits/ (last visited Feb. 19, 2018).

9. *See* David Lauter, *A Primer on Executive Power: Trump Can't End Same-Sex Marriages, But He Could Speed up Deportations*, L.A. TIMES (Nov. 11, 2016), http://www.latimes.com/politics/la-na-pol-trump-executive-power-20161110-htmlstory.html. *Compare* U.S. CONST. art. II, §§ 1–3 (describing the President's powers as, among other things, to execute the laws of the United States), *with id.* art. III, § 1 (establishing the judicial power to be with the Supreme Court).

10. *See* LEVINE & WERMIEL, *supra* note 7, at 342; David A. Anderson, *The Promises of* New York Times v. Sullivan, 20 ROGER WILLIAMS U. L. REV. 1, 1 (2015); Harry Kalven, Jr.,

cases, though, have also tested the actual malice doctrine. Outrageous lawsuits such as the billion-dollar pink slime case, which settled before a verdict[11] and the jury verdict in the Hulk Hogan case, which led to Gawker's demise, appear to be chipping away at the actual malice doctrine.[12]

This article will discuss the *New York Times v. Sullivan* constitutional, actual malice privilege in the modern context of the President Trump administration. Part I of this essay will address candidate and President Trump's views on defamation and his history as a libel plaintiff. Part II traces the origins of the actual malice doctrine and its revolutionary invocation in the landmark *New York Times v. Sullivan* case. Part III will look at some significant post-*Sullivan* cases. Part IV will address the doctrine's role as a pillar of American exceptionalism. Part V will look at both the constitutional and practical reasons why this doctrine should not be overturned.

The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 SUP. CT. REV. 191, 193–94 (1964) ("[Sullivan] may prove to be the best and most important [opinion the Supreme Court] has ever produced in the realm of freedom of speech."). Justices White, Scalia and Kennedy openly criticized Sullivan. LEVINE & WERMIEL, *supra* note 7, at 342.

11. Beef Prods. v. ABC, 949 F. Supp. 2d 936, 937–38 (D. S.D. 2013); Jeremy Barr, *ABC News Reaches Settlement in 'Pink Slime' Case*, HOLLYWOOD REP. (June 28, 2017), http://www.hollywoodreporter.com/news/abc-news-reaches-settlement-pink-slime-case-1017343. In 2012, Beef Products, Inc. sued ABC seeking more than $2 billion in damages for the television network's use of the term "pink slime" in a report about beef preparation practices. Barr, *supra*. The suit, filed in South Dakota, was based on defamation and product disparagement causes of action and publication with actual malice. *Beef Prods.*, 949 F. Supp. 2d at 937–38; Barr, *supra*. The case went to trial despite the fact that the term was ostensibly descriptive, true, and drawn from a government scientist, Gerald Zirnstein. Niraj Chokshi, *Trial to Decide if ABC News Defamed Meat Processor with Report on 'Pink Slime*,' N.Y. TIMES (June 5, 2017), https://www.nytimes.com/2017/06/05/us/pink-slime-lawsuit.html. Midway through the trial, the parties settled for an undisclosed sum. Barr, *supra*; Chokshi, *supra*.

12. Anna M. Phillips, *Jury Awards Hulk Hogan Millions More in Punitive Damages in Sex Tape Trial: $140.1 Million Total*, TAMPA BAY TIMES (Mar. 21, 2016), http://www.tampabay.com/news/courts/civil/gawker-media-pleads-for-leniency-as-hulk-hogan-sex-tape-trial-resumes/2270192. In *Bollea v. Gawker Media*, the professional wrestler known as Hulk Hogan, whose real name is Terry Bollea, convinced a jury that *Gawker*, an online gossip publication, illegally released a harmful recording of the plaintiff having sex with his friend's wife. *See* No. 522012CA012447, 2016 WL 4072660, at *1 (Fla. Cir. Ct. 2016); Phillips, *supra*. The tape also included the plaintiff making racially insensitive comments. Wyatt Massey, *Wrestler Hulk Hogan Apologizes for Racist Remarks*, CNN (July 24, 2015), http://www.cnn.com/2015/07/24/entertainment/hulk-hogan-wwe-apology-racism-feat/index.html. The $114 million in damages, which included punitive damages, essentially shut down the online publication and an appeal based on a First Amendment defense, which might have proven successful, was not mounted because Florida's rules on appeals would have required a $50 million bond. Phillips, *supra*.

I. TRUMP AND LIBEL

As the 2016 Presidential campaign dragged on, vitriolic criticism, verbal attacks, and threats against the institutional press became a major component of candidate Donald Trump's campaign rhetoric. At points throughout the campaign, individual reporters were targeted for insults and criticism. At some campaign events, the candidate whipped up a fury of rhetoric against the press and reporters going as far as to call the press "the enemy of the American people."[13] The Trump campaign kept reporters in pens or designated areas at some campaign events, refused access through interviews, and famously fought with Megyn Kelly during a debate.[14]

Perhaps no single statement exemplified Trump's antipathy toward the press than his vow to "open up libel laws."[15] The actual statement, made at a campaign rally in Fort Worth, Texas, was:

> One of the things I'm going to do if I win, and I hope we do and we're certainly leading. I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when *The New York Times* writes a hit piece which is a total disgrace or when *The Washington Post*, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected.[16]

An international report on global press freedom produced by the Committee to Protect Journalists noted, "[l]ike so much of his anti-media rhetoric, Trump's litigation threat taps into a trend."[17]

Even before entering politics, Trump's litigiousness was well-renowned.[18] *USA Today* tracked and analyzed more than 4,000 lawsuits

13. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), https://twitter.com/realdonaldtrump/status/832708293516632065?lang=en.html; *see* Michael M. Grynbaum, *Trump Calls Media the 'Enemy of the American People,'* N.Y. TIMES (Feb. 17, 2017), https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html; Adam Liptak, *Trump Declarations Seen as Threat to Rule of Law*, N.Y. TIMES (June 4, 2016). https://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html

14. Charlotte Alter, *Trump Faced His Toughest Debate Opponent: Megyn Kelly*, TIME (Mar. 4, 2016), http://time.com/4247405/donald-trump-megyn-kelly-debate-opponent/; Michael Calderone, *Trump Campaign Restricts Reporters Covering What Happens Off Stage*, HUFFINGTON POST (Nov. 25, 2015), https://www.huffingtonpost.com/entry/donald-trump-campaign-journalists-restricted_us_5655c50be4b08e945fea918f.

15. Gold, *supra* note 2.

16. *Id.*

17. Alan Huffman, *What is the Worst-Case Scenario?*, COMM. TO PROTECT JOURNALISTS (Apr. 25, 2017), https://cpj.org/2017/04/what-is-the-worst-case-scenario.php.

18. *See, e.g.*, Penzenstadler et al., *supra* note 8.

Trump and his businesses litigated in roughly thirty years of prominent business dealings.[19] The suits "range from skirmishes with casino patrons to million-dollar real estate suits to personal defamation lawsuits," the study declared.[20]

Trump invoked the defamation or libel cause of action in a number of high profile cases, ostensibly to repair his reputation.[21] Trump's defamation suits range from a claim against a former *New York Times* business reporter who wrote a book asserting that Trump was not a billionaire,[22] to a former Trump University student,[23] to a former beauty queen.[24] He sued comedian Bill Maher for breach of contract after the comedian refused to pay five million dollars if Trump did not produce a birth certificate proving that Trump was not the "spawn of his mother having sex with an orangutan."[25]

In what appears to be his first defamation case, in 1984, Trump sued the architectural critic for the *Chicago Tribune*, Paul Gapp, who criticized Trump's plans to build the world's tallest building on a landfill in lower Manhattan.[26] The court dismissed the suit with a lesson in the First Amendment, the privilege of protected opinion, and rhetorical hyperbole.[27] The judge intimated that a number of cases with stronger implications had also been dismissed under the First Amendment.[28] The judge also advised that "men in public life" must accept some level of criticism for their public roles.[29] The court wrote:

> Plaintiff, having sought publicity for his proposal, finds that defendants do not like his proposed structure. He, on the other hand, does not like their conception any better. The words of the Latin proverb are particularly appropriate here: *De gustibus non est disputandum*, there is

19. *Id.*

20. *Id.*

21. *See* PROSSER & KEETON ON TORTS 773–79 (W. Page Keeton et al. eds., 5th ed. 1984). The tort of defamation provides a civil remedy for plaintiffs aggrieved by false, published, unprivileged statements about the plaintiff that harms his or her reputation. *Id.*

22. *See* Trump v. O'Brien, 958 A.2d 85, 88 (N.J. Super. Ct. App. Div. 2008).

23. *See* Makaeff v. Trump Univ., LLC, 715 F.3d 254, 258 (9th Cir. 2013).

24. *See* Miss Universe L.P. v. Monnin, 952 F. Supp. 2d 591, 594 (S.D.N.Y. 2013).

25. *See* Complaint at 4, Trump v. Maher, No. BC499537 (Cal. App. Dep't Super. Ct. Feb. 4, 2013).

26. Trump v. Chi. Tribune Co., 616 F. Supp. 1434, 1434–35 (S.D.N.Y. 1985).

27. *Id.* at 1435–36, 1438.

28. *See id.* at 1436–37 (citing Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 13 (1970)).

29. *See id.* at 1438 (quoting Adey v. United Action for Animals, Inc., 361 F. Supp. 457, 465 (S.D.N.Y. 1973)).

> no disputing about tastes. The complaint is dismissed.[30]

A report published by the American Bar Association analyzed Trump's defamation suits and claims against media entities, labeling Trump a "libel bully."[31] The Seager Report also noted that Trump was widely unsuccessful in suing the media with four cases dismissed, two voluntarily withdrawn and one arbitration won as a result of a default.[32] The report stated: "Media defense lawyers would do well to remind Trump of his sorry record in speech-related cases filed in public courts when responding to bullying libel cease-and-desist letters."[33]

The actual malice rule has been something of a bugaboo in Trump's defamation actions, and Seager noted "Trump has never been able to prove actual malice in a public trial court."[34] The Court of Appeals for the Ninth Circuit, in *Makaeff v. Trump University*, held that Trump University was a limited purpose public figure, necessitating proof of actual malice.[35] This case involved a disgruntled former Trump University customer who sued the business for deceptive trade practices and then faced a counterclaim for defamation.[36] The predominant issue on appeal involved whether the counterclaim should be dismissed with fees based on California's Anti-SLAPP (Strategic Lawsuits Against Public Participation) law.[37]

The court ruled that actual malice was required in this case, citing two important principles under *Gertz v. Robert Welch*: 1) as public figures both the business and Trump himself have "greater access" to media to repair their reputations; and 2) both the business and Trump have achieved widespread fame and notoriety, which generates widespread public attention.[38] Later, the court clarified that the business was a public figure because it was involved in a matter of public interest.[39] Further, in a footnote, the court explained:

> Because a showing of actual malice necessarily depends on the falsity of the statements at issue, the district court may assume the falsity of the statements and proceed directly to the actual malice inquiry. If it

30. *Id.* at 1438.

31. Susan E. Seager, *Donald J. Trump Is a Libel Bully But Also a Libel Loser*, MEDIA L. RESOURCE CTR., http://www.medialaw.org/images/stories/MediaLawLetter/2016/October/Trump_Libel.pdf (last visited Feb. 19, 2018).

32. *Id.*

33. *Id.*

34. *Id.*

35. 715 F.3d 254, 258 (9th Cir. 2013).

36. *Id.* at 258.

37. *See id.* at 261 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325, 345 (1974)).

38. *Id.* at 265 (citing *Gertz*, 418 U.S. at 345).

39. *Id.* at 270.

> concludes that Trump University cannot establish a reasonable probability of proving actual malice, it need not inquire whether the statements were actually false for the purposes of ruling on the motion to strike.[40]

These cases are a prime example of how American defamation law differs from many around the world. A nation's defamation law can be a strong indicator of how it accepts political dissent and whether it respects or safeguards wide-open discourse.[41] In a handbook on international libel law, media lawyer Charles Glasser writes:

> In many nations, there is no constitutional right to press freedom, but the constitution does recognize the personal rights (also called "dignitary rights" in some jurisdictions). In many of these nations, there simply is no "First Amendment" that trumps other rights. Yet other nations' press law represents a balance of two: a constitutional right of a free press is on an equal footing with personal rights. In balancing the two, courts weigh the rights of the press against the responsibilities to avoid harming dignitary interests.[42]

The United States discarded the concept of seditious libel decades ago, and the First Amendment's application to defamation law has played an important role in facilitating wide-open debate, discussion of public issues, and criticism of people in power.[43]

A. Make Sedition Great Again—Libel, Seditious Libel, and the First Amendment

All libels are not created equal. Libel posed a particularly precarious problem for publishers and speakers in the colonial era and the early decades after the establishment of the United States.[44] The crime of seditious libel came to the colonies along with other British influences, sending a potential chill down the spine of speakers and publishers who may have either deliberately or even unintentionally criticized people in government—the crown, its representatives, governors, or the church.[45] Many a colonial publisher had faced potential prosecution, if not simple

40. *Makaeff*, 715 F.3d at 271 n.13.

41. *See* MICHAEL J. ABRAMOWITZ, HOBBLING A CHAMPION OF GLOBAL PRESS FREEDOM, *in* FREEDOM OF THE PRESS 2017: PRESS FREEDOM'S DARK HORIZON 1, 1 (Freedom House 2017), https://freedomhouse.org/sites/default/files/FOTP_2017_booklet_FINAL_April28.pdf.

42. INTERNATIONAL LIBEL & PRIVACY HANDBOOK, *supra* note 6, at xvi.

43. *See* RONALD K. L. COLLINS & SAM CHALTAIN, WE MUST NOT BE AFRAID TO BE FREE 28–29 (2011). *See generally* ANTHONY LEWIS, MAKE NO LAW (1991).

44. *See* COLLINS & CHALTAIN, *supra* note 43, at 28–29; STEPHEN D. SOLOMON, REVOLUTIONARY DISSENT 3–4 (2016).

45. *See* WILLIAM F. SWINDLER, PROBLEMS OF LAW IN JOURNALISM 5–7 (1955).

legal harassment, but none personified this struggle more than John Peter Zenger, a New York printer whose newspaper, *The Weekly Journal*, in the 1730s seemed to have a mission to criticize and attack the Royal Governor of New York.[46]

One author wrote,

> [t]he acquittal of John Peter Zenger in 1735, in a prosecution for seditious libel, is celebrated, deservedly or not, because it "marked a milestone in the fight for the right to criticize the government." That right is indispensable to personal liberty and is inseparable from self-government. When any avenues of political expression are closed, government by consent of the governed may be foreclosed.[47]

Even after the founding of the country, the passage of the Constitution, and the First Amendment, the Alien and Sedition Law of 1798 presented "a shocking encroachment on the freedom of political speech."[48] The laws were "a sword poised to strike critics of the government."[49] These criminal laws were an outgrowth of bitter political and geographic fighting between the Federalists and the Republicans.[50]

In a seminal history of the country's early wrestling match with civil liberties, expression, and security, James Morton Smith recounts how Federalists and Republicans instituted a range of laws under the auspices of national security and governmental stability, beginning with the Naturalization Act of 1798 and extending into the Alien and Sedition Laws of 1798.[51] These laws were xenophobic and fearful that certain public criticism of the government or government officials could be destabilizing and worthy of punishment.[52]

The Sedition Law criminalized a range of public criticism, particularly, "any false, scandalous and malicious statements" about the president, Congress, or the government with the "intent to defame them, or to bring them into contempt or disrepute, or to excite against them the

46. *Id.* at 5–7.

47. FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON xix (Leonard W. Levy ed. 1966).

48. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 292 (1985); ELIZABETH LAWSON, THE REIGN OF WITCHES: THE STRUGGLE AGAINST THE ALIEN AND SEDITION LAWS: 1798–1801, at 24–25 (1952).

49. SOLOMON, *supra* note 44, at 4.

50. Robert D. Rachlin, *Essay*: *The Sedition Act of 1798 and the East-West Political Divide in Vermont, in Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?: Hearing before the Committee on The Judiciary United States Senate*, 111th Cong. 90, 117 (2010).

51. *See* JAMES MORTON SMITH, FREEDOM'S FRETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 12, 94–95 (1956).

52. *See id.* at 16, 94.

hatred of the good people of the United States."[53] Violating the Sedition Law was punishable by up to two years in prison and a fine of up to $2,000.[54]

While these laws were enveloped in the bitter politics of the nascent republic in the 1790s and early 1800s, a prescient James Madison, the primary author of the First Amendment, shortly after the law's passage, wrote a letter to Thomas Jefferson stating, "I hope . . . the bridle is not yet put on the press."[55] Congress barely weighed the constitutionality of these laws or its legal authority to pass legislation on libel, devoting only a half-day to debate.[56] At the time, prior restraint through Congressional legislation was the predominant concern under the First Amendment.[57]

The sedition laws aimed to silence speakers and critics, which Smith believed was anti-democratic: "The years between 1798 and 1801 afford the first instance under the Constitution in which American political leaders faced the problem of defining the role of public criticism in a representative government."[58] He then asks, "[a]re the people the superiors of the rulers, or are the rulers the superiors of the people?"[59]

The Sedition Act remained in place until it expired in 1801, with Smith listing at least fourteen editors and publishers facing charges.[60] But the Sedition Law never made it to the Supreme Court because it expired.[61] In the years following the law's sunset, fines were repaid to defendants and as president Thomas Jefferson pardoned those who had been convicted.[62] In 1804, Jefferson wrote: "I discharged every person under

53. Act of July 14, 1798, ch. 74, 1 Stat. 596; SMITH, *supra* note 51, at 94–95.
54. Act of July 14, 1798, ch. 74, 1 Stat. 596–97; SMITH, *supra* note 51, at 95.
55. SMITH, *supra* note 51, at 95–96.
56. SMITH, *supra* note 51, at 131, 134–35.
57. *Id.* at 136.

> The evidence is conclusive that the Sedition Law, as enforced, reduced the limits of speech and press in the United States to those set by the English common law in the days before the American Revolution. This was the standard advocated by the Federalists who enacted the law, and it was the standard applied by the Federalist judges who interpreted the law.

Id. at 424.

58. *Id.* at 418.
59. *Id.* at 419.
60. *See generally* SMITH, *supra* note 51 (discussing the Sedition Act and its negative implications).
61. LEWIS, *supra* note 43, at 65 ("The constitutionality of the Sedition Act was never tested in the Supreme Court . . . But it should be noted that three of the six men who sat on the court in 1800, Justices Chase, Patterson and Bushrod Washington, had presided at Sedition Act trials without intimating any constitutional qualms.").
62. N.Y. Times v. Sullivan, 376 U.S. 254, 276 (1964).

punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image."[63]

The final nail in the coffin of sedition came in 1964 with Justice William Brennan's analogy to the facts underlying the case in *New York Times v. Sullivan* and the parallels to seditious libel.[64] Justice Brennan wrote,

> [i]f 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. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, . . . which first crystallized a national awareness of the central meaning of the First Amendment.[65]

II. ACTUAL MALICE—WHERE DOES IT COME FROM?

In 1964, the Supreme Court constitutionalized and revolutionized American defamation law in the landmark *New York Times v. Sullivan* case. The case involved the newspaper's appeal of a $500,000 trial verdict in favor of a Montgomery, Alabama, police commissioner who claimed his reputation was injured by the newspaper after it published an advertorial with several relatively innocuous errors.[66] Though he was not named in the ad, L.B. Sullivan used the libel per se tort to recover damages, arguing that the erroneous publication imputed criminal activity.[67] The ad was part of the heated national debate on civil rights and the plaintiff, a public official, found a hospitable home-court advantage in his home-town courts.[68]

Justice Brennan, writing for the Court, equated Sullivan's action to nothing more than a modern form of a seditious libel action aimed at punishing critics of public policy.[69] Justice Brennan wrote:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that

63. *Id.*

64. *Id.* at 273–77.

65. *Id.* at 273 (citing LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 258 (1960)).

66. *Sullivan*, 376 U.S. at 256–58. Among the misstatements published in the advertorial were facts such as the song protestors sang, the level of the police presence on campus and the number of times Martin Luther King had been arrested. *Id.* at 258–59.

67. *See id.* at 256–58.

68. *See* LEWIS, *supra* note 43, at 13–14.

69. *See Sullivan*, 376 U.S. at 273.

it was false or with reckless disregard of whether it was false or not.[70]

Throughout the opinion, Brennan stressed the importance of the free press in relation to public debate, acknowledging that even some degree of falsity must be part of the discussion of public issues.[71] A public official's invocation of defamation law to punish critics of official conduct violated the central tenet of the First Amendment, and was tantamount to a revival of sedition actions, Brennan argued.[72]

A free and aggressive press needed protection, Brennan wrote, bolstering his argument with a famous quote from James Madison: "Some degree of abuse is inseparable from the proper use of every thing [*sic*]; and in no instance is this more true than in that of the press."[73]

To that end, Brennan believed a guarantee that all information—especially critical information about a public official or public affairs—be one hundred percent accurate, one hundred percent of the time, would be too burdensome and chill speech.[74] He also applied Madisonian principles of the role of the press, flow of information, and self-government.[75] He called for "breathing space" for the press, which would be manifested in the actual malice rule.[76]

Even before *Sullivan*, Justice Brennan had proposed adoption of the actual malice standard in a dissenting opinion in a 1959 case involving a libelous press release in *Barr v. Matteo*.[77] Brennan argued that a public official should only be able to recover defamatory damages by proving actual malice.[78]

Only a few years later, when *Sullivan* appeared before the court, Herbert Wechsler, the Columbia Law School professor and principal author of the *Times*' brief, honed in on Brennan's point, reprising the

70. *Id.* at 279–80 (citing Coleman v. MacLennan, 98 P. 281, 282 (Kan. 1908)).

71. *See id.* at 270–71, 279 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

72. *Id.* at 273, 276 (citing LEVY, *supra* note 65, at 258).

73. *Id.* at 270–71 (citing *Terminiello*, 337 U.S. at 4).

74. *Sullivan*, 376 U.S. at 279 ("Under such a rule, would-be critics of official conduct may be deterred 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.").

75. *See id.* at 274–76 (quoting Madison's Report on the Virginia Resolutions, *reprinted in* DEBATES ON THE FEDERAL CONSTITUTION 569–70 (4 Jonathan Elliot ed., 2d ed., 1836)).

76. *Id.* at 271–72, 298–99 (Goldberg, J., concurring) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)) (explaining how breathing space is needed for citizens to speak their minds).

77. *See* 360 U.S. 564, 588–89, 591 (1959) (Brennan, J., dissenting).

78. *Id.* at 586–87 n.2 (citing 2 FOWLER V. HARPER & FLEMING JAMES, JR. THE LAW OF TORTS 451–52 (2d ed. 1956)) ("Actual 'malice' is required to vitiate a qualified privilege, not simply the 'constructive' malice that is inferred from the publication.").

actual malice arguments.[79] Further, the brief supported the argument by citing to several of the same sources Brennan previously relied on.[80] Though Brennan had dabbled with actual malice a few years earlier, Wechsler is credited with reprising it and buttressing his arguments with stronger precedent, *Coleman v. MacLennan*, which was described in a footnote in the brief as "frequently cited as a leading case."[81]

The footnote noted that actual malice was still a "minority view."[82] But the brief was more forceful in arguing the nuances between negligence and the need to have a higher burden for public official plaintiffs in libel cases.[83] "It might be required, for example, that the official prove special damage, actual malice, or both," the brief argued.[84]

The brief's fourth argument brought in actual malice along with the public official's privilege.[85] Because public officials have an immunity from liability for statements made within the scope of their official conduct, "[t]he States accord the same immunity to statements of their highest officers, though some differentiate their lowlier officials and qualify the privilege they enjoy, taking the position urged by the minority in the *Matteo* case. But all hold that all officials are protected unless actual malice can be proved."[86]

A. Coleman v. MacLennan *(Kansas 1908)*

Justice Brennan's importation of actual malice is largely traced to *Coleman v. MacLennan*, a 1908 Kansas Supreme Court decision upholding a newspaper's defense to a libel action.[87] The plaintiff, the Kansas attorney general who was running for re-election, got roped into

79. *See* Brief for Petitioner at 22–23, 31, *Sullivan*, 376 U.S. 254 (No. 39) [hereinafter N.Y. Times Brief]; Bruce L. Ottley, John Bruce Lewis & Younghee Jin Ottley, New York Times v. Sullivan*: A Retrospective Examination*, 33 DEPAUL L. REV. 741, 770 (1984).

80. *Compare* N.Y. Times Brief, *supra* note 79, at 54 n.*, 55 n* (citing HARPER & JAMES, *supra* note 78, at 449–50), *with Sullivan*, 376 U.S. at 281 n.20 (citing HARPER & JAMES, *supra* note 78, at 449–50).

81. N.Y. Times Brief, *supra* note 79, at 54 n.* (citing Coleman v. MacLennan, 98 P. 281, 282 (Kan. 1908)); LEWIS, *supra* note 43, at 120; *see* David A. Anderson, *Wechsler's Triumph*, 66 ALA. L. REV. 229, 241 (2014).

82. N.Y. Times Brief, *supra* note 79, at 54 n.* ("Scholarly opinion, while describing as still a 'minority view' in libel law this requirement that a plaintiff officer or candidate prove actual malice has favored it with substantial unanimity.").

83. *Id.* at 22–23.

84. *Id.* at 31.

85. *Id.* at 55.

86. N.Y. Times Brief, *supra* note 79, at 55 (citing Barr v. Matteo, 360 U.S. 564, 755 (1959)).

87. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 280–82, 285 (citing or quoting to *Coleman* four times throughout the majority); Coleman v. MacLennan, 98 P. 281, 281 (Kan. 1908).

a school-funding scandal and brought a libel claim against the *Topeka State Journal*, a newspaper covering the brouhaha.[88]

Actual malice was part of the jury instructions, and ultimately became a major element to the state high court's application and discussion of the role and meaning of malice, especially with regard to defamation cases brought by public officials.[89] The common law of libel and English influences, juxtaposed with the extent to which newspapers can publish with privileges, as well as the state's strong adherence to press freedom combined for a deep and forward-thinking judicial opinion upholding freedom of the press.[90]

The Kansas Supreme Court spoke to the importance of criticism in public affairs.[91] Notably, the court wrote:

> There are social and moral duties of less perfect obligation than legal duties which may require an interested person to make a communication to another having corresponding interest. 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.[92]

Further, the court wrote:

> Under a form of government like our own there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointive, and by becoming a candidate, or allowing himself to be the candidate of others, a man tenders as an issue to be tried out publicly before the people or the appointing power his honesty, integrity, and fitness for the office to be filled.[93]

The court was unmistakable in its pronouncement that libel cases brought by public officials threatened to stifle commentary on public issues and criticism of public officials, posing a significant threat to freedom of the press.[94] The rationale for the actual malice standard is

88. *Coleman*, 98 P. at 281.

89. *Id.* at 281–82, 285–87 ("Q. On the 20th day of August, 1904, when said article complained of was published, did said defendant, or any of his employees, have any actual malice of or against the said plaintiff? A. No.").

90. *Id.* at 283–84 (quoting KAN. CONST. B. OF R. § 11) ("The liberty of the press shall be inviolate.").

91. *See id.* at 285.

92. *Id.*

93. *Coleman*, 98 P. at 285.

94. *See id.* at 289–90 (quoting Atkinson v. Detroit Free Press Co., 9 N.W. 501, 524–25 (Mich. 1881)).

resonant today:

> Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But in measuring the extent of a candidate's profert of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles.[95]

III. THE RECENT SUPREME COURT AND THE FIRST AMENDMENT

The twenty-first century Supreme Court has been protective of First Amendment values. For example, the Court has made broad pronouncements expanding First Amendment protections to the internet[96] and to protections of video games.[97] Even the extent to which the government will invade expressive activity—notably the recent decision in *Matal v. Tam*, refusing to allow a segment of the Trademark Act to bar registration of offensive names—the Court has supported expressive activity.[98]

However, the Court refused to find express First Amendment protections for high school students in *Morse v. Frederick*[99] and twice eschewed finding a First Amendment justification to protect broadcasters for liability for spontaneous fleeting expletives.[100] The Court has found a First Amendment right to lie about military honors[101] and posting violent and misogynist lyrics on social media.[102]

Perhaps no single case exemplifies the Court's expansion of First Amendment values better than *Citizens United v. Federal Election Commission*.[103] *Citizens United* was a controversial decision because the Court neutered elements of campaign finance regulations while finding that corporations and unions could use money to express themselves the same ways ordinary citizens do under the First Amendment. "If the First

95. *Id.* at 291.

96. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)) ("[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."); *see* Ashcroft v. ACLU, 542 U.S. 656, 660–62 (2004); *Reno*, 521 U.S. at 870.

97. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011).

98. 137 S. Ct. 1744, 1751 (2017) (quoting 15 U.S.C. § 1052(a) (2012)) ("Speech may not be banned on the ground that it expresses ideas that offend.").

99. *See* 551 U.S. 393, 397 (2007).

100. *See* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 258 (2012) (citing FCC v. Pacifica Found., 438 U.S. 726, 738–40 (1978)); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 517, 529 (2009).

101. *See* United States v. Alvarez, 567 U.S. 709, 714, 723 (2012).

102. *See* Elonis v. United States, 135 S. Ct. 2001, 2012–13 (2015).

103. 558 U.S. 310, 326 (2010).

Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech," the Court wrote in *Citizens United*.[104]

As expansive as the Court has been on First Amendment jurisprudence, in recent years the Court has not faced many newsgathering challenges or challenges under the press clause. *Bartnicki v. Vopper* appears to be the only twenty-first century Supreme Court decision weighing in on press rights.[105] In a Freedom of Information Act (FOIA) case, the Court ruled against the press.[106] Furthermore, the Court has not ruled on a libel case since the early 1990s with *Masson v. New Yorker Magazine* (1991)[107] and *Milkovich v. Lorain Journal Co.* (1990).[108] Both cases heavily relied on Sullivan's actual malice standards.[109]

In *Masson*, Justice Kennedy acknowledged the cosmetic challenges posed by actual malice, which he called "a term of art"[110] and an "unfortunate" phrase.[111] He wrote: "In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity."[112] This case involved a magazine series and later a book, which included a series of fabricated or altered quotes attributed to the plaintiff, a Sanskrit scholar and director of the Sigmund Freud Archives.[113]

The plaintiff argued that the misquotations and fabrications harmed his reputation and the author's knowledge of the misquotations constituted publication with actual malice.[114] While providing a grammar and punctuation lesson, the Court also set down a rule that in a journalistic setting, alteration of quotes may be permissible so long as the author does not change the meaning of the quote.[115] The Court added: "We reject the

104. *See id.* at 349.

105. *See generally* 532 U.S. 514 (2001) (deciding that the First Amendment protects the disclosure of illegally intercepted communication by individuals who did not conduct that interception).

106. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004).

107. *See generally* 501 U.S. 496 (1991) (holding that a public figure satisfied the actual malice test for libel of a public figure).

108. *See generally* 497 U.S. 1 (1990) (deciding that there is no absolute privilege protecting opinion from the application of defamation laws).

109. *See Masson*, 501 U.S. at 510; *see also Milkovich*, 497 U.S. at 14.

110. *See Masson*, 501 U.S. at 499.

111. *Id.* at 511 (citing Harte-Hanks Comm'ns v. Connaughton, 491 U.S. 657, 666 n.7 (1989)).

112. *Id.*

113. *Id.* at 499–502.

114. *See id.* at 511, 514.

115. *Masson*, 501 U.S. at 514.

idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment."[116]

By not equating even a deliberate misquotation with malice or actual malice, the Court gave journalists and authors tremendous leeway, and even some flexibility, all under the protections granted by the First Amendment.[117] This is a continuation and extension of the *Sullivan* rule.[118]

Actual malice also played a significant role in the Court's decision in *Milkovich v. Lorain Journal Co.*, which dealt with the extent to which opinions would be protected under the First Amendment.[119] This defamation case revolved around allegations that a high school wrestling coach lied about a fight at a wrestling match during an administrative inquiry.[120] Chief Justice Rehnquist, writing for the majority, reviewed the purpose behind the *Sullivan* rule, intended to protect criticism of public officials in their public capacity, later extended to public figures.[121]

Though the Court in *Milkovich* balked at creating a wholesale privilege for opinion, *Sullivan* provided a mode of interpretation, as well as protection, for some opinions.[122] The Court wrote:

> Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.[123]

Another gauge for the Court's more recent view on tort liability and the First Amendment came in 2011, in *Snyder v. Phelps*.[124] In *Snyder*, the Court invalidated a $10 million judgment for intentional infliction of emotional distress levied against Rev. Fred Phelps, leader of a small Christian sect—the Westboro Baptist Church—which regularly protested at and around high-profile events and funerals of fallen soldiers.[125] The church protested outside the funeral of a fallen Marine, whose father

116. *Id.*
117. *See id.* at 517 (citing N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964)).
118. *See id.* (citing *Sullivan*, 376 U.S. at 279–80).
119. 497 U.S. 1, 3, 14 (1990) (citing *Sullivan*, 376 U.S. at 279–80).
120. *Id.* at 3–4.
121. *Id.* at 14 (quoting *Gertz*, 418 U.S. at 334).
122. *See id.* at 20–21 (citing Phila. Newspapers v. Hepps, 475 U.S. 767, 774 (1986)).
123. *Id.* at 20.
124. *See* 562 U.S. 443, 447 (2011).
125. *Id.* at 448, 450, 459.

brought the tort action seeking damages for emotional distress.[126] For the majority, Chief Justice Roberts wrote:

> The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." The placards read "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," "God Hates Fags," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You." While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.[127]

Though public officials and public figures must prove that statements were published with actual malice, plaintiffs designated as private figures in most states have a less-exacting standard to satisfy in defamation cases: negligence.[128] This standard for liability and fault by the publisher is more relaxed for private figures requiring the plaintiff to prove that the publisher knew or should have exercised "reasonable care" to balance publication of false information.[129] In addition to the *Sullivan* rationale for the role that public officials and figures play in public affairs, private figures are treated differently because they may lack access to the media or have fewer resources at their disposal to repair their reputations.[130]

IV. AMERICAN EXCEPTIONALISM—THE FIRST AMENDMENT, LIBEL, AND THE REST OF THE WORLD

The First Amendment and American adherence to wide-open debate, free speech, and freedom of press, elevates American libel law as a model of American exceptionalism.[131] With independent media, prohibitions on prior restraint, and the actual malice standard, American law makes defamation claims by public officials and public figures

126. *Id.* at 448–50; Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008) (indicating that the trial court rejected the defamation claim).

127. *Snyder*, 562 U.S. at 454 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985)).

128. Gertz, 418 U.S. at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual.")

129. *See id* at 366-67.

130. *See* Time Inc. v. Firestone, 424 U.S. 448, 485-86 (1976).

131. *See* FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT 52–53 (2017).

different from most of the rest of the world.[132] Again, this is a key distinction for American press and media law.[133]

Perhaps no legal issue exemplifies American exceptionalism regarding freedom of speech, freedom of the press, and the adherence to actual malice than our repudiation of international "libel tourism."[134]

The concept of libel tourism first found its way into the American courts in 2005 after author Rachel Ehrenfeld sought to have American courts reject a civil libel judgment she faced after losing a libel case in England.[135] Both the New York Court of Appeals and the Second Circuit Court of Appeals weighed in on the jurisdictional and First Amendment issues Ehrenfeld argued.[136] However, the courts deferred to the New York State Legislature, which in the next term amended the state's civil practice rules.[137]

Ehrenfeld had argued that the libel judgment she faced in England, after defaulting by not appearing in court, should not be enforced by American courts because the plaintiff, a Saudi Arabian businessman, would not have been able to recover damages under American libel law.[138] American libel law would have indemnified journalists and authors, in particular, from lawsuits aimed at harassing, punishing, or chilling speech.[139]

The plaintiff, Khalid Salim Bin Mahfouz, a Saudi Arabian businessman and former banker, had deep pockets to forum-shop and finance the litigation, finding a jurisdiction, Great Britain, where the libel

132. GLASSER, INTERNATIONAL LIBEL, *supra* note 6, at 6–7. Glasser notes that some countries have a heighted standard for public defamation plaintiffs or people involved in matters of public interest, somewhat akin to actual malice. *Id.*

133. *Id.* at xvi.

134. *See* ABRAMS, *supra* note 131, at 52–53; Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507, 507 (2012); Gabriela A. Urbina, *Why the Free Speech Protection Act of 2009 Serves as a Necessary Judicial Restraint Against Foreign Libel Judgments*, 17 ILSA J INT'L & COMP. L. 147, 148 (2010).

135. Ehrenfeld v. Mahfouz, 881 N.E.2d 830, 832–33 (N.Y. 2007).

136. *See* Ehrenfeld v. Mahfouz, 518 F.3d 102, 105 (2d Cir. 2008). While the Second Circuit Court of Appeals did address both the jurisdictional and First Amendment issues, the New York Court of Appeals did not address the First Amendment issue. The Court of Appeals specifically declined to do so, because the Second Circuit had certified the question of jurisdiction under New York law.

137. N.Y. C.P.L.R. 302(d) (MCKINNEY 2017); *see Ehrenfeld*, 518 F.3d at 105; *Ehrenfeld*, 881 N.E.2d at 838; Roy S. Gutterman, *2007–2008 Survey of New York Law: Media Law*, 59 SYRACUSE L. REV. 953, 953–54 (2009); Sarah Staveley-O'Carroll, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J. L. & LIBERTY 252–53 (2009).

138. *Ehrenfeld*, 518 F.3d at 104; *Ehrenfeld*, 881 N.E.2d at 831–33.

139. *Id.*, *see also* Staveley-O'Carroll, *supra* note 138, at 255–56, 258, 267.

laws were "claimant-friendly."[140] Only twenty-three copies of the book, *Funding Evil: How Terrorism is Financed—and How to Stop It*, were sold in England through online booksellers, while a single chapter was available online through ABCnews.com.[141] The plaintiff sued in the High Court of Justice, Queens Bench Division, arguing allegations that he and his family had funded terrorists were false.[142]

Mahfouz demanded a public apology and a promise that the author never repeat the allegations.[143] He also demanded the author or publisher destroy all copies of the book and that the author make a charitable donation as punishment as well as pay his legal fees.[144] Ehrenfeld refused these demands and also ignored the suit, opting not to mount a defense; thus she was held in default.[145]

In the United States, Ehrenfeld sought declaratory action to prevent enforcement of the British judgment, but both New York state and federal courts declined jurisdiction on the matter.[146] The courts' refusal prompted legislative action with the 2008 amendments to New York's civil procedure rules[147] and long-arm statute, which explicitly bar collection of defamation judgments from foreign jurisdictions, which do not comport with American defamation or First Amendment standards.[148] Another revision allowed for declaratory relief in such cases.[149]

New York's revisions were the first of this type in the country. The bill's original assembly sponsor, Rory Lancman, in a memorandum in support of the legislation, wrote:

> Overseas jurisdictions, lacking the free speech and free press protections guaranteed by the New York and United States constitutions, often have libel laws designed to discourage and inhibit free expression, rather than promote it. Despots and terrorist networks whose activities have been exposed by American authors and news organizations have increasingly turned to such jurisdictions to obtain

140. *See* Gutterman, *supra* note 137, at 953–54; Staveley-O'Carroll, *supra* note 137, at 267–68.

141. *Ehrenfeld*, 881 N.E.2d at 832.

142. *Id.*; *Ehrenfeld*, 518 F.3d at 103–04.

143. *Ehrenfeld*, 881 N.E.2d at 832.

144. *Id.*

145. *Id.* at 832–33.

146. *Id.* at 833 (citing Ehrenfeld v. Mahfouz, 2006 U.S. Dist. LEXIS 23423, at *14 (S.D.N.Y. Apr. 25, 2006)).

147. Libel Terrorism Protection Act, 2008 N.Y. Laws 66 (codified at scattered sections of N.Y. C.P.L.R. (2017)).

148. *Id.*; *see* Paul H. Aloe, *Survey of New York Law, Civil Practice*, 58 SYRACUSE. L. REV. 713, 743–45 (2008) ("[T]he 'Libel Terrorism Protection Act,' is designed to overrule Ehrenfeld.").

149. 2008 N.Y. Laws 66 (codified at C.P.L.R. 302(d) (2017)).

> defamation verdicts which they could never obtain in an American court in order to harass and intimidate American authors and journalists.[150]

When New York Governor David Paterson signed the law in 2008, he said New York "has now done all it can to protect our authors while they live in New York, they remain vulnerable if they move to other states, or if they have assets in other states."[151]

Foreign judgments can be enforced in U.S. courts.[152] But because of the threat posed by libel tourism and the fact that more permissive and chilling foreign defamation standards should not be enforced by U.S. courts, both New York State and the United States amended respective laws on this. New York was the first state to legislate this matter with the 2008 amendments to the Civil Practice Law and Rules' long-arm statute known as the Libel Terrorism Protection Act.[153] The LTPA reads:

> The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.[154]

Governor Paterson then turned his attention to other jurisdictions, urging other states and Congress to enact similar measures.[155] Following the call to action California,[156] Illinois[157] and Florida[158] amended their laws with revisions modeled on the Libel Terrorism Protection Act.

The United States would pass a similar measure in 2010 with the Federal 2010 SPEECH Act, the acronym for the patriotic mouthful:

150. Legislative Memorandum of Assemb. Skelos, *reprinted in* 2008 McKinney's Session Laws Bill No. 2, ch. 66, at 1737.

151. Matthew Pollack, *New York Enacts Libel Terrorism Protection Act*, REPS. COMM. FOR FREEDOM PRESS (May 2, 2008), https://www.rcfp.org/browse-media-law-resources/news/new-york-enacts-libel-terrorism-protection-act; Press Release, N.Y. State, Governor Paterson Signs Legislation Protecting New Yorkers Against Infringement of First Amendment Rights By Foreign Libel Judgments (May 1, 2008).

152. *See, e.g.*, 28 U.S.C. § 2467(b)(1) (2012).

153. 2008 N.Y. Laws 66.

154. *Id.*

155. *See* Press Release, Gov. David Paterson, *supra* note 151.

156. CAL. CIV. PROC. CODE § 1716(c)(9) (West 2017).

157. 735 ILL. COMP. STAT. 5/2-209(a) (2016).

158. FLA. STAT. § 55.605(2)(h) (2017) ("An out-of-country foreign judgment need not be recognized if: The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state before which the matter is brought first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the United States Constitution and the State Constitution.").

Securing the Protection of Our Enduring and Established Constitutional Heritage Act.[159]

The law allows a petitioner to seek a declaratory judgment to not enforce a foreign defamation[160] judgment based on laws that are not compatible with American law.[161] The law states:

> Any United States person against whom a foreign judgment is entered on the basis of the content of any writing, utterance, or other speech by that person that has been published, may bring an action in district court, under section 2201(a), for a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States. For the purposes of this paragraph, a judgment is repugnant to the Constitution or laws of the United States if it would not be enforceable under section 4102(a), (b), or (c).[162]

The legislative history made grand pronouncements about freedom of speech and the press as vital to a robust democracy.[163] A report to the Senate's Judiciary Committee begins with an invocation of *New York Times v. Sullivan* as an integral landmark decision which stands alone in the world.[164] The committee also referred to a 2008 United Nations Human Rights Committee report which documented global threats to journalists and scholars based on abuse of defamation laws.[165]

> Federal legislation is necessary to ensure that American authors, reporters, and publishers have nationwide protection from foreign libel judgments, even when the foreign party has not yet sought enforcement of those judgments in the United States. Additionally, federal legislation is needed to provide a single, uniform standard for addressing these foreign libel judgments.[166]

"The committee bill, as reported, combats the chilling effect that foreign defamation lawsuits are having on American free speech," the report stated.[167] The law fights this two ways: 1) prohibiting enforcement of libel judgments from countries or jurisdictions with laws, policies, or

159. SPEECH Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (codified at 28 U.S.C. §§ 4101–05 (2012)).

160. 28 U.S.C. § 4101. The definition states: "The term 'defamation' means any action or other proceeding for defamation, libel, slander, or similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress, have presented any person in a false light, or have resulted in criticism, dishonor, or condemnation of any person." *Id.*

161. SPEECH Act § 4101(a)(1).

162. *Id.*

163. *See id.* sec. 2 (1)–(3).

164. S. REP. NO. 111-224, at 2 (2010); *see* H.R. REP. NO. 111-154, at 7 (2009).

165. S. REP. NO. 111-224, at 2–3.

166. *Id.* at 4.

167. *Id.*

standards that do mirror First, Fifth, and Fourteenth Amendment standards; and 2) allows American authors to employ declaratory relief to clear their names after being hit with defamation litigation abroad.[168]

The legislative findings unequivocally declared:

> The threat of the libel laws of some foreign countries is so dramatic that the United Nations Human Rights Committee examined the issue and indicated that in some instances the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work. The advent of the internet and the international distribution of foreign media also create the danger that one country's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.[169]

The SPEECH Act has only been adjudicated in a handful of cases[170] and is the subject of only one circuit court decision in *Trout Point Lodge v. Handshoe*.[171] Though this case thoroughly examined and applied the act in a dispute emanating from a blog written by a Mississippi blogger, the underlying libel litigation was not the result of international defamation forum shopping.[172] Instead, this case involved a default judgment from Nova Scotia, Canada, for two Canadian resident-citizens and a Canadian-sited lodge and business that was swept into a political scandal in Louisiana, which the blogger, Doug K. Handshoe wrote about.[173]

Because Canadian libel law differs from U.S. law regarding the burden of proof, which rests on the defendant to prove that the offending statements were true (rather than American law which requires the plaintiff to prove falsity), the underlying case would not have been successful in a U.S. court.[174]

As a case of first impression, the court wrote that the statute requires

168. *Id.*

169. SPEECH Act, Pub. L. No. 111-223, 124 Stat. 2380, sec. 2 (4) (2010) (codified at 28 U.S.C. 4101–05 (2012)).

170. *See* Joude v. Word Press Foundation, No. C 14-01656, 2014 U.S. Dist. LEXIS 122867, at *5 (N.D. Cal. Sept. 2, 2014) (acknowledging but not enforcing elements of the SPEECH Act); Eng v. Cushing, 14-cv-3905 (ENV), 14-cv-3912 (ENV), 2014 U.S. Dist. LEXIS 160910, at *3 n.1 (E.D.N.Y. July 11, 2014) (disregarding application of SPEECH Act to case).

171. 729 F.3d 481, 483 (5th Cir. 2013).

172. *Id.* at 483–84.

173. *Id.* at 484.

174. *Id.* at 488–90 ("There is no meaningful dispute that the law applied by the Nova Scotia Court provides less protection of speech and press than First Amendment and Mississippi law. Canadian defamation law is derivative of the defamation law of the United Kingdom, which has long been substantially less protective of free speech.").

analysis because:

> a party may enforce a foreign defamation judgment in a domestic court if either (A) the law of the foreign forum, as applied in the foreign proceeding, provides free-speech protection that is coextensive with relevant domestic law, or (B) the facts, as proven in the foreign proceeding, are sufficient to establish a defamation claim under domestic law.[175]

V. IN DEFENSE OF ACTUAL MALICE

The Supreme Court's reliance on precedent has been a hallmark of the high court's jurisprudence since the country's founding. The doctrine of stare decisis, defined as "[t]o abide by, or adhere to, decided cases" means courts adhere to precedent.[176] Stare decisis has risen to the public's attention, notably in Chief Justice John Roberts's testimony during his confirmation hearing before the Senate in 2005.[177] As Chief Justice Roberts later wrote, "fidelity to precedent is vital to the proper exercise of the judicial function."[178]

This does not mean that the Court never overturns precedent.[179] But the Court does so sparingly to ensure some degree of continuity in the constitutional system.[180] The Supreme Court has invoked stare decisis in a range of cases with First Amendment implications.[181]

175. *Id.* at 488.

176. *Stare Decisis*, BLACK'S LAW DICTIONARY (6th ed. 1990).

177. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice Of The United States: Hearing Before the Committee on the Judiciary, United States Senate*, 109th Cong. 145 (2005) ("It's settled as a precedent of the court, entitled to respect under principles of stare decisis.").

178. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 377 (2010) (Roberts, J., concurring).

179. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (explicitly overturning *Plessy v. Ferguson*); Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896) (standing for the separate but equal segregation policy in the civil rights arena).

180. *See, e.g.*, Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.").

181. *See* FCC v. Fox TV Stations, 556 U.S. 502, 534 (2009) (Thomas, J., concurring) ("These dramatic changes in factual circumstances might well support a departure from precedent under the prevailing approach to stare decisis."); Morse v. Frederick, 551 U.S. 393, 432 (2007) (Roberts, J., concurring) (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)) (noting that the Court's holding used stare decisis to protect procedural and evidentiary rules); RAV v. St. Paul, 505 U.S. 377, 398 (1992) (White, J., concurring) (citing Allied-Signal v. Dir., Div. of Taxation, 504 U.S. 768, 783–86 (1992)) (". . . the Court declined to abandon its precedents, invoking the principle of stare decisis.").

One recent example of the Court's departure from stare decisis in a First Amendment case came in 2010 in *Citizens United v. Federal Election Commission*, which overturned two well-established campaign finance cases and established new and controversial standards.[182] The Court wrote, "[s]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision."[183]

Justice Kennedy wrote,

> [o]ur precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. Beyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.[184]

The rationale applied in *Citizens United* to overturning two well-established campaign finance cases is also relevant to preserving *Sullivan* under the auspices of protecting important First Amendment and political speech issues. Justice Kennedy pointed to five factors to guide a court in abandoning stare decisis or overturning precedent: 1) was the underlying issue in error; 2) the antiquity of the precedent; 3) reliance interest at stake; 4) whether the precedent was well-reasoned; and 5) the precedent's shortcomings.[185]

None of these factors gives rise to justifying overturning *New York Times v. Sullivan*. At the very least with more than fifty years of precedent, *Sullivan* and the actual malice standard have been woven into a long line of both federal and state cases. Even Chief Justice Burger acknowledged this in his concurring opinion in *Dun & Bradstreet v. Greenmoss*, a 1985 defamation case.[186] Noting that he dissented in *Gertz v. Robert Welch*, which interpreted and applied *Sullivan*, Burger wrote, "*Gertz*, however, is now the law of the land, and until it is overruled, it must, under the principle of *stare decisis*, be applied by this Court."[187]

182. *See generally* 558 U.S. 310 (2010) (holding that laws preventing corporations from using general treasury funds for political advertising violates the First Amendment right to freedom speech).

183. *Id.* at 363 (citing Helvering, 309 U.S. at 119).

184. *Id.* at 362–63 (internal quotation marks omitted) (quoting Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009)).

185. *See id.* at 362–63 (quoting *Montejo*, 556 U.S. at 792–93).

186. *See* 472 U.S. 749, 763–64 (1985).

187. *Id.*

A. Other Practicalities

The fact that there is no federal defamation law further subverts Trump's vow to change libel law.[188] However, that does not necessarily negate any concern on this matter. First, there is a potential and nefarious back-door to possibly alter a single precedent, which would require a severe change in personnel on the Supreme Court and the appointment of enough justices to create a majority intent on overturning a single precedent. Second, there would need to be a viable case in the judicial pipeline—either an appeal from a state high court or a federal circuit court that was compelling enough to merit a grant of certiorari.

This is the same scenario envisioned in the John Grisham thriller, *The Pelican Brief*, where a wealthy developer assassinates two Supreme Court justices with a liberal bent on environmental regulation so the president could appoint two more pro-development justices.[189] Beyond the political conspiracies and international intrigue, *The Pelican Brief* highlights a legitimate, though far-fetched concern regarding the Court's operations, procedures, and majority rules.

There does not appear to be a movement among the current Court to step back from the actual malice rule. In fact, the late Antonin Scalia was the Court's most vocal critic of *Sullivan*.[190] His replacement, Justice Neil Gorsuch, while a judge on the Court of Appeals for the Tenth Circuit, weighed in on defamation and actual malice cases at least four times.[191]

In *Bustos v. A&E Television Networks*, a case involving a defamation claim by a prison inmate who was featured on a cable television show about prison gang life, Gorsuch wrote that *New York Times v. Sullivan*'s "constitutional patina" in recent years was seen as "becoming not just a feature of the common law but a First Amendment

188. *See* ABRAMS, *supra* note 131, at xvii.

189. *See* Judith Grant, *Picturing Justice: Images of Law and Lawyers in the Visual Media: Lawyers as Superheroes: The Firm, The Client, and the Pelican Brief*, 30 U.S.F. L. REV. 1111, 1119–20 (1996). *See generally* JOHN GRISHAM, THE PELICAN BRIEF (1992).

190. *See* Dahlia Lithwick, *Target Practice: Justice Scalia Sets his Sights on* New York Times Co. v. Sullivan, SLATE (July 17, 2007), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/07/target_practice.html; David G. Savage, *Scalia Criticizes Historic Supreme Court Ruling on Freedom of the Press*, L.A. TIMES (Apr. 18, 2014), http://www.latimes.com/nation/nationow/la-na-nn-scalia-ginsburg-supreme-court-libel-20140418-story.html.

191. *See Special Report on Supreme Court Nominee Neil Gorsuch*, REPS. COMM. FOR FREEDOM PRESS (2017), http://www.rcfp.org/gorsuch-report. In one unpublished opinion, *How v. Baxter Springs*, Gorsuch was part of the three-judge panel affirming the dismissal of a criminal libel lawsuit brought by a city government candidate. 217 F. App'x 787, 790, 798–99 (10th Cir. 2007).

imperative."[192]

In an earlier case involving invasion of privacy and intentional infliction of emotional distress claims by two undercover police officers, Gorsuch affirmed the dismissal of the claims against a New Mexico television station.[193] He found the underlying issue was a matter of legitimate public interest because the plaintiffs were officials who were identified as potential participants in a sexual assault.[194] In an extensive footnote, the court applied the standards established under *Sullivan*'s First Amendment protections for matters of legitimate public concern, which "often dovetails with the explanation for 'public official' designations for purposes of analyzing a publisher's First Amendment defense."[195]

In a concurring opinion in a complicated school-speech case, *Mink v. Knox*, Gorsuch deferred to a well-established circuit precedent reaffirming the First Amendment protections associated with parody and satire and matters of public interest.[196]

CONCLUSION

While much of the handwringing about Trump's rhetoric has been done by members of the media and their lawyers, it is important to reiterate that the interests protected under the First Amendment may vest the press with immunity and legal privileges; the rights are there for the public to enjoy.[197] The First Amendment fuels the marketplace of ideas and allows citizens to be armed with legitimate, valid, and uncensored information.[198] This also extends to art, commentary, entertainment, literature, and general information.

In its annual study of international press freedom, Freedom House's 2017 *Freedom of the Press* report noted that press freedom has fallen to its lowest point in thirteen years.[199]

> The United States remains one of the most press-friendly countries in the world. It enjoys lively, aggressive, and diverse media, and some of the strongest legal protections for reporting and expression anywhere in

192. 646 F.3d 762, 762, 764 (10th Cir. 2011) (citing N.Y. Times v. Sullivan, 376 U.S. 254, 256 (1964)) (affirming dismissal of defamation claim because the underlying allegations were true).

193. Alvarado v. KOB-TV, 493 F.3d 1210, 1213–14, 1222, 1225 (10th Cir. 2007).

194. *Id.*

195. *Id.* at 1220 n.9 (quoting *Sullivan*, 376 U.S. at 282–83).

196. 613 F.3d 995, 1012–13 (10th Cir. 2010) (citing Pring v. Penthouse Int'l, 695 F.2d 438, 443 (10th Cir. 1982)).

197. *See* MEIKLEJOHN, *supra* note 1, at 98.

198. *See id.* at 98–99.

199. ABRAMOWITZ, *supra* note 41, at 1.

> the world. With a handful of exceptions in recent years, reporters in the United States—in contrast to counterparts in some other countries—have been able to pursue their profession without fear of physical violence.[200]

Though some of the cause of concern predates the Trump presidency, Freedom House reported that some of candidate and President Trump's anti-press rhetoric, including his "enemy of the people" statement, echo those of dictators, such as Stalin, and may send the wrong message to the rest of the world.[201] Freedom House hoped the Constitution, checks and balances, and the judiciary could provide sufficient protections for press freedoms in the United States.[202] "Though these institutions may be tested, there is ample reason to hope that U.S. press freedom will remain vibrant in the years ahead[,]" Freedom House reported.[203]

Similarly, in its annual *Attacks on the Press* review, the Committee to Protect Journalists (CPJ) expressed concern with Trump's campaign promises to scale back the *New York Times v. Sullivan* precedent and roll back libel laws.[204] Freedom of the press's bipartisan support in the legislature as well as the adherence to Supreme Court precedent seemed reassuring.[205]

CPJ warns:

> The media protection that was granted in *New York Times v. Sullivan* contrasts with media treatment in countries with less stringent libel laws, such as in India and Brazil, where CPJ has found that journalists are often burdened with hefty fines and legal fees that can have a chilling effect on the flow of information. Notably, any effort to weaken legal libel protections for the media in the U.S. could open social media—Trump's preferred medium—to such suits as well.[206]

Free speech philosopher Alexander Meiklejohn, who famously lauded *New York Times v. Sullivan* as a cause for celebration and

200. *Id.*

201. *Id.* at 2 ("Trump's attacks mirror initial actions in other countries where media freedom subsequently suffered far more drastic restrictions and interference.").

202. *See id.*

203. *Id.* ("A greater danger is that the United States will stop being a model and aspirational standard for other countries. Protection of press freedom in the United States remains vital to the defense and expansion of press freedom worldwide; indeed, it is a cornerstone of global democracy. When political leaders in the United States lambaste the media, it encourages their counterparts abroad to do the same. When U.S. leaders step back from promoting democracy and press freedom, journalists beyond American shores feel the chill.").

204. HUFFMAN, *supra* note 17.

205. *Id.*

206. *Id.*

"dancing in the streets,"[207] viewed First Amendment protections of freedom of speech as inherently democratic, even a civil right to provide voters with the tools and information necessary to make decisions in the democracy.[208]

Though his book, based on his lectures, was published in 1948, his thoughts are equally valid, if not prescient, for today's political and legal climate:

> If the meaning and validity of the First Amendment be derived from the principles of self-government, still another very serious limitation of its scope must be recognized. The principle of the unqualified freedom of public speech is, then, valid only in and for a society which is self-governing. It has no political justification where men are governed without their consent.[209]

Faith in the American institutions of government, particularly the Supreme Court, may go a long way in assuaging public concern. Significant modification or overturning *New York Times v. Sullivan* would do more than throw American media into a tailspin. Stripping the media of its First Amendment protections could reprise sedition laws, maybe not criminal, but affording a more lenient and quite chilling civil action. Stripping away First Amendment protections would not only imperil journalists, but it would rob citizens of their rights to speak out against the government or express themselves as citizens or human beings. In addition to news and commentary, this slippery slope would jeopardize art, literature, filmmaking, music, and any form of expression the government or powerful players deem negative or disparaging.

This fear of a dystopian America where the media are neutered and speakers muffled, suppressed, prosecuted, and oppressed falls short of the wide-open debate protected by the constitution and decades of jurisprudence. That does not sound like making America great again.

207. *See* Kalven, Jr., *supra* note 10, at 221 n.125.
208. *See* MEIKLEJOHN, *supra* note 1, at 98.
209. *Id.* at 100.