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## The Promises of New York Times v. Sullivan

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## Articles

### **The Promises of *New York Times v. Sullivan***

**David A. Anderson\***

By any measure, *New York Times Co. v. Sullivan*<sup>1</sup> was a monumental decision. It altered American politics, journalism, and public life, for better and worse. It freed the press from the handcuffs of archaic libel doctrines, and it removed the constraints of provable truth. It stripped away some of the legal underbrush that public officials relied on to conceal their misdeeds, and it liberated attack dogs in political campaigns. It subjected celebrities to levels of scrutiny that press agents could not prevent, and it abetted the creation of celebrity culture.

Justice Brennan's opinion for the Court downplayed the case's significance. Indeed, Brennan went out of his way to make the changes wrought by the decision seem incremental.<sup>2</sup> But many saw in the decision potentially revolutionary ideas about freedom

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1. 376 U.S. 254 (1964).

2. For example, by analogizing the new "actual malice" rule to "a like rule, which has been adopted by a number of state courts," *id.* at 280, and by claiming that the new rule "is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen," *id.* at 282. The alleged "like rule" was a far less protective common law rule accepted in a minority of states, and "the protection accorded a public official" was absolute while the actual malice rule was not.

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of speech and press, the relation of speech and reputation, the direction of First Amendment theory, the Supreme Court's priorities, and the needs of a self-governing people. My aim in this Article is to identify some of those expectations and evaluate their success. Expectations related to reform of libel law, expansion of First Amendment theory, shifting the focus of First Amendment jurisprudence, and protecting information as well as ideas are evaluated in Sections I-IV, respectively.

## I. REFORMING THE LAW OF LIBEL

The expressed goal of *New York Times* was to liberate debate on public issues from the chill of libel.<sup>3</sup> The perceived problem with the common law regime it replaced was that it dampened the vigor and limited the variety of public debate, because critics of official conduct were “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.”<sup>4</sup> The antidote was:

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 it was false or with reckless disregard of whether it was false or not.<sup>5</sup>

Even though the Court stopped short of removing the chill of libel altogether, that goal has been largely achieved. Justice Black complained in his concurrence that the actual malice test “provides at best an evanescent protection for the right critically to discuss public affairs.”<sup>6</sup> During the Court's deliberations, however, Black had sent Brennan a respectful note stating that, however the case came out, “it is bound to be a very long step towards preserving the right to communicate ideas.”<sup>7</sup> This private note turned out to be a more accurate prediction than Black's

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3. *See id.* at 270.

4. *Id.* at 279.

5. *Id.* at 279–80.

6. *Id.* at 293 (Black, J., concurring).

7. KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* 170 (2011).

public criticism of the majority.

Judging by the number of scurrilous charges, half-truths, and unprovable accusations that surface in political campaigns, it is hard to believe that the vigor and variety of public debate is still being dampened, at least in politics. The media still complain about libel law, mostly because they still have to defend against occasional suits, but successful libel suits by public officials have all but vanished. Although the *New York Times* decision talked about freeing debate on *public issues*, it actually only addressed debate about public officials, and then only those statements relating to their official conduct.<sup>8</sup> The logic of the decision, however, soon led the Court to extend its protection to statements about the character of public officials,<sup>9</sup> the fitness of candidates for public office,<sup>10</sup> and the character and conduct of private persons who seek to influence public events.<sup>11</sup> The logic did not extend to people who seek no such influence and are famous only because they are successful in their fields, but the Court soon extended the *New York Times* rule to them too<sup>12</sup> – exposing celebrities, athletes, and artists to the same scrutiny as public officials.

Alleviating the chill of libel law was not accomplished solely, or even primarily, by the actual malice rule. The rule merely added another element to the libel plaintiff's burden and by itself would have had limited effect. The decision's transformative effect on the law of libel resulted mainly from the ancillary rules that the Court established, some in the *New York Times* opinion and some later. One of the former was the requirement that plaintiffs prove actual malice clearly and convincingly.<sup>13</sup> This enhanced evidentiary standard made it easier for judges to overrule juries, as the Court did in *New York Times* itself,<sup>14</sup> but it did not necessarily give judges carte blanche to evaluate the evidence for themselves. That power came with the next step: abandonment of the usual deference to jury findings on questions

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8. *N.Y. Times*, 376 U.S. at 279–80.

9. *St. Amant v. Thompson*, 390 U.S. 727, 732–33 (1968).

10. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971).

11. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

12. *Id.*

13. *N.Y. Times*, 376 U.S. at 285–86.

14. *Id.* at 285.

of fact. The Court claimed that “considerations of effective judicial administration” required it to review the evidence itself to determine whether it could constitutionally support the judgment.<sup>15</sup> This appeared to be nothing more than a discreet way of saying that the Court did not trust the Alabama courts to faithfully apply the new rule. Few people recognized it for what it became: a repudiation of the centuries-old belief that juries, not judges, were the best safeguard against abuses in libel law.<sup>16</sup> The assertion of power to review the evidence soon evolved into full-blown “independent review” by judges.<sup>17</sup>

Making judges the final arbiters of libel, at least in actual malice cases, is the main reason for the success of *New York Times* and its progeny. As long as juries had the final say on matters of fact, unpopular defendants could take little comfort from the actual malice rule, even as reinforced by the clear and convincing proof standard. Independent review changed all that. It meant that the defendant could overcome an adverse jury verdict if the trial judge, exercising his or her own judgment unencumbered by deference to the jury, disagreed. If the trial judge agreed with the jury, the defendant could still win if an appellate court disagreed with the jury. And independent review rewarded only defendants. It was not available to plaintiffs because its purpose was to ensure that the judgment did not offend the Constitution, and an erroneous verdict in the defendant’s favor posed no constitutional threat.

The Court’s commitment to the reform of libel law did not end with *New York Times*. In the twenty-five years following *New York Times*, the Court decided twenty-seven additional libel cases, most of them expanding the constitutional protection.<sup>18</sup> It held

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15. *Id.* at 284–85.

16. The belief that juries were the best safeguard goes back at least to the case of *John Peter Zenger*, 17 Howell’s St. Tr. 675, 721–22 (1735). The fullest report of the case and its legacy is JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Stanley Nider Katz, ed., 1963); see also VINCENT BURANELLI, THE TRIAL OF PETER ZENGER (1957).

17. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 *passim* (1984).

18. The cases are cited in David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 n.2 (1991).

that actual malice is not shown by proving ill will<sup>19</sup> or failure to investigate.<sup>20</sup> Hyperbolic statements<sup>21</sup> or statements that were false but created an impression no more harmful than the truth would have created,<sup>22</sup> could not meet the test. The Court extended *New York Times* to low-level appointed officials<sup>23</sup> and private citizens who assumed prominent positions on public matters.<sup>24</sup> It also extended its influence to other torts, such as intentional infliction of emotional distress<sup>25</sup> and invasion of privacy.<sup>26</sup>

Together with these later decisions, *New York Times* was remarkably successful in reducing the threat of libel judgments. It was markedly less successful, however, in reducing the chill that results from fear of having to defend a libel case. The actual malice test is a cumbersome and expensive way of avoiding liability. It does little to prevent burdensome litigation; plaintiffs who have little chance of succeeding continue to sue, and because actual malice is a state-of-mind test, it invites extensive inquiry into the defendant's knowledge, leading to intrusive and costly discovery efforts.<sup>27</sup>

Relieving defendants of these burdens has been accomplished largely by non-constitutional changes that make it easier for defendants to win without going to trial. The Supreme Court held that under the Federal Rules of Civil Procedure, plaintiffs are required to meet the clear and convincing proof standard to survive a motion for summary judgment,<sup>28</sup> and many states have

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19. *Garrison v. Louisiana*, 379 U.S. 64, 78–79 (1964).

20. *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968).

21. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970).

22. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).

23. *See Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (holding that “the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs,” and could apply to the supervisor of a county recreation area); *Henry v. Collins*, 380 U.S. 356 (1965) (per curiam) (Collins was a local police chief, see *Henry v. Collins*, 158 So. 2d 28, 30 (Miss. 1963)).

24. *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Ct. App. 1965), *rev'd sub nom. Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 140 (1967) (Walker was a retired general who inserted himself in a racial protest).

25. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

26. *Time, Inc. v. Hill*, 385 U.S. 374, 390–91 (1967).

27. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 176 (1979).

28. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

held the same as a matter of state law.<sup>29</sup> In a few states, this preference for summary judgment is bolstered by statutes that give defendants a right to interlocutory appeal if their summary judgment motions are denied.<sup>30</sup> These statutes go a long way towards deterring suits, because they require plaintiffs' cases to survive one or more appeals before they even get to a jury.

Many states have statutes that require some plaintiffs to make a preliminary showing of likelihood of success before they can pursue their claims.<sup>31</sup> These statutes were originally aimed at "Strategic Lawsuits Against Public Participation" ("SLAPP") and were touted as a way to prevent targets of public controversy (such as polluting industries) from silencing citizen activists by filing libel suits that had little chance of producing damage awards, but would divert the critics' resources and energies.<sup>32</sup> Anti-SLAPP statutes generally permit the defendant to file an early motion to strike the complaint.<sup>33</sup> If the defendant can show that the suit arose out of speech that concerns a public issue, the complaint will be dismissed unless the plaintiff can demonstrate, through pleadings and affidavits, a probability of prevailing.<sup>34</sup> Media defendants quickly availed themselves of the procedure,<sup>35</sup> and in some states the preliminary proceeding has become the principal means by which libel cases are decided.<sup>36</sup>

In the world of new media, all of these developments,

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29. See, e.g., *George v. Fabri*, 548 S.E.2d 868, 875 (S.C. 2001); *Eubanks v. N. Cascades Broad.*, 61 P.3d 368, 374 (Wash. Ct. App. 2003).

30. See, e.g., N.Y. C.P.L.R. § 5701(a) (McKinney Supp. 2014); TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (West Supp. 2011).

31. For a comprehensive list of state statutes and case law, see *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection/> (last visited Sept. 13, 2014).

32. See Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 731 n.4 (2003).

33. See, e.g., CAL. CIV. PRO. CODE § 425.16(b)(1) (West Supp. 2014) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a *special motion to strike*." (emphasis added)).

34. See, e.g., *id.* ("... unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."). See also *Lee v. Pennington*, 830 So. 2d 1037, 1044 (La. Ct. App. 2002).

35. See, e.g., *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46, 50-52 (Cal. Ct. App. 1995).

36. See Braun, *supra* note 32, at 735.

including the *New York Times* decision itself, are far less important than Section 230 of the Communications Decency Act (“CDA”).<sup>37</sup> That federal statute, passed in 1996, immunizes Google, Yahoo, Facebook, YouTube, Twitter, Tumblr, and innumerable other websites from liability, unless they originate the defamatory material themselves.<sup>38</sup> In other words, almost everyone who would be worth suing for online defamation is untouchable. One student of the new media says, “CDA 230 is [t]oday’s *Sullivan*.”<sup>39</sup>

That is a bit of an overstatement. It is true that non-constitutional developments have done more than the *New York Times* decision to reduce the chill resulting from the expense and uncertainty of litigation. But for the old media and most individual speakers, it is still the *Times* decision that provides the ultimate safeguard against large judgments. More importantly, the *Times* decision precipitated the changes in attitudes that made courts and legislatures amenable to these non-constitutional changes. Without saying so explicitly, *New York Times* proclaimed that free speech is more important than reputation in the American value system.<sup>40</sup> Disquieting as that proposition was to many people, it eventually became the unspoken credo upon which judges and legislators acted.

The best measure of *New York Times*’ success in protecting criticism of public officials is to be found in the headlines of any day’s newspaper, to say nothing of the blasts in the blogosphere: reports of the sexual peccadillos of military leaders, aspersions on the honesty of public officials, accusations of cronyism or graft, even charges of criminal conduct. For better or worse, libel law no longer “dampens the vigor and limits the variety of public debate.”<sup>41</sup>

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37. 47 U.S.C. § 230(c) (2012).

38. *Id.*

39. Marvin Ammori, *The “New” New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2286 (2014).

40. See Joan E. Schaffner, Note, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 433, 444 (1990) (“[B]y preserving free speech[,] . . . the Court allowed the law of defamation to lose most of its protection for reputation.”).

41. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

## II. EXPANDING FIRST AMENDMENT THEORY

Initially, *New York Times* seemed to be a breakthrough in First Amendment theory. The late Harry Kalven, an astute interpreter of the First Amendment, believed the Court had produced “an opinion that may prove to be the best and most important it has ever produced in the realm of freedom of speech.”<sup>42</sup> If free speech was more important than reputation in the American value system, then free speech probably was more important than most other values as well.

Until *New York Times*, speech had been treated the way most countries treat it today: as an important value to be balanced against other values.<sup>43</sup> The clear and present danger test<sup>44</sup> was intended to skew that balance in favor of speech, but the assumption was still clear: other interests could still trump free speech. In Justice Brandeis’s most famous defense of free speech, he said the exercise of free speech “is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, *political, economic, or moral*.”<sup>45</sup> As late as 1951, the Court embraced Learned Hand’s view: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>46</sup>

The promise of *New York Times* was that speech was a value of a different order – if not a preeminent value, at least one fundamental to a political system based on sovereignty of the people. Of course the Court had previously identified it as a “fundamental right,” but that was for purposes of deeming it

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42. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 194 (1964).

43. See European Convention on Human Rights art. 10, Nov. 4, 1950, C.E.T.S no. 194.

44. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

45. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (emphasis added), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). The kinds of injuries mentioned in this list could justify restricting speech for just about any reason the government might give.

46. *Dennis v. United States*, 341 U.S. 494, 510 (1951) (alteration in original) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)) (internal quotation marks omitted).

protected by the Due Process clause of the 14th amendment.<sup>47</sup> That usage said nothing about its relation to other rights; after all, the rights to use contraceptives<sup>48</sup> and refuse medical treatment<sup>49</sup> are also considered fundamental for 14th Amendment purposes, and no one thinks that makes them preeminent. Treating freedom of speech as fundamental to the political system made it not just a fundamental personal right, but a foundational right.

The language that came to embody this new understanding was the assertion of “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>50</sup> Those words have become the starting point for First Amendment analysis in a wide variety of cases; they have been quoted in sixty-three Supreme Court opinions on subjects ranging from postal censorship to campaign finance.<sup>51</sup>

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47. See *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (stating that freedom of speech and press “are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action”).

48. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

49. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

50. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

51. See *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011) (Kagan, J., dissenting) (public financing of elections); *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (funeral protests); *Christian Legal Soc’y of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 3020 (2010) (Alito, J., dissenting) (public university’s official recognition of a religious student group); *Citizens United v. FEC*, 558 U.S. 310, 471 (2010) (Stevens, J., concurring in part and dissenting in part) (campaign finance); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 467 (2007) (political speech); *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (campaign finance, political speech, and disclosures), *overruled by Citizens United*, 558 U.S. 310; *Bartnicki v. Vopper*, 532 U.S. 514, 516 (2001) (broadcasting of intercepted speech); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring in part and dissenting in part) (campaign finance); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (distribution of anonymous leaflets); *Waters v. Churchill*, 511 U.S. 661, 672 (1994) (discharge of government-employed nurse); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (defamation); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 92 n.8 (1990) (Stevens, J., concurring) (political considerations in government employment); *Thornburgh v. Abbott*, 490 U.S. 401, 421 n.2 (1989) (Stevens, J., concurring in part and dissenting in part) (regulations governing receipt of subscription publications by federal prison inmates); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (abortion protesters picketing before or about residence); *Boos v. Barry*, 485 U.S. 312, 318 (1988) (signs critical of foreign governments on public sidewalks near embassies of

those governments); Rankin v. McPherson, 483 U.S. 378, 387 (1987) (discharge of public employee for political speech); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986) (libel); Lorain Journal Co. v. Milkovich, 474 U.S. 953, 954 (1985) (mem) (Brennan, J., dissenting denial of certiorari) (libel); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting) (exclusion of federal employees from participation in a charity drive); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755 (1985) (defamation); McDonald v. Smith, 472 U.S. 479, 486 (1985) (Brennan, J., concurring) (libel); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 582 (1985) (Brennan, J., dissenting) (copyright infringement); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985) (campaign finance); FCC v. League of Women Voters of Cal., 468 U.S. 364, 382 (1984) (political speech); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 314 (1984) (Marshall, J., dissenting) (demonstrators sleeping in park); Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (posting of signs on public property); Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 309 (1984) (Stevens J., dissenting) (public employee speech); Connick v. Myers, 461 U.S. 138, 162 (1983) (Brennan, J., dissenting) (same); Anderson v. Celebrezze, 460 U.S. 780, 794 (1983) (early filing deadline for independent candidates for office); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (civil rights boycott); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 566 (1981) (Stevens, J., dissenting in part) (commercial speech); Lorain Journal Co. v. Milkovich, 449 U.S. 966, 970 (1980) (Brennan, J., dissenting denial of certiorari) (libel); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring in the judgment) (public access to criminal trial); Carey v. Brown, 447 U.S. 455, 462–63 (1980) (picketing); Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 548 n.9 (1980) (Marshall, J., concurring) (inserts in utility bills); McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring in the judgment) (political candidacy and religious belief); Elrod v. Burns, 427 U.S. 347, 357 (1976) (discharge of public employees based on political affiliation); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 65 (1976) (adult movie theater); Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 626 n.3 (1976) (Brennan, J., concurring in part) (political canvassing and solicitation); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (campaign finance and political speech), *superseded by statute as stated in McConnell*, 540 U.S. 93; Rogers v. United States, 422 U.S. 35, 48 (1975) (Marshall, J., concurring) (threat against the life of the President of the United States); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (libel); Lehman v. City of Shaker Heights, 418 U.S. 298, 310–11 (1974) (Brennan, J., dissenting) (political candidate's right to advertise); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 252 (1974) (political candidate's right to reply to newspaper); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 273 (1974) (libel); Colum. Broad. Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 112 (1973) (requirements of broadcasters regarding acceptance of editorial advertisements); Branzburg v. Hayes, 408 U.S. 665, 738 (1972) (Stewart, J., dissenting) (right of reporters to refuse to testify regarding confidential sources); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (school picketing); N.Y. Times Co. v. United States, 403 U.S. 713, 724 (1971)

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The phrase is said to have originated in a memo to Justice Brennan from one of his law clerks, Stephen Barnett.<sup>52</sup> Its rhetorical power is majestic, but it was more aspirational than descriptive. Our history was *not* one of commitment to uninhibited debate on public issues. The Court had previously held that the law need not tolerate advocacy of resistance to the draft,<sup>53</sup> opposition to war,<sup>54</sup> urging overthrow of the government,<sup>55</sup> advocating revolution,<sup>56</sup> or endorsing Communism.<sup>57</sup>

There was certainly no national commitment to the view that *defamatory* speech should be uninhibited. The commitment was to the proposition that debate on public issues should be *inhibited* for the purpose of protecting reputation. The Framers of the First Amendment gave assurances that they were leaving the states free to punish libel.<sup>58</sup> Until 1964, “[c]reators of legal doctrine insisted that despite guarantees for freedom of political expression, the good names of the ‘best men’ could not be left totally unguarded.”<sup>59</sup> Every state permitted suits for libel arising

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(Douglas, J., concurring) (prior restraint); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971) (defamation), *abrogated by Gertz*, 418 U.S. 323; *Wiseman v. Massachusetts*, 398 U.S. 960, 961 (1970) (mem) (Douglas, J., dissenting denial of certiorari) (film censorship); *Ginzburg v. Goldwater*, 396 U.S. 1049, 1050–51 (1970) (mem) (Black, J., dissenting denial of certiorari) (libel); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (threat against the life of the President of the United States); *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (exclusion of representative from membership in the House of Representatives); *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966) (defamation); *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (libel); *Lamont v. Postmaster Gen. of the U.S.*, 381 U.S. 301, 307 (1965) (postal censorship); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (libel).

52. See SETH STERN & STEPHEN WERMEIL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 224 (2010).

53. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

54. *Abrams v. United States*, 250 U.S. 616, 623–24 (1919).

55. *Gitlow v. New York*, 268 U.S. 652, 665–71 (1925).

56. *Whitney v. California*, 274 U.S. 357, 371 (1927), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

57. *Dennis v. United States*, 341 U.S. 494, 511 (1951).

58. See Letter from Thomas Jefferson, to Abigail Adams (Sept. 11, 1804), in WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 82 (1976). In the First Congress, a separate amendment forbidding states from violating freedom of the press passed the House, but was rejected by the Senate. See JEFFREY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* 70 (1990).

59. NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE*

from debate of public issues; some may have restricted such suits more than others,<sup>60</sup> but no state held that public debate should be uninhibited by defamation law.

Nevertheless, the ideal of “uninhibited, robust, and wide-open debate” was a powerful one, and it did not seem to be limited to the defamation context. Such a national commitment should be protected from other restraints as well. And indeed, the promise may have been better fulfilled in fields other than defamation. In *New York Times Co. v. United States*, the “Pentagon Papers” case, the Court made clear that public discussion of national security matters could not be inhibited, at least by a prior restraint.<sup>61</sup> *Nebraska Press Ass’n v. Stuart* seemed to allow suppression of public discussion about pending trials, but the standards it laid down for restraining such speech were so demanding that virtually no gag order can meet them.<sup>62</sup> The Court held that a state could not punish a newspaper for attempting to influence an election with a last-minute editorial,<sup>63</sup> or breaching the confidentiality of a judicial discipline proceeding,<sup>64</sup> or violating a statute that forbids publication of the name of a juvenile offender.<sup>65</sup> A newspaper could not be required to publish the reply of a public official it attacked.<sup>66</sup> A publisher could not be required to escrow profits from a criminal’s tell-all book for the benefit of his victims.<sup>67</sup> States could not differentially tax newspapers, even for the purpose of benefitting some of them.<sup>68</sup> Nor has the idea of “uninhibited, robust, and wide-open” debate been confined to cases involving the press. It has been invoked to protect labor picketing,<sup>69</sup> door-to-door canvassing of voters,<sup>70</sup> public employees’

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HISTORY OF THE LAW OF LIBEL 11 (1986).

60. *Compare* *Coleman v. McLennon*, 98 P. 281, 288 (Kan. 1908), *with* *Post Publ’g Co. v. Hallam*, 59 F. 530, 539 (6th Cir. 1893).

61. 403 U.S. 713, 723–24 (1971) (per curiam).

62. 427 U.S. 539, 562–70 (1976).

63. *Mills v. Alabama*, 384 U.S. 214, 220 (1966).

64. *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978).

65. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979).

66. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 255–56, 258 (1974).

67. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

68. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

69. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95–96, 99 (1972).

political rights,<sup>71</sup> a candidate's right to appear on the ballot,<sup>72</sup> and anti-gay demonstrators at military funerals,<sup>73</sup> among many others.

Of course, speech did not turn out to be entirely “uninhibited, robust and wide-open” after *New York Times*. Even in cases that quote that slogan, the Court has permitted speech to be inhibited in the interest of a wide variety of other goals, including public decency,<sup>74</sup> protecting intellectual property,<sup>75</sup> protecting access to abortion clinics,<sup>76</sup> enforcing non-discrimination policies,<sup>77</sup> and protecting a public official's authority to run his office.<sup>78</sup> As Robert O'Neil said, “[d]espite the strong rhetoric about how public discourse needed to be ‘uninhibited, robust, and wide open,’ when the dust settled, there were still situations in which free speech and press could be subordinated to individual interests in economic ventures, standing in the community, or general good feelings.”<sup>79</sup>

Kalven thought the decision rejected the judicial methodologies that had enabled the Court to subordinate speech to other interests.<sup>80</sup> He said it did away with the clear and present danger test, cut “the balancing test . . . down to its appropriate size,” and rejected the two-level theory in which some categories of speech are beneath First Amendment concerns.<sup>81</sup> But the clear and present danger test survives,<sup>82</sup> although it is applied more rigorously today. The balancing test, far from being cut down to size, seems to have expanded to become the Court's

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70. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 617 (1976).

71. *Elrod v. Burns*, 427 U.S. 347, 357 (1976).

72. *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983).

73. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215, 1220 (2011).

74. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70–71 (1976).

75. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

76. *Hill v. Colorado*, 530 U.S. 703, 715 (2000).

77. *Hastings Christian Fellowship v. Martinez*, 130 S. Ct. 2971, 2991 (2010).

78. *Connick v. Myers*, 461 U.S. 138, 149 (1983).

79. ROBERT O'NEIL, *THE FIRST AMENDMENT AND CIVIL LIABILITY* 31 (2001) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (second internal quotation marks omitted).

80. See Kalven, *supra* note 42, at 204–05.

81. *Id.* at 204–05, 216.

82. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1068–69 (1991); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

First Amendment methodology of choice.<sup>83</sup> Categorization of speech as unprotected has diminished though not disappeared;<sup>84</sup> it has been replaced by a two-tier system in which some categories of speech are protected but less fully than others.<sup>85</sup> So *New York Times* did not launch a methodological revolution.

It does seem clear, though, that *New York Times* marked an important change in the Court's view of the importance of free speech. While other interests can still defeat it, free speech enjoys a much stronger advantage than it had before *New York Times*. Competing interests are judged more skeptically. For example, while the Court recognizes strong interests in protecting privacy, it probes individual privacy claims and rejects those in which it finds weaknesses.<sup>86</sup> When restrictions on speech are imposed to protect defendants' fair trial rights,<sup>87</sup> rehabilitation of juvenile offenders,<sup>88</sup> or integrity of elections, the Court insists on strong proof of necessity.<sup>89</sup> Except in the area of national security, there is little deference to the legislature's or the executive's assessment of the need to restrict speech. The dangers in many of these cases would have been sufficiently clear and present to justify suppression of speech if that were the test, but since *New York Times* the bar has been raised.

Some people hoped for a more modest theoretical breakthrough: harmonizing libel law with the rest of First

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83. See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524, 530 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979).

84. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 107–09 (1973) (per curiam); *Miller v. California*, 413 U.S. 15, 22–24 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam).

85. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection value for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.” (citations omitted)).

86. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 533–35 (2001); *Fla. Star*, 491 U.S. at 540–41; *Smith*, 443 U.S. at 97, 105–06; *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 837–38 (1978); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975).

87. See *Gentile*, 501 U.S. at 1054–55.

88. See *Smith*, 443 U.S. at 104.

89. See *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010); *Mills v. Alabama*, 384 U.S. 214, 219–20 (1966).

Amendment theory.<sup>90</sup> Herbert Wechsler, counsel for the New York Times, had this goal in mind. His brief reviewed the Court's decisions on anti-government advocacy,<sup>91</sup> provocation,<sup>92</sup> freedom of association,<sup>93</sup> contempt,<sup>94</sup> loyalty oaths,<sup>95</sup> newspaper antitrust,<sup>96</sup> and street preaching,<sup>97</sup> and claimed that these cases "are the premises today of any exploration of the scope of First Amendment freedom."<sup>98</sup> Justice Brennan's opinion cited many of the same cases in support of the proposition that "freedom of expression upon public questions is secured by the First Amendment."<sup>99</sup> But by choosing a solution peculiar to libel law, the decision assured that defamation would continue to have its own trajectory quite different from the rest of First Amendment jurisprudence. As Robert O'Neil has observed, "libel remains, as it has always been, a unique area of First Amendment law."<sup>100</sup>

New York Times Co. v. Sullivan failed to fully integrate libel with the rest of First Amendment thought, but it did elevate speech generally in the pantheon of American values.

### III. SETTING PRIORITIES

Kalven saw in the decision "a happy revolution of free-speech doctrine."<sup>101</sup> He believed that in repudiating seditious libel, the Court had identified the central meaning of the First Amendment: "a core of protection of speech without which democracy cannot

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90. See generally, e.g., Kalven, *supra* note 42; Samuel R. Pierce Jr., *The Anatomy of a Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315 (1965).

91. Brief for the Petitioner at 42, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (Nos. 39, 40), 1963 WL 105891 [hereinafter N.Y. Times Brief] (citing *Stromberg v. California*, 283 U.S. 359, 369–70 (1931)).

92. *Id.* (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

93. *Id.* at 42–43 (citing *NAACP v. Button*, 371 U.S. 415, 428–29 (1963)).

94. *Id.* at 44 (citing *Bridges v. California*, 314 U.S. 252, 267–68 (1941)).

95. *Id.* at 43 (citing *Speiser v. Randall*, 357 U.S. 513, 516–17, 520 (1958)).

96. *Id.* at 58 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

97. *Id.* at 42–43 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 310–11 (1940)).

98. *Id.* at 44.

99. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

100. O'NEIL, *supra* note 79, at 35.

101. Kalven, *supra* note 42, at 205.

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function.”<sup>102</sup> To him, this meant that “analysis of free-speech issues should hereafter begin with the significant issue of seditious libel and defamation of government by its critics rather than with the sterile example of a man falsely yelling fire in a crowded theater.”<sup>103</sup> Kalven added: “I am not so much predicting what the Court will do with the case as a precedent as I am suggesting that the opinion makes a notable shift in constitutional idiom and could provide a new start for consideration of free-speech problems.”<sup>104</sup>

His caution was well advised; the decision did not revolutionize free speech doctrine. If he meant only that the decision would increase protection for speech about public officials, it has indeed done so. However, that was hardly a revolution. The Court had already taken giant steps in that direction in the contempt cases.<sup>105</sup> Although those cases had left open the possibility that criticism of judges and courts might be punished as contempt on a showing of clear and present danger, it was already clear that such punishments would rarely be permitted.<sup>106</sup> That did not mean that public officials could be defamed with impunity, of course; but if non-defamatory calumny of judges was protected, it was not unthinkable that they and other public officials might have to endure some defamation too.

But the broader revolution that Kalven envisioned was toward the view of the First Amendment espoused by Alexander Meiklejohn, who argued that speech relating to self-government was absolutely protected.<sup>107</sup> The Court has consistently protected such speech, but by rationales that fall far short of Meiklejohn’s absolutist view.<sup>108</sup> Nor has the Court ever accepted Meiklejohn’s

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102. *Id.* at 208.

103. *Id.* at 205.

104. *Id.* at 194.

105. *See, e.g.*, *Wood v. Georgia*, 370 U.S. 375, 383 (1962); *Craig v. Harney*, 331 U.S. 367, 373 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946); *Bridges v. California*, 314 U.S. 252, 270–71 (1941).

106. *See, e.g.*, *Wood*, 370 U.S. at 383 (“[T]he burden upon this Court is to define the limitations upon the contempt power according to the terms of the Federal Constitution.”).

107. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 252, 255 (1961).

108. *See, e.g.*, *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (reversing a criminal conviction for disclosing information about judicial disciplinary proceedings because the interests advanced by the state

corollary, which was that “[t]he First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ It is concerned not with a private right, but rather with a public power, a governmental responsibility.”<sup>109</sup>

If the revolution that Kalven foresaw was that the Court henceforth would concentrate its fire on what he and Meiklejohn saw as “the central meaning” and not waste bullets on the periphery, that has not happened. The Court’s First Amendment jurisprudence since *New York Times* has moved far afield from speech relevant to self-government. The Court has fired bullets in defense of crush videos,<sup>110</sup> video games,<sup>111</sup> commercial speech,<sup>112</sup> pornography,<sup>113</sup> indecency on cable television,<sup>114</sup> and hate speech<sup>115</sup> – subjects that would seem to have more to do with private rights than governing.

Meiklejohn said “[w]e must recognize that there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment.”<sup>116</sup> But his view was perplexingly complicated. He thought, “literature and the arts are protected because they have a ‘social importance’ which I have called a ‘governing’ importance.”<sup>117</sup> So perhaps some of the Court’s forays that seem to have more to do with private rights qualify as governance-related because “[t]hey lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.”<sup>118</sup>

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were “insufficient”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 725–26 (1971) (per curiam) (refusing to enjoin publication of the Pentagon Papers because the government had not met a heavy burden of showing justification).

109. Meiklejohn, *supra* note 107, at 255. Perhaps Kalven didn’t endorse the negative corollary, but his enthusiasm for Meiklejohn’s theory did not appear to be qualified. *See generally* Kalven, *supra* note 42.

110. *United States v. Stevens*, 559 U.S. 460 (2010).

111. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

112. *E.g.*, 44 *Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996).

113. *E.g.*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

114. *E.g.*, *United States v. Playboy Entm’t Grp.*, 529 U.S. 803 (2000).

115. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

116. Meiklejohn, *supra* note 107, at 258.

117. *Id.* at 262.

118. *Id.* at 257.

If the central meaning is that expansive, it has little utility; in that view, the central meaning is that all speech that has social value is equally protected. But I do not believe that is the idea that Kalven embraced. He applauded the *New York Times* decision because he believed that it marked the beginning of a new theory of the First Amendment, one that emphasized the protection of speech that was important for self-government – not self-fulfillment or self-expression.<sup>119</sup> If I am right, *New York Times* brought about no revolution; the Court has given speech about self-government no greater primacy than it had before. Indeed, such speech now receives far less of the Court's attention than speech that primarily concerns self-expression or personal enjoyment.<sup>120</sup> The Court has avoided cases involving speech about great public issues – the reasons for and conduct of war,<sup>121</sup> the suppression of speech to combat terrorism,<sup>122</sup> massive surveillance of citizens' communications,<sup>123</sup> and the leaking of information held secret in the name of national security,<sup>124</sup> while extending First Amendment protection to video games in which the player engages in virtual rape, torture, and dismemberment,<sup>125</sup> lying about military honors,<sup>126</sup> and pharmaceutical advertising that creates false epidemics of impotence and attention deficit hyperactivity disorder.<sup>127</sup>

#### IV. PROTECTING INFORMATION, NOT JUST IDEAS

Another potential consequence of *New York Times*, less remarked then and since, might have been to establish a

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119. See Kalven, *supra* note 42, at 255.

120. Of course, that might be because protection of speech relating to self-government is well settled while the status of other types of speech is more uncertain.

121. *E.g.*, *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968).

122. *E.g.*, *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004) (mem).

123. *E.g.*, *Am. Civ. Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008) (mem).

124. *E.g.*, *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972) (mem).

125. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

126. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

127. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

meaningful public right to be informed. Until *New York Times*, First Amendment jurisprudence, at least in the Supreme Court, focused primarily on the expression of ideas. In the great formative cases of the 20th century, First Amendment claimants were defending their right to express opinions. Schenck, Frohwerk, and Debs ran afoul of the law by exhorting people to resist the draft.<sup>128</sup> Abrams's crime was verbally attacking capitalism;<sup>129</sup> Gitlow's was advocating overthrow of the government;<sup>130</sup> Whitney's and Dennis' was embracing the Communist Party;<sup>131</sup> Cantwell's was expressing a low opinion of the Catholic Church;<sup>132</sup> and Chaplinsky's was insulting a police officer.<sup>133</sup> None of these defendants were prosecuted for conveying information. Even the contempt cases<sup>134</sup> were primarily about opinions – unwelcome opinions about actions of judges.

*New York Times* took a giant step beyond those cases by protecting statements of fact, even false ones. The opinion approvingly quoted Judge Edgerton's assertion that "[t]he protection of the public requires not merely discussion, but information."<sup>135</sup> The Court's key conclusion – that some falsehoods must be protected to prevent self-censorship<sup>136</sup> – can only pertain to information because ideas or opinions cannot be false. The Court embraced Madison's view that freedom of speech and press are necessary prerequisites for the exercise of popular sovereignty.<sup>137</sup> "The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."<sup>138</sup>

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128. *Debs v. United States*, 249 U.S. 211, 212, 216 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205–06 (1919); *Schenck v. United States*, 249 U.S. 47, 48–49 (1919).

129. *Abrams v. United States*, 250 U.S. 616, 617, 619–20 (1919).

130. *Gitlow v. New York*, 268 U.S. 652, 655–56 (1925).

131. *Dennis v. United States*, 341 U.S. 494, 497 (1951); *Whitney v. California*, 274 U.S. 357, 363–68 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

132. *Cantwell v. Connecticut*, 310 U.S. 296, 300–01 (1940).

133. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569–70 (1942).

134. *See supra* note 105.

135. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)).

136. *Id.* at 279.

137. *See id.* at 275–76.

138. *Id.* at 275.

That discussion would be woefully incomplete if it consisted only of ideas and opinions without factual information.

The Court did not consistently distinguish between fact and opinions or ideas. Indeed, the opinion obscures the advance by speaking as if the case involved only the protection of ideas. It cites the earlier First Amendment cases as authority without acknowledging that there might be a difference between protecting ideas and protecting statements of fact.<sup>139</sup> It quotes statements about “unfettered interchange of ideas”<sup>140</sup> and “enlightened opinion.”<sup>141</sup> It repeats the assertion from *Cantwell v. Connecticut* that compares political belief to religious faith and declares that excesses must be expected in both.<sup>142</sup> It repeatedly refers to the need to protect “critics” and “criticism,” as if nothing more was at issue in the case.<sup>143</sup> But Sullivan was not complaining about ideas or opinions; his complaint was that the advertisement at issue had gone beyond that, ascribing to him specific acts of dishonorable conduct that he did not commit.<sup>144</sup> Protecting that speech required the Court to go beyond anything it had done before.

Of course, there is no bright line between facts and ideas, as the Court recognized many years later when asked to recognize additional protection for defamation in statements of opinion.<sup>145</sup> Most expressions of opinion state, or at least imply, some factual assertions.<sup>146</sup> That is true of the advertisement in *New York Times*. The factual statements were part of an effort to persuade readers that the opinions voiced in the advertisement were

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139. *See id.* at 269–73.

140. *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

141. *Id.* at 271 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

142. *Id.* (citing *Cantwell*, 310 U.S. at 310).

143. *See id. passim.*

144. *Id.* at 256–58.

145. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990).

146. The archaic “rolled-up plea” was a sensible response to this: it allowed a defendant to plead that any factual matter in the defamatory publication was true and any statements of opinion were fair comment, without having to identify which were which. *See, e.g.,* *Shenkman v. O’Malley*, 2 A.D.2d 567, 569, 572–73 (N.Y. App. Div. 1956) (identifying “the ‘rolled up plea’ of truth and fair comment” as a complete defense, but holding that the plea failed because repeating opinions of others was not fair comment).

correct: civil rights demonstrators were being treated unjustly and their cause deserved readers' financial support.<sup>147</sup> So it was not implausible to speak in *New York Times* of protecting ideas, even though more was involved. It was only in later cases that it became clear that the decision protected information even when it was not part of any exposition of ideas or opinions.<sup>148</sup>

The breakthrough in *New York Times* was the recognition that democracy requires not just freedom to speak one's mind, but also freedom to be informed about public issues.<sup>149</sup> Perhaps because that idea was only implied and not expressed, it has been generally ignored. Although the Court later flirted with the idea of a right to receive information,<sup>150</sup> that right has been all but stillborn. Had the implication been clearly seen and embraced, it might have done much to give meaning to Madison's dictum that "[t]he people, not the government, possess the absolute sovereignty."<sup>151</sup> As it is, the government has great freedom to manipulate the public's exercise of sovereignty by managing, controlling, and hiding information.

If the Court had followed the logic of the public's right to be informed, the right could have partially filled the gap left by the Court's continuing refusal to give force to the press clause.<sup>152</sup> The press clause was included in the First Amendment to protect discussion of public affairs, which the Framers believed was an essential prerequisite for self-government.<sup>153</sup> The Court has partially achieved that objective through the speech clause, protecting in the name of "freedom of speech" matters that the

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147. See *N.Y. Times*, 376 U.S. at 257–58.

148. See, e.g., *Ocala Star-Banner v. Damron*, 401 U.S. 295, 300–01 (1971) (applying *New York Times* to a news report that erroneously identified plaintiff as a criminal suspect).

149. See *N.Y. Times*, 376 U.S. at 270.

150. See generally, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 478 (1976) (invalidating restriction on drug advertising, not as an abridgement of speaker's First Amendment rights, but as a violation of a consumer's right to receive information).

151. *N.Y. Times*, 376 U.S. at 274 (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569–70 (Jonathan Elliot ed., 1876)) (internal quotation marks omitted).

152. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978); *Pell v. Procunier*, 417 U.S. 817, 829–31 (1974).

153. I discussed this history at length in *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

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Framers would have thought of as freedom of the press issues.<sup>154</sup> Indeed, *New York Times* itself is a case that the Framers would have seen as a free press case. That is true not only of the case against the Times, a press entity, but also the case of the four individual defendants; their use of someone else's printing press to express their views is exactly how the Framers envisioned the free press operating.<sup>155</sup> Counsel for the Times treated the case consistently as a free press case; he never invoked freedom of speech.<sup>156</sup> The brief of the four individual defendants hedged: it spoke of "freedom of utterance,"<sup>157</sup> "freedom of written expression,"<sup>158</sup> "freedoms of press, speech, assembly and association,"<sup>159</sup> or simply "the Constitution."<sup>160</sup> But the Court treated *New York Times* and subsequent cases as free speech cases, and when free press claims could not be squeezed into the free speech category,<sup>161</sup> the Court's response has been to deny a remedy as it has done in cases denying access to government information.<sup>162</sup> Recognizing that *New York Times* implied a public right to the information necessary for self-governance would have compelled a different result in those cases, or at least a less facile one.

## V. CONCLUSION

The Court's reform of libel law has to be judged a success, not because the actual malice test was a success, but because of the

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154. See, e.g., *Leathers v. Medlock*, 499 U.S. 439 (1991); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *N.Y. Times Co. v. United States*, 403 U.S. 1 (1971).

155. See David A. Anderson, *Freedom of the Press*, 80 TEXAS L. REV. 429, 446–47 (2002) ("Freedom of the Press' referred to the freedom of the people to publish their views, rather than the freedom of journalists to pursue their craft.").

156. See generally N.Y. Times Brief, *supra* note 91.

157. Brief for the Petitioners at 18, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (Nos. 39, 40), 1963 WL 105893. This was the brief of the four individual petitioners, whose case was briefed and argued separately from that of the Times.

158. *Id.* at 39.

159. *Id.* at 26.

160. *Id.* at 62.

161. As was done in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

162. See, e.g., *Houchin v. KQED, Inc.*, 438 U.S. 1, 12–15 (1978); *Pell v. Procunier*, 417 U.S. 817, 829–34 (1974).

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Court's persistence in refining, expanding, and enforcing *New York Times*. The recognition that libel law could violate the First Amendment was the critical step that made possible all the Court's subsequent defamation decisions and the many restrictions later imposed on libel law by state judges and legislatures.

The decision altered First Amendment theory, not as dramatically as its admirers had hoped, but implicitly, by elevating free speech to a position of primacy that it had not previously enjoyed. It did not revolutionize First Amendment theory, but its impact has been felt in many areas other than defamation. It did not succeed in focusing the Court's attention on a "central meaning" of the First Amendment; on the contrary, First Amendment jurisprudence has only grown more scattershot, if not incoherent.

By extending First Amendment protection to information as well as ideas, the decision had the potential to limit the government's ability to hinder discussion on public issues by manipulating and hiding information. The Court invoked Madison's assertion that "the censorial power is in the people over the Government, and not in the Government over the people."<sup>163</sup> The decision could have been read to give meaning to that ideal, but that interpretation has failed to gain any traction.

*New York Times Co. v. Sullivan* did less than its fans hoped it would, but few could have imagined that what began as a garden-variety torts case would become one of the most transformative legal events of the 20th century.

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163. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting 4 ANNALS OF CONG. 934 (1794)) (internal quotation marks omitted).