

NEW YORK TIMES CO. v. SULLIVAN—50-YEAR AFTERWORDS

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This is not a law review article.¹ It is an address that was delivered largely in these words at the University of Alabama Law School on February 28, 2014, at a symposium marking the fiftieth anniversary of the Supreme Court’s decision in *New York Times Co. v. Sullivan*² (“*Sullivan*” or “*New York Times v. Sullivan*”). It was meant to present a broad overview of the case and its consequences and to serve as a backdrop for an examination by others of various specific aspects of the decision and its impact.

I.

New York Times v. Sullivan is an important and difficult case. It is also remarkable in at least this highly relevant respect: as Justice Goldberg noted in his concurrence, the Supreme Court was “writing upon a clean slate.”³ It had been widely assumed and expressed that civil judgments based on the ancient English defamation torts—libel and slander—were entirely matters of state law, unconstrained by First Amendment protections.⁴ From there, in a single bound, the *Sullivan* Court jumped to a

* Senior Judge, United States Court of Appeals for the Second Circuit. The author is indebted to, and in awe of, the late Anthony Lewis, whose 1991 book *Make No Law: The Sullivan Case and the First Amendment*, is the author’s source of first and last resort when attempting to understand the history and significance of *New York Times Co. v. Sullivan*. This Article is humbly dedicated to his memory. The author also gratefully acknowledges the assistance of David Schulz and Stuart Karle, who read and helpfully commented on early versions of these remarks. Special thanks go to Richard Tofel for background information on the legal struggles of Dow Jones publications in Singapore in the 1980s and 1990s and the author’s wife Anne and his law clerks, particularly Eugene A. Sokoloff, for their patient support. Thanks too to the Editors of the *Alabama Law Review* for their fine work on both arranging the symposium and editing and publishing this Article.

1. Cf. RENÉ MAGRITTE, THE TREACHERY OF IMAGES (1928–29) (painting of a pipe with the caption “Ceci n’est pas une pipe.” (“This is not a pipe.”)), available at http://en.wikipedia.org/wiki/The_Treachery_of_Images. Footnotes have been added by the author in order, *inter alia*, to make this *look* like a law review article.

2. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The author gave versions of this address at symposia marking the fiftieth anniversary of *New York Times Co. v. Sullivan* at the Roger Williams University School of Law on February 21, 2014; New York University School of Law on April 2, 2014; and the Silha Center for The Study of Media Ethics and The Law at the University of Minnesota School of Journalism and Mass Communication on April 23, 2014.

3. *Id.* at 299 (Goldberg, J., concurring).

4. *See id.* at 299–300.

new and complex set of constitutionally based limitations on defamation suits by public officials, applicable, as the First Amendment is through the Fourteenth, nationwide.⁵ The new rules required plaintiffs to support their claims with proof of “actual malice.”⁶ They provided that “actual malice” must be established by clear and convincing evidence and that a defendant was entitled to independent appellate review of any trial court finding to that effect.⁷ And they established that criticism of government action could not in any event constitutionally support a libel action by an unidentified responsible government official.⁸ There is no simple explanation of how, in one fell swoop, the Court got there.

To put this all in perspective, I thought I would start by looking at *Sullivan* in the context of a legal system about as far away as you can get from New York City, Montgomery, and Tuscaloosa without leaving the planet—the dystopian legal world of Singapore press law.

Lee Kwan Yew,⁹ Singapore’s larger-than-life first prime minister, was “[t]he longest-serving prime minister in world history.”¹⁰ He became the first prime minister of Singapore on June 5, 1959.¹¹ He held that post for some thirty years, was then senior minister, and thereafter mentor minister to his son, the third prime minister.¹² He put it this way early on: “[F]reedom of the news media[] must be subordinated to the overriding needs of the integrity of Singapore, and to the primacy of purpose of an elected government.”¹³ Or as a Singaporean official said in connection with a dispute with a foreign newspaper some years later: “Singapore is not America, and we have no ‘free and unrestricted press in American usage.’”¹⁴

By way of background, for many years I enjoyed the challenge and privilege of acting as outside American legal counsel for the *Wall Street Journal* and, among others, its Asian publications. In May 1988, I was with

5. The First Amendment was first applied to the states through the Fourteenth Amendment in *Gitlow v. New York*, 268 U.S. 652 (1925).

6. *Sullivan*, 376 U.S. at 279–80.

7. *Id.* at 285 n.26.

8. *Id.* at 291–92.

9. Sometimes spelled “Lee Kuan Yew.”

10. *Lee Kuan Yew*, BIOGRAPHY.COM, <http://www.biography.com/people/lee-kuan-yew-9377339> (last visited March 22, 2014).

11. *See id.*

12. *See Lee Kuan Yew*, WIKIPEDIA, http://en.wikipedia.org/wiki/Lee_Kuan_Yew (last visited March 22, 2014).

13. Lee Kwan Yew, Address to the General Assembly of the International Press Institute (June 9, 1971), *quoted in* CHERIAN GEORGE, FREEDOM FROM THE PRESS: JOURNALISM AND STATE POWER IN SINGAPORE, 74 (2012).

14. Dow Jones & Co., Inc., Lee Kuan Yew Vs. the News: A History 15 [hereinafter Dow Jones white paper] (unpublished and undated white paper) (on file with the Dow Jones & Co., Inc. corporate relations department in New York and the *Alabama Law Review*).

a London-based barrister in Singapore representing the *Asian Wall Street Journal*. We were at a hearing in the High Court; the country's tribunal of first instance for most cases. It shares the name with the roughly corresponding institution in England. The old Singapore High Court building looked to me as though it had been moved block by block from London's Strand. And it stood across the street from, of all things, huge cricket grounds in the Singapore City center.¹⁵ The judge and the barristers were in robes; the judge, at least, was bewigged. As I listened to an argument regarding the gazetting of the *Journal*—gazetting was the drastic government-imposed limitation-by-licensing of the *Journal's* circulation in Singapore—I was struck, as you can tell, by just how very English everything seemed to be.¹⁶

But John Berthelsen, a former *Journal* reporter who has long covered the area, observed several years ago:

Being charged in the Singapore courts is tantamount to being convicted. As far as can be determined, neither the government nor the Lee family [has ever] lost a case against the press in their own courts The government or members of the Lee family have filed defamation or contempt charges against virtually every major publication in Asia, including the *Financial Times*, *Time Magazine*, the *Economist*, *Bloomberg News Service*, [and] the now-defunct *AsiaWeek* . . . [and won.]¹⁷

Recently, a Singapore-based scholar similarly noted: “[T]wo laws—defamation and contempt of court—have been the most regularly used instruments against foreign media, next to the government’s gazetting powers.”¹⁸ He cited, as what he called “[t]he classic example,” a 1994 lawsuit against the *International Herald Tribune*.¹⁹ The suit arose from an article that referred simply to “intolerant regimes in Asia” and a compliant judiciary.²⁰ “Although Singapore was not mentioned by name,” the scholar reported, “the government [successfully] charged that the article defamed

15. See, e.g., Cricket Pitch, MEMORIES OF SINGAPORE, http://www.singas.co.uk/Lynne_Copping/cricket_pitch.jpg (last visited March 22, 2014). The High Court was in the domed building across the street from the field.

16. See, e.g., R.C., *A Chill in The Blogosphere*, ECONOMIST, (Jan. 19, 2011, 6:50 AM), http://www.economist.com/blogs/banyan/2011/01/singapores_media; Dow Jones white paper, *supra* note 14, at 8.

17. John Berthelsen, *Singapore's Lees Cow the International Herald Tribune Again*, ASIA SENTINEL (Mar. 24, 2010), <http://www.asiasentinel.com/politics/singapores-lees-cow-the-international-herald-tribune-again/>.

18. See FREEDOM FROM THE PRESS, *supra* note 13, at 41.

19. *Id.*

20. *Id.*

Singapore's Prime Minister and scandalised [Singapore's] courts."²¹ Starting to sound a little like *New York Times v. Sullivan*, is it not?

English common law and procedure, then, can still serve as elegant, impressive, and effective means of suppressing freedom of expression. They have been used rather brilliantly to that end in some Commonwealth nations, making their proceedings look and sound as English as Downton Abbey.

II.

The American constitutional law of defamation generally—and *New York Times v. Sullivan* in particular—are each part of a long history of the Supreme Court's grappling with how to apply the command "Congress shall make no law . . . abridging the freedom of speech, or of the press"²² and to do it so as to render speakers and the press safe from the panoply of restrictions arising under ancient principles of English law.

The English law of direct licensing was abandoned in England in the late seventeenth century.²³ Although apparently still used in the form of gazetting in Singapore—it never took hold, at least in its raw form, on this side of the Atlantic—or the Pacific for that matter. So it has not, in that form at least, been an issue for our courts. But the early American Republic did adopt the English statutory and common laws of sedition, criminalizing certain criticism of government.²⁴ These gave way, by the time of *Sullivan*, to well-settled doctrine, expressly recognized in *Sullivan*, that sedition laws—in particular ours of 1798—were generally barred by the First Amendment.²⁵

The Supreme Court also grappled with American analogues of English statutes criminalizing various other kinds of speech. Under U.S. laws, for example, unlawful "espionage" included the distribution of leaflets urging resistance to military induction,²⁶ or cutting back on the production of war materiel.²⁷ The Supreme Court's curtailment of such prohibitions began in 1919, with Justice Holmes' articulation of the "clear and present danger"

21. *Id.*

22. U.S. CONST. amend. I.

23. See MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA C. BARNETT LIDSKY, *MASS MEDIA LAW: CASES AND MATERIALS* 27 (8th ed. 2011) ("The last [English] licensing legislation expired in 1694 and was not renewed.").

24. See PHILLIP I. BLUMBERG, *REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC* 82–83 (2010).

25. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1964).

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

27. See *Abrams v. United States*, 250 U.S. 616 (1919).

test in *Schenck*.²⁸ Later that year, in his so-called “great dissent”²⁹ in *Abrams*, Holmes famously wrote:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market³⁰

The “marketplace of ideas.”

The English also enforced injunctions on speech and the press by citations for contempt of court orders. Contempt was available, too, to suppress criticism or commentary on the work of the courts³¹ and even to bar reporting on criminal or civil matters being considered by a court. The most notorious example of the latter was the injunction of *The Sunday Times of London* some years ago from publishing articles warning of the dreadful birth defects caused by the tranquilizer thalidomide. The injunction was entered on the grounds that there was a civil case then pending on the subject that might have been affected by such a publication.³² The latter species of contempt, upheld by the United States Supreme Court in *Patterson v. Colorado*,³³ was sharply curtailed under the First Amendment by the Court’s 1940s decisions in *Bridges v. California*,³⁴ *Pennekamp v. Florida*,³⁵ and *Craig v. Harney*.³⁶ Injunctions—together with

28. *Schenck*, 249 U.S. at 52 (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”). It should be noted that Justice Holmes, speaking for the Court, upheld the constitutionality of the conviction for seditious speech that was being appealed.

29. *Abrams*, 250 U.S. at 639; see THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (2013).

30. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

31. Referred to in England as “scandalising the court,” or far more colorfully in Scotland as “murmuring judges.” See “*Scandalising Court*” *Under Review*, BBC NEWS UK, (Aug. 9, 2012, 10:56 PM), <http://www.bbc.com/news/uk-19204860>. Unlike in Singapore, a prosecution on that theory in the U.K. had not been successful between 1931 and 2013. In the latter year, the offense was abolished by statute. See Crime and Courts Act, 2013, c. 22, § 33 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2013/22/section/33>. It was strictly limited in those parts of the Commonwealth that are (unlike Singapore) subject to the jurisdiction of the Privy Council by the Council on April 16, 2014. See *Dhoocharika v. Dir. of Pub. Prosecutions*, [2014] UKPC 11 (U.K.), available at http://www.jcpc.uk/decided-cases/docs/JCPC_2012_0058_Judgment.pdf.

32. See *Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. (ser. A) at 245 (1979), available at http://www.hrcr.org/safrica/limitations/sunday_times_uk.html (holding that the injunction violated Article 10(1) of the European Convention on Human Rights).

33. *Patterson v. Colorado*, 205 U.S. 454 (1907).

34. *Bridges v. California*, 314 U.S. 252 (1941).

35. *Pennekamp v. Florida*, 328 U.S. 331 (1946).

36. *Craig v. Harney*, 331 U.S. 367 (1947).

contempt for disobeying them—were addressed more broadly in *Near v. Minnesota*³⁷ and the *Pentagon Papers* case.³⁸ And in their cousin, *Nebraska Press Ass'n v. Stuart*,³⁹ the Court balanced free speech concerns against a criminal defendant's right to an impartial jury, expressing a profound skepticism of injunctions—so-called “gag orders”—against the press even when used to protect the fairness of a defendant's criminal trial. Together, these cases rendered most injunctions against speech and press presumptively unconstitutional and, as a result, virtually extinct.

Prominently, lastly, and of course, there were actions under English common law of libel and slander. It was *New York Times v. Sullivan* that began to outline the limitations on the use of these actions to quash unpopular speech about public figures, public men and women, and—to some extent—public affairs.

It is to *Sullivan*, then, that we now turn—recognizing it as, among other things, part of this arc of emerging Supreme Court jurisprudence that served to protect free speech and free press from ancient English common law and statutory tools of suppression.

III.

To be sure, *Sullivan* arose in a highly volatile context: race relations in the South in the late 50s and early 60s. It is not unusual for American turmoil to beget great cases; fears about the nation's involvement in World War I and the early Red Scares gave rise to the revolution in fundamental First Amendment protections articulated by Justices Holmes and Brandeis. The *Pentagon Papers* case was spawned by the massive national upheaval over the war in Vietnam.⁴⁰ Perhaps the great cases would not have been great—or even decided quite the way they were—had they arisen under more pedestrian circumstances. But central to all of them, I think, is the Court's attempt to make good on First Amendment guarantees—not only a desire to resolve the controversial political, moral, or ethical circumstances in which the cases arose. Plainly, *Sullivan* cannot be considered apart from the struggle over civil rights or the identity of the *Times*. But that seems to me to be the subject for a different series of conversations.

37. *Near v. Minnesota*, 283 U.S. 697 (1931).

38. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

39. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

40. *See New York Times Co. v. United States*, 403 U.S. at 724 (Douglas, J., concurring).

As an op-ed contributor to *Forbes* magazine commented recently, “If judicial decisions were categorized like books, the . . . Supreme Court’s 1964 opinion in *Times v. Sullivan* would be a modern classic.”⁴¹

The facts are easily rehearsed. L. B. Sullivan was the elected Commissioner of Public Affairs in Montgomery, Alabama. His duties included supervision of the Montgomery police department.⁴² The *Times* published a paid advertisement entitled “Heed Their Rising Voices,” which sought to raise money in support of civil rights activists in the South.⁴³ The litigation centered on two paragraphs in the ad. The first, at the heart of the litigation, read:

In Montgomery, Alabama, after students sang “My Country, ‘Tis of Thee” on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.⁴⁴

That was wrong in several particulars. Most seriously, the dining hall was never padlocked, either in an attempt to starve the students into submission, or for any other reason.⁴⁵

Commissioner Sullivan brought a libel suit in Alabama state court against the *Times* and four black pastors from Alabama whose names appeared along with sixteen others at the bottom of the ad as signatories to it.⁴⁶ If nothing else, that served to destroy diversity of citizenship and thereby thwart removal of the case to federal court by the *Times*.

The trial judge, Walter Burgwyn Jones, took particular pride in his Southern heritage.⁴⁷ But with the pride, Anthony Lewis tells us, came his disdain for what the judge referred to as the “recognized rabble-rousers and

41. Joseph H. Cooper, *In a Political Campaign, Is There a Constitutionally-Protected Right to Lie?*, FORBES (Jan. 31, 2014), <http://www.forbes.com/sites/realspin/2014/01/31/in-a-political-campaign-is-there-a-constitutionally-protected-right-to-lie/>.

42. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

43. *Id.* at 256–57.

44. *Id.* at 257. The second paragraph at issue read:

Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for ‘speeding,’ ‘loitering’ and similar ‘offenses.’ And now they have charged him with ‘perjury’—a felony under which they could imprison him for ten years.

Id. at 257–58.

45. *Id.* at 259.

46. *Id.* at 257.

47. ANTHONY LEWIS, *MAKE NO LAW* 25 (1991).

racial agitators” who insisted on integrating the gallery at trial.⁴⁸ He ordered the bailiffs to segregate it. And “[h]e praised ‘white man’s justice, a justice born long centuries ago in England, brought over to this country by the Anglo-Saxon race.’”⁴⁹

In the case before him, Judge Jones decided as a matter of law that the statements in the ad were libelous per se—that is, actionable without proof of actual harm.⁵⁰ He also decided as a matter of law—indeed, it was conceded—that portions of the ad were false.⁵¹ The only questions for the jury were: had the defendants published the ad; was it “of and concerning” Sullivan; and, if so, how much was Sullivan entitled to in damages?⁵²

Two hours and twenty minutes after retiring, the jury returned a verdict for \$500,000 against the *Times* and the ministers—every penny Sullivan had sought.⁵³ The judgment was entered, and the Alabama Supreme Court affirmed.⁵⁴ It concluded, among other things, that, as was widely thought to be the law, defamatory statements were flatly unprotected under the federal Constitution.⁵⁵

The same advertisement gave rise to three other libel suits against the *Times* by men who had served as Montgomery City Commissioners and one by Alabama’s Governor. In one of those lawsuits that had gone to trial by the time the Supreme Court heard *Sullivan*, the plaintiff had also been awarded \$500,000.⁵⁶ The damages sought in the remaining cases totaled \$2,000,000.⁵⁷ At about the same time, a pair of *Times* articles about race relations in Birmingham, written by the renowned Pulitzer Prize-winning, *New York Times* reporter Harrison Salisbury, attracted libel suits by public officials seeking in the aggregate more than \$3,000,000 in damages from the *Times* and \$1,500,000 from Salisbury.⁵⁸ Justice Hugo Black—a graduate of the University of Alabama School of Law—concurring in *Sullivan*, reported that there were pending at the time a total of “eleven libel suits by local and state officials against the *Times* seeking \$5,600,000, and five such suits against [CBS] seeking \$1,700,000.”⁵⁹ James C. Goodale, the former general counsel of the *Times*, has wondered aloud

48. *Id.* at 26.

49. *Id.* at 25–26.

50. *Sullivan*, 376 U.S. at 262.

51. *Id.*

52. *Id.*

53. LEWIS, *supra* note 47, at 33.

54. *Sullivan*, 376 U.S. at 290.

55. *Id.* at 295 (Black, J., concurring).

56. *Id.* at 278 n.18.

57. *Id.*

58. LEWIS, *supra* note 47, at 22.

59. *Sullivan*, 376 U.S. at 295 (Black, J., concurring).

whether, particularly in light of the labor troubles then facing the New York press, the *Times* Company could have survived that onslaught.⁶⁰

There was little doubt about the principal purpose of the *Sullivan* suit: One local Alabama daily newspaper, *The Montgomery Advertiser*—now a Gannett newspaper—summed up the trial court’s judgment with the headline: “State Finds Formidable Legal Club to Swing at Out-of-State Press.”⁶¹

The Supreme Court granted certiorari and unanimously reversed.⁶² The key holding of Justice Brennan’s opinion for six members of the Court was contained in a single, if rather long, sentence:

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 it was false or with reckless disregard of whether it was false or not.⁶³

But there was much more to Justice Brennan’s opinion.

Jack Weiss, a good friend and former colleague of mine—now the Chancellor of the L.S.U. (Paul M. Hebert) Law Center—used to co-teach a seminar on First Amendment law with me at Columbia Law School. When it came to our class about *Sullivan*, Jack would hand out a sheet of paper listing ten different holdings and a dictum from the opinion.⁶⁴ Before I

60. LEWIS, *supra* note 47, at 35 (“The *Times* was financially vulnerable in those days. James Goodale, later its general counsel, said of the 1960 libel cases: ‘Without a reversal of those verdicts there was a reasonable question of whether the *Times*, then wracked by strikes and small profits, could survive.’”).

61. *Id.* The *Montgomery Advertiser* is now a Gannett newspaper. See MONTGOMERY ADVERTISER, <http://www.montgomeryadvertiser.com> (last visited March 23, 2014).

62. *Sullivan*, 376 U.S. at 264.

63. *Id.* at 279–80.

64. The list provided by Chancellor Weiss read:

SOME KEY HOLDINGS OF NEW YORK TIMES v. SULLIVAN

1. Application of a state rule of law in a civil action constitutes state action. (376 U.S. at 265.) [reversing Alabama S. Ct.]

2. State defamation law, at least insofar as it relates to criticism of the official conduct of public officials, “must be measured by standards that satisfy the First Amendment.” (376 U.S. at 269.) [also reversing Alabama S. Ct.]

3. The First Amendment applies to paid advertisements that express opinions about important public issues. (376 U.S. at 266.)

4. A public official cannot recover 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.” (376 U.S. at 279.)

5. Appellate courts must “make an independent examination of the whole record” to assure that “the judgment does not constitute a forbidden intrusion on the field of free expression.” (376 U.S. at 285.)

discuss several of these, though, I should point to one that is conspicuous by its absence.

IV.

The advertisement that gave rise to the *Sullivan* case was published from New York largely for an audience in and about New York and, presumably, the corridors of power in Washington, D.C. Fewer than 400 copies made their way into Alabama—about thirty-five into Montgomery County.⁶⁵ (Likely, a similarly small number were circulated in other states far from New York and New Yorkers.) Was that limited Alabama circulation enough to support its courts' exercise of personal jurisdiction over the publisher of the *Times*? Yes, said the Alabama courts.⁶⁶ And the United States Supreme Court decided, by way of a footnote, that the issue had been waived by the *Times* because it had entered a general appearance—rather than a special appearance—in the Alabama courts.⁶⁷

Odd? According to Lewis, the *Times* had in fact attempted to file a special, not a general, appearance precisely for the purpose of preserving its ability to challenge personal jurisdiction.⁶⁸ It had done so through its counsel's use of a form set out in a treatise, *Alabama Pleading and Practice at Law*, written by none other than Walter Burgwyn Jones—the judge presiding at the *Sullivan* trial.⁶⁹ But the judge ruled against the *Times*

6. The evidence must demonstrate actual malice with “convincing clarity.” (376 U.S. at 285-86.)

7. “Actual malice” goes to the state of mind of the defendant—whether the defendant knew or suspected that the statement was false—and does not mean negligence. (376 U.S. at 287-88.)

8. State law “of and concerning” determinations, at least with respect to criticism of the official conduct of public officials, are subject to federal constitutional scrutiny under the First Amendment. (376 U.S. at 288-92.)

9. The First Amendment forbids liability for libel of government (i.e., seditious libel). Likewise, general criticism of government action may not constitutionally be held to be defamatory of (i.e., “of and concerning”) individual public officials merely by virtue of their offices. (*Id.*)

10. Rules of law—whether common law or statutory—that deter protected speech because of “doubt whether [its truth] can be proved in court or fear of the expense of having to do so” violate the First Amendment because they “dampen[] the vigor and limit[] the variety of public debate.” (376 U.S. at 279.)

11. (Dictum) State law application of the defense of substantial truth may be subject to constitutional limitations. (376 U.S. at 289.)

65. *Sullivan*, 376 U.S. at 260 n.3 (“Approximately 394 copies of the edition of the *Times* containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the *Times* for that day was approximately 650,000 copies.”).

66. *New York Times Co. v. Sullivan*, 144 So. 2d 25, 33 (Ala. 1962).

67. *Sullivan*, 376 U.S. at 264 n.4.

68. LEWIS, *supra* note 47, at 25.

69. *Id.*

anyway—partly on the merits, but partly on the grounds that the lawyer, using forms from the judge’s own treatise, had mistakenly entered a general appearance.⁷⁰

Why, in an opinion chock-a-block with rulings on so many other issues, did the Supreme Court duck this jurisdictional question—arising either under the Free Press or Due Process Clause? The reason might have been that dismissing the *Times* from the case on jurisdictional grounds would not have affected the judgment against the Alabama ministers, which would have remained before the Court in the other pending case: *Abernathy v. Sullivan*.⁷¹ If the Court were to address the core protections of the First Amendment, it may well have preferred to do so in a case in which the *Times*—a preeminent member of the institutional press—was a defendant, rather than in *Abernathy*, against four Alabama residents who had no connection with the writing or publication of the allegedly defamatory matter before the Court. Justice Brennan noted that as a matter of constitutional law the judgment against the pastors was infirm for that narrow reason alone.⁷² Dropping the *Times* on jurisdictional grounds would thus almost surely have left the weighty issues addressed by the *Times* Court for another day.

V.

The principal holding of *Sullivan*—as noted—was its adoption of the “actual malice” standard for public-official defamation cases. The choice of both the term and the standard remains something of a puzzlement.

Justice Brennan borrowed the words “actual malice” from a 56-year-old Kansas state libel decision,⁷³ reading them to mean the publication of an untrue statement “with knowledge that [the statement in question] was false[,] or with reckless disregard of whether it was false or not.”⁷⁴ “Reckless disregard” was itself later redefined by the Supreme Court as— in one of its iterations—a “high degree of awareness of . . . probable falsity.”⁷⁵ “Actual malice,” then, did not have much to do with what we

70. *See id.* at 25–27.

71. *See Sullivan*, 376 U.S. at 254, 256.

72. *Id.* at 286.

73. *Id.* at 280–81 (citing *Coleman v. MacLennan*, 98 P. 281 (1908)).

74. *Id.* at 280.

75. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). An alternate definition was employed by the Court in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968): “[I]n fact entertain[ing] serious doubts as to the truth of [the] publication [in question].”

usually mean by the term “malice.” It meant not ill-will, but, in effect, “lying.”⁷⁶

The late and long-time Southern District of New York Judge Charles Brieant described “actual malice” using a felicitous paraphrase of Humpty Dumpty’s statement in Lewis Carroll’s *Through the Looking Glass*: “‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”⁷⁷ Judge Brieant’s version was:

In the context of a libel suit “actual malice” simply does not mean ill-will or spite And . . . reckless does not mean grossly negligent, its common use When the Supreme Court uses a word, it means what the Court wants it to mean. “Actual malice” is now a term of art having nothing to do with actual malice.⁷⁸

As noted, Justice Brennan did not make up the term from whole cloth: he pieced it together from a Supreme Court decision on the knowledge necessary to hold a bookseller liable for peddling obscene writings, from that 1908 Kansas case⁷⁹ and other state cases of similar import,⁸⁰ from the views of scholars,⁸¹ and from the countervailing protection given to public officials by the Court five years earlier for *their* statements about *private* persons.⁸² But still: why that standard and not another—gross negligence, for example, or a limitation to recovery for proven pecuniary loss? Justice Brennan did not say.

The “actual malice” standard makes sense. I think there is good reason to say that a citizen engaged in debate about public persons, or perhaps upon public issues, should be permitted to say that which he or she believes

76. *Garrison*, 379 U.S. at 75 (applying actual malice test to criminal libel case and commenting that “the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.”).

77. “And only *one* for birthday presents, you know. There’s glory for you!”
 “I don’t know what you mean by ‘glory,’” Alice said.
 Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant “‘there’s a nice knock-down argument for you!’”
 “But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.
 “When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”
 “The question is,” said Alice, “whether you *can* make words mean so many different things.”
 “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”
 Lewis Carroll, *THROUGH THE LOOKING GLASS*, Ch. 6, available at <http://ebooks.adelaide.edu.au/c/carroll/lewis/looking/chapter6.html> (last visited March 23, 2014).

78. *Reliance Ins. Co. v. Barron’s*, 442 F. Supp. 1341, 1350 (S.D.N.Y. 1977).

79. *Sullivan*, 376 U.S. at 280–81.

80. *Id.* at 280 n.20.

81. *Id.*

82. *See Barr v. Matteo*, 360 U.S. 564 (1959).

to be true, whether or not it in fact is or the defendant can prove that it is. But the *Sullivan* Court did not fully explain itself in this regard.

Indeed, why was the adoption of that sort of general standard necessary at all? Later in his opinion, Justice Brennan explained that as a matter of constitutional law, the advertisement was *not* “of and concerning” [about] Commissioner Sullivan, even though he had overall responsibility for the Montgomery police department.⁸³ As Justice Brennan noted, Commissioner Sullivan’s libel verdict was contrary to the observation of the Illinois Supreme Court decades earlier that “no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.”⁸⁴ Brennan wrote:

There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which . . . “reflects not only on [one] but [also] on the other Commissioners and the community.” Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.⁸⁵

Why was that not the beginning and the end of *Sullivan*? That ruling alone would not, of course, prevent some later plaintiff’s judgment in another defamation case, based not on criticism of government in general, but on false allegations of fact made in good faith about a named public official. The Court presumably would have then had to go back to the drawing board, and perhaps it would *then* have adopted the “actual malice” test. But the fact remains that the *Sullivan* case has at least two apparent independent “holdings,” including this one, which could alone have resolved the case before the Court.

VI.

More mysterious still is the Court’s introduction to its discussion of the evidence in the case: “Applying these standards, we consider that the proof presented to show actual malice lacks the *convincing clarity* which the

83. *Sullivan*, 376 U.S. at 288.

84. *Id.* at 291 (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (1923)).

85. *Id.* at 292.

constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law.”⁸⁶ Convincing clarity? Now where did that come from? I find no citation for the proposition in *Sullivan*.

The term “clear and convincing evidence” does indeed dot the legal landscape—although I have yet to find a Google map to tell me just where. In the case of *Sullivan*, speculation centers, I gather, on the rather obscure opinion in *Nishikawa v. Dulles*.⁸⁷ In that 1958 decision, the Court considered the government’s attempt to expatriate an American citizen of Japanese descent who had served as a member of the Japanese armed forces during the War.⁸⁸ Chief Justice Warren said for the Court that principles governing denaturalization and expatriation cases “call[] for placing upon the Government the burden of persuading the trier of fact by *clear, convincing and unequivocal* evidence that the act showing renunciation of citizenship was voluntarily performed.”⁸⁹

Maybe, then, it was simply the importance of the First Amendment rights declared in *Sullivan* that elicited the “convincing clarity” requirement. Or perhaps “actual malice,” being—like “voluntariness” in *Nishikawa*—a state of mind, the Court was anxious to prevent finders of fact from deciding libel cases based on their subjective whim as to whether to believe the defendant’s protestations of good faith. Or the Court may have been thinking more broadly of the standard set forth for many or most state law actions for fraud, which also involve state of mind and which must under that law be proven by clear and convincing evidence.⁹⁰

In any event, the *Sullivan* Court employed the clear and convincing standard without telling us why.

VII.

This leaves us with what is, for me, the core of the decision. The concern was obvious: whatever the rule of law adopted by the Court, what

86. *Id.* at 285–86 (emphasis added).

87. 356 U.S. 129 (1958).

88. *Id.* at 131.

89. *Id.* at 135 (emphasis added).

90. *See recently, inter alia*, *Ex parte Branson Mach., LLC*, 78 So. 3d 950, 956 (Ala. 2011); *Hassan v. Yusuf*, 944 N.E.2d 895, 909 (Ill. App. Ct. 2011); *In re Phillip Dean Kline*, 311 P.3d 321, 336 (Kan. 2013); *N.E. Ins. Co. v. Young*, 26 A.3d 794, 800 (Me. 2011); *Encinias v. Whitener Law Firm, P.A.*, 310 P.3d 611, 620 (N.M. 2013); *S.D. Pub. Assur. Alliance v. Aurora Cnty.*, 803 N.W.2d 612, 620 (S.D. 2011); *Claman v. Popp*, 279 P.3d 1003, 1016–17 (Wyo. 2012); *see also Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 239 (2d Cir. 1999) (“In order to prevail on a fraudulent misrepresentation claim under New York law . . . [e]ach element must be proven by clear and convincing evidence.”). *But cf.* 42 U.S.C. § 300aa-22(b)(2), 300aa-23(d)(2) (using “clear and convincing evidence” test in connection with vaccine manufacturer’s liability for harm resulting from their vaccines).

was to prevent judges and juries, like those that ruled in the *Sullivan* case itself, from deciding to impose sanctions on speech they hated, irrespective of what standard the Supreme Court told them to apply?

The First Amendment is about protecting unpopular speech. You do not need a constitutional provision to preserve your right to say things at the risk of wide public approval and applause. And it is here that Justice Brennan drew most heavily upon the great Holmes and Brandeis pronouncements about First Amendment guarantees. Most to the point was a passage from Brandeis's concurrence in *Whitney v. California*—quoted in *Sullivan*.⁹¹ It is an oft-rehearsed paragraph, famously concluding: “Recognizing the occasional tyrannies of governing majorities, [the Framers] amended the Constitution so that free speech and assembly should be guaranteed.”⁹²

I think that is the heart of the matter: the danger of the occasional tyrannies of governing majorities in the form of the local judges and juries in defamation cases rendering massive verdicts against outsiders for their expression of unpopular views—and not only in Alabama or the South; the danger that a local majority's natural impulse might be to punish and seek to silence what Justice Holmes referred to in his dissent in *Schwimmer* as “the thought that [they] hate.”⁹³ That observation, although absent from *Sullivan*, bears repeating here: “[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other[,] it is the principle of free thought—not free thought for those who agree with us[,] but freedom for the thought that we hate.”⁹⁴

91. *Sullivan*, 376 U.S. at 270.

92. *Whitney v. California*, 274 U.S. 357, 375–76 (1927). The full quotation reads:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

93. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

94. *Id.* at 654–55.

How to address this problem? Justice Brennan sought to do so largely by invoking the principle of independent judicial review. He wrote:

This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." In [such] cases . . . we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." We must make an "independent examination of the whole record" so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.⁹⁵

But what institution could be counted on to rise to that task, to set aside personal feelings and views on speech—sentiments that it may well share with the majority of the community? Who could reliably assure that, on the evidence, "actual malice" had in fact been established with "convincing clarity"? Not necessarily the trial judge—we can suspect as much from *Sullivan* itself. Not the United States Supreme Court—it has not heard a constitutional defamation case for that purpose in more than twenty years. Perhaps, by default, the ultimate responsibility has fallen to the highest court to which an appeal may be taken as of right in the jurisdiction in issue—which would, ironically perhaps, include the Supreme Court of Alabama in Alabama state court cases. Has that worked? My impression, and it is no more than that—albeit in light of my reading of many, many appellate cases in this area decided since *Sullivan*—is that, overall and with some remarkable exceptions, it has. The press's reporting on public figures appears to be largely free from intimidation by the threat of defamation lawsuits.

Was *Sullivan* an ideal solution to the problem presented by the facts of the case? Should we be troubled by the rarity of its subsequent use as a model by open and progressive regimes elsewhere in the world? "No," on both counts. Of course, I think, the Court could not and did not, in facing the pressing issue of public official defamation cases for the first time—and during just two months between argument and decision—arrive at a perfect solution. That should not in any way diminish our gratitude and respect for

95. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (footnotes and citations omitted).

the fact that under difficult and heated circumstances the Brennan-led Court found a solution, and that that solution has in large measure worked for the past fifty years. Indeed, looking at *Sullivan* from the standpoint of free speech and press, I think it has worked very well.

In making that assessment, we ought not to look at *Sullivan* in a vacuum. Without getting hopelessly sidetracked, we must also take into account that the libel plaintiff's lot has been made more difficult in federal courts by the relatively recent stiffening, in *Iqbal* and *Twombly*, of pleading requirements.⁹⁶ Those cases are now very frequently cited in opinions granting motions to dismiss defamation complaints.⁹⁷ It may be painfully difficult to plead "plausibly" facts that would establish a defendant's actual malice at least without first taking the deposition of the defendant.

There is also § 230 of the federal Communications Decency Act of 1996,⁹⁸ which renders Internet service providers immune from liability for material that they do no more than transmit—somewhat different from the rules applicable to the print and broadcast media.⁹⁹ And there are the burgeoning so-called anti-SLAPP statutes that in some states and some federal courts make bringing a defamation suit found to be baseless grounds not only for losing the lawsuit swiftly, but for paying the defendant's costs and legal fees as well.¹⁰⁰

There are still defamation suits. And, perhaps happily, they still seem to have their *in terrorem* effect on publishers—by and large, I suspect, the media still hesitate before running or broadcasting what may be libelous. And in the process, they do tend to consult their lawyers, as well as their own ethical principles. But at the end of the day, I suspect that libel

96. In *Bell Atlantic Corp. v. Twombly*, [550 U.S. 544 (2007),] the Supreme Court decided that "[w]hile a complaint [in federal court] attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." "[E]nough facts [must be pleaded] to state a claim to relief that is plausible on its face." More recently, in *Ashcroft v. Iqbal*, [556 U.S. 662, 678–79 (2009),] the Court commented: "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," however, dismissal is in order. 2 ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS*, §16:2.2 (4th ed. 2014) (footnotes omitted).

97. A fellow at the Media Law Resource Center performed a Lexis search for defamation cases during the period October 16–November 27, 2013, and found that eighteen complaints had been dismissed during that time span apparently based at least in part on *Iqbal/Twombly* grounds. Note that cases that refer to the *Iqbal/Twombly* pleading standards but without using the phrase "plausible on its face," and invasion of privacy cases or cases based on similar theories, were, because of the search parameters, not reflected in that number. See, e.g., *Schwartz v. OneWest Bank, FSB*, 2013 U.S. Dist. LEXIS 162613 (E.D. Pa. Nov. 13, 2013). *Id.* at n.22.1.

98. 47 U.S.C. § 230.

99. See 1 SACK, *supra* note 96, at § 7:3.2.

100. See 2 SACK, *supra* note 96, at § 16:2.3. The availability of libel insurance has also provided meaningful protection for statements in the press. See *id.* Ch. 17.

litigation is only rarely a serious threat, at least to what we would think of as the mainstream press and mainstream speakers—which is not to say that the mainstream press and mainstream speakers are the only ones entitled to First Amendment protection. And it is not to say whether whatever’s left of libel law offers sufficient protection for reputation: fodder for a separate discussion on another day.

In any event, after *Sullivan*, the wave of Southern libel judgments against the Northern press in civil rights matters largely washed back into the Gulf.

VIII.

One more conundrum: why limit the “actual malice” requirement to suits by public *officials*—later extended to include so-called “public figures?” A public official plaintiff was what *New York Times v. Sullivan* was about, but was that all that concerned the *Sullivan* Court? To be sure, the Court spoke in terms of: “sharp attacks on government and public officials,”¹⁰¹ “erroneous reports of the political conduct of officials,”¹⁰² “[i]njury to official reputation,”¹⁰³ and so on. So its concern was the freedom to criticize public officials.

But the Court also remarked that “[t]he constitutional safeguard . . . ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes.’”¹⁰⁴ It spoke of the “opportunity for free political discussion to the end that government may be responsive to the will of the people.”¹⁰⁵ Quoting from a contempt of court decision, it referred to the “prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions”¹⁰⁶—public “*institutions*,” not public men. Perhaps most strikingly, Justice Brennan referred to “debate on public issues,” which, he said, “should be uninhibited, robust, and wide-open.”¹⁰⁷ This might *include*

101. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

102. *Id.* at 270.

103. *Id.* at 272.

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

105. *Id.*

106. *Id.* (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941)) (internal quotation marks omitted).

107. *Id.* at 270. Recently, in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court relied in part on this language to support its holding affirming the reversal of a large verdict for a plaintiff alleging the tort of intentional infliction of emotional distress arising out of the anti-gay and anti-Catholic picketing near the funeral services for his son, a casualty of the Iraq war, on First Amendment grounds, *id.* at 1215 (“Whether the First Amendment prohibits holding [the defendants] liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.”).

attacks on government and on public officials,¹⁰⁸ but he did not limit that principle to speech about them.

So which is it that requires the meticulous and far-ranging protection accorded by the *Sullivan* Court: statements about public figures, or more broadly, speech on public *matters*? Of course, ten years later, after to-ing and fro-ing,¹⁰⁹ the Court in *Gertz* decided not to fully extend *Sullivan* protection to all communications about matters of public interest.¹¹⁰ *Gertz*, whose fortieth anniversary we marked in June of this year, in setting forth the law as it applies to public and private *figures*—as opposed to public officials—is, to me, far more complex, frustrating, and ambiguous in its application than is the rule in *Sullivan*. Yet another subject for another day.¹¹¹

But the question remains: what was the *Sullivan* Court’s principal concern in 1964? Recall that the most serious mistake in the ad “Heed Their Rising Voices” was the charge that “[w]hen the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.”¹¹² That was false. It just did not happen.¹¹³

I have a friend, a former *Journal* editor, named Mack Solomon. Let’s imagine that Solomon, instead of taking up journalism, had gone into the food service business. And suppose he had been awarded the cafeteria franchise on the Alabama State College campus. Solomon was shocked to read “Heed Their Rising Voices”—he had not done anything like padlocking the cafeteria. And suppose further that he was sick of ignorant Northerners accusing law-abiding Southerners like himself of all manner of outrages against black people—in particular false charges that he abandoned his heart-felt responsibility to feed black Alabama State students. Suppose, too, that he had seen similar attacks leveled at private bus lines, which, according to local custom and rules, asked black passengers to sit in the back; and at several local drugstores, which had been vilified in the Northern press for failing to desegregate their lunch counters. And suppose he wondered what he could do about it.

108. *Sullivan*, 376 U.S. at 270.

109. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality opinion that would have held in the affirmative).

110. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

111. If we were talking about *Gertz*, by the way, I would ask whether Francesco Schettino is a public figure for defamation-law purposes. He is the former captain of the *Costa Concordia*, who steered it onto the rocks of an island off the Tuscan coast, killing thirty-two people. See e.g., *Francesco Schettino News Feed*, GUARDIAN, <http://www.theguardian.com/world/francesco-schettino> (last visited March 23, 2014). It is unlikely he did it “voluntarily,” or to insert himself in a pre-existing public controversy, or to become famous. Does that matter for these purposes?

112. See *Sullivan*, 376 U.S. at 256–57.

113. See *id.* at 259.

Imagine finally that my friend Solomon, with help from counsel, hit upon the idea of suing the *Times* and the Alabama pastors whose names appeared in the ad in Montgomery Circuit Court for libel, asserting that the ad was of and concerning him. Less than two-and-a-half hours after being charged by the judge that the ad was false and defamatory as a matter of law, and that the only questions for them were whether it was published “of and concerning” Solomon, and if so, how much in damages was warranted, the all-white jury returned a verdict for Solomon in the amount of \$500,000. The State Supreme Court affirmed, and the *Times* and the ministers sought certiorari from the United States Supreme Court. What then?

Would the Supreme Court have granted certiorari? Or would it have decided that its concern was criticism of public officials, rather than the discussion of matters of public interest such as the struggle over civil rights. Would it have denied the petition for that reason? Or, had it granted the petition, would a Justice have said for the Court, “The constitutional guarantees require . . . [that] a public official [must, to recover] damages for a defamatory falsehood relating to his official conduct, [establish] . . . ‘actual malice.’”¹¹⁴ But would the Court have then concluded that, “Inasmuch as the plaintiff in this case is *not* a public official, he is not protected by this rule. We affirm.”

Or would the Court have taken a different tack? Would it have found that speakers and members of the press are constitutionally protected from defamation suits brought by persons written or spoken about in relation to public issues, but who were not, like Commissioner Sullivan, public officials? And what test would it then have adopted?

In other words, what would the result have been in the private-plaintiff case of *New York Times v. Solomon*? And would we be marking the fiftieth anniversary of *New York Times v. Solomon* today?

114. Cf. *id.* at 279.