

# THE COLLISION BETWEEN THE FIRST AMENDMENT AND SECURITIES FRAUD

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## ABSTRACT

*This Article seeks to correct the imbalance that occurs when the First Amendment and securities fraud collide. Under current precedent, securities analysts, credit rating agencies, and financial journalists are subject to differing liability standards depending on whether they are sued for defamation or for securities fraud. Under *New York Times Co. v. Sullivan*,<sup>1</sup> First Amendment protections apply in the defamation context in order to prevent the chilling of valuable speech, yet courts have declined to extend these protections to the securities fraud context. This imbalance threatens to chill valuable speech about public companies. To prevent the dangerous chilling effect of potential securities fraud liability, this Article contends that the *Sullivan* protections should apply equally in securities fraud cases. Therefore, under this Article's recommendation, a securities fraud claim asserted against a noncommercial speaker for speech concerning a public company cannot prevail absent a showing of actual malice, by clear and convincing evidence, and subject to independent appellate review.*

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1. 376 U.S. 254, 279-80 (1964).

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## I. INTRODUCTION

Thirty years ago, leading First Amendment attorney James C. Goodale predicted that the First Amendment and securities regulation were on a “collision course” because “there is no greater statutory regulation of speech than the ‘33 and ‘34 Securities Acts and the ‘40 Investment Adviser and Investment Company Acts.”<sup>2</sup> This has been a slow-motion collision. A number of scholars have posited that various limitations on the dissemination of truthful information—such as the Quiet Period Rules<sup>3</sup> and Regulation FD<sup>4</sup>—fail First Amendment scrutiny, but these regulations have been only rarely challenged in court,<sup>5</sup> likely because, as noted by Professor Frederick Schauer, “the existence of an established regulatory scheme may also produce an environment in which the likely challengers to that scheme have become comfortable with it and have learned how to use it to their advantage.”<sup>6</sup> Conversely, a number of litigants have argued that there should be a First Amendment overlay in securities fraud cases,<sup>7</sup> but this question has been largely ignored by scholars. Without scholarly heft to support this argument, litigants have been largely unsuccessful in arguing that the First Amendment has any bearing on securities fraud liability. For example, the Fourth Circuit recently summarily rejected this argument:

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2. James C. Goodale, *The First Amendment and Securities Act: A Collision Course?*, N.Y. L.J., Apr. 8, 1983, at 1, 1.

3. See HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* 102 (1995); Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 780 (2007); Susan B. Heyman, *The Quiet Period in a Noisy World: Rethinking Securities Regulation and Corporate Free Speech*, 74 OHIO ST. L.J. 189, 189 (2013).

4. See Drury, III, *supra* note 3, at 788; Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1, 84 (2005).

5. See, e.g., *SEC v. Siebel Sys., Inc.*, 384 F. Supp. 2d 694, 709 n.16 (S.D.N.Y. 2005) (not reaching the defendant’s argument that Regulation FD violated the First Amendment because “the complaint itself fails to allege a cognizable cause of action for violation of Regulation FD”).

6. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1806 (2004).

7. See, e.g., *SEC v. Pirate Investor LLC*, 580 F.3d 233, 255 (4th Cir. 2009).

“Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment.”<sup>8</sup> This Article seeks to fill this scholarly void by analyzing whether there is a First Amendment overlay when securities fraud claims are premised on noncommercial speech.

As an example, imagine a securities analyst who allegedly published unduly negative research about a public company. If the covered company sued the analyst for defamation, the analyst would likely be able to rely on the protections afforded by *New York Times Co. v. Sullivan* and its progeny.<sup>9</sup> In particular, the company would probably be required to prove by “clear and convincing evidence” that the analyst made the allegedly false statements with “actual malice,” and this actual malice finding would be subject to independent appellate review.<sup>10</sup> If, on the other hand, an investor or the Securities and Exchange Commission sued the securities analyst for securities fraud on the basis of this very same research report, the analyst would not be able to rely on these constitutional protections, and the analyst would be exposed to securities fraud liability under lower standards than required by the *Sullivan* protections.<sup>11</sup> Therefore, there is an imbalance between the First Amendment protections that are in place when the analyst is sued under a defamation theory and when the analyst is sued under a securities fraud theory.

This Article seeks to correct the imbalance that occurs when the First Amendment and securities fraud collide. This imbalance threatens to chill valuable speech about public companies, undercutting the goals of the *Sullivan* protections. In particular, this Article contends that the *Sullivan* protections should apply in securities fraud cases when the defendant is a noncommercial speaker (such as an independent securities analyst, credit rating agency, or financial journalist) and the speech concerns a public company.<sup>12</sup>

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8. *Id.*

9. *See* 376 U.S. 254, 279–80 (1964).

10. *See, e.g.,* Compuware Corp. v. Moody’s Investors Servs., Inc., 499 F.3d 520, 525–26 (6th Cir. 2007) (applying the *Sullivan* protections in a defamation suit asserted by a rated company against a credit rating agency); Nat’l Life Ins. Co. v. Phillips Publ’g, Inc., 793 F. Supp. 627, 648–49 (D. Md. 1992) (applying the *Sullivan* protections in a defamation suit asserted by an insurance company against a publisher of investment newsletters).

11. *See Pirate Investor LLC*, 580 F.3d at 244 (rejecting the import of the *Sullivan* protections into a securities fraud action).

12. Of note, this Article does not address whether the companion First Amendment doctrine that statements of “pure opinion” are not actionable in defamation should also be incorporated into securities fraud actions. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990). This author has previously argued that statements of “pure opinion” as defined by First Amendment precedent in the defamation context are not actionable as securities fraud because they are immaterial as a matter of law. *See Wendy Gerwick Couture, Opinions Actionable as Securities Fraud*, 73 LA. L. REV. 381, 437–46 (2013). Therefore, there is no need to incorporate this First Amendment doctrine into securities fraud jurisprudence.

This Article proceeds in five additional Parts. Part II demonstrates that the *Sullivan* protections apply when a public company sues a noncommercial speaker for defamation. In particular, this Part draws from the policy rationales underlying the current First Amendment precedent to argue that a public company qualifies as a public figure, that the *Sullivan* protections apply equally to media and non-media defendants, and that these protections apply only to noncommercial speech.

Part III demonstrates that a noncommercial speaker is potentially exposed to liability in securities fraud for the very same speech that would be protected under *Sullivan* and its progeny if sued in defamation. Because of the breadth of speech encompassed by the “in connection with” element of securities fraud, noncommercial speech is potentially actionable as securities fraud. Yet, the securities fraud liability standards are lower than the *Sullivan* protections because scienter can be proven by a preponderance of the evidence and is subject to deferential appellate review.

Part IV argues that the “*Sullivan* balancing test,” the structure that the *Sullivan* Court applied to analyze the First Amendment overlay in defamation actions, should likewise apply in securities fraud actions. In particular, this Part shows that the *Sullivan* balancing test has been applied to a variety of non-defamation causes of action that, like defamation, implicate First Amendment concerns, and this Part argues that securities fraud claims likewise merit First Amendment scrutiny. Finally, this Part debunks the popular “truisms” that the First Amendment is inapplicable to “fraud” claims and that the First Amendment is inapplicable to securities regulation.

Part V applies the *Sullivan* balancing test to securities fraud claims, recommending that the *Sullivan* protections should apply in securities fraud cases based on noncommercial speech about public companies. Further, this Part discusses how this Article’s Recommendation serves important policy goals in addition to those embodied in the First Amendment and adds to the scholarly literature about the constitutionality of securities regulation.

Finally, Part VI briefly concludes, calling upon litigants and other scholars to continue to tackle the complicated question of the First Amendment overlay on securities regulation.

## II. FIRST AMENDMENT PROTECTIONS APPLY IN DEFAMATION ACTIONS INVOLVING NONCOMMERCIAL SPEECH ABOUT PUBLIC COMPANIES

This Part demonstrates that First Amendment protections likely apply to defamation claims asserted by a public company against a noncommercial speaker. In particular, the public company could not prevail in the defamation suit without showing by “clear and convincing” evidence

that the speaker acted with “actual malice.” Moreover, an appellate court reviewing the case would perform an “independent inquiry” into whether the public company had made this requisite showing. This Article will refer to this trio of protections (clear and convincing evidence, actual malice, and independent inquiry) as “the *Sullivan* protections.”

In order to demonstrate that the *Sullivan* protections apply when a public company sues a noncommercial speaker for defamation, this Part analyzes three issues that have not yet been decided by the Supreme Court: (1) whether a public company qualifies as a “public figure” for purposes of the *Sullivan* protections; (2) whether these protections apply equally to media and non-media defendants; and (3) whether these protections are limited to noncommercial speech. Drawing on the policy rationales underlying the current First Amendment precedent, this Part concludes that a public company qualifies as a public figure, that the *Sullivan* protections apply equally to media and non-media defendants, and that these protections apply only to noncommercial speech. Therefore, this Part demonstrates that the clear and convincing evidence, actual malice, and independent inquiry standards apply when a public company sues a defendant, media or otherwise, for allegedly defamatory noncommercial speech.

#### A. *The Sullivan Protections Apply in Defamation Actions Asserted by Public Figures*

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”<sup>13</sup> This constitutional protection of speech furthers a number of goals fundamental to a free society. First, by protecting the freedom of speech, the First Amendment ensures that the public engages in spirited debate about topics of public importance, including—but not limited to<sup>14</sup>—political and social issues.<sup>15</sup> This open interchange of divergent ideas permits members of society to make up their own minds about these topics, which is essential to an effectively functioning democracy.<sup>16</sup> This exchange of ideas operates like a

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13. U.S. CONST. amend. I.

14. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (“The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940))).

15. *See Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

16. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 n.19 (1976) (“This Court likewise has emphasized the role of the First Amendment in guaranteeing our

marketplace, with ideas competing for allegiance by virtue of their merits.<sup>17</sup> Second, by protecting the freedom of speech, the First Amendment affords individuals the ability to express themselves about political and social issues,<sup>18</sup> as well as “philosophical social, artistic, economic, literary, or ethical matters,” among others.<sup>19</sup> Self-expression and self-governance are intrinsically related, and both are fundamental in a democratic society.<sup>20</sup>

Therefore, “as a general matter, ‘the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”<sup>21</sup> This prohibition on regulation of content is not absolute, however. For example, obscenity can be regulated without running afoul of the First Amendment.<sup>22</sup> Similarly, defamation regulation has long been recognized as permissible.<sup>23</sup> That is not to say,

capacity for democratic self-government.” (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964)); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’” (quoting *Sullivan*, 376 U.S. at 270)); *Associated Press v. U.S. Tribune Co.*, 326 U.S. 1, 20 (1945) (“[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”).

17. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”); *Time*, 385 U.S. at 406 (Harlan, J., concurring in part and dissenting in part) (“‘The marketplace of ideas’ where it functions still remains the best testing ground for truth.”).

18. *NAACP v. Button*, 371 U.S. 415, 431 (1963) (plurality opinion) (“‘Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights.’” (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250–51 (1957)) (plurality opinion)); *Bridges v. California*, 314 U.S. 252, 270 (1941) (“[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.” (footnote omitted)).

19. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (refusing to grant public workers greater First Amendment rights than private workers in the collective bargaining context, despite public unions’ necessarily political activities) (“It is no doubt true that a central purpose of the First Amendment ‘was to protect the free discussion of governmental affairs.’ But our cases have never suggested that expression about philosophical social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.” (citations omitted)).

20. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–04 (1984) (“The First Amendment presupposes that the freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”); *Garrison*, 379 U.S. at 74–75 (“For speech concerning public affairs is more than self-expression; it is the essence of self-government.”).

21. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

22. *Roth v. United States*, 354 U.S. 476, 484–85 (1957).

23. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (listing “defamation” and “fraud” as among those categories of expression in which content-based restrictions have historically and traditionally been permissible); *id.* at 2561 (Alito, J., dissenting) (“Laws prohibiting fraud, perjury, and defamation . . . were in existence

however, that *all* regulation of defamation is consistent with the First Amendment.<sup>24</sup> Indeed, the Supreme Court rejected that contention in the seminal case of *New York Times Co. v. Sullivan*:

In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet “libel” than we have to other “mere labels” of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.<sup>25</sup>

As *Sullivan* and its progeny have made clear, the First Amendment limits the ability of “public officials” and “public figures” to recover for defamation. In order to recover in a defamation action, a public official or figure must show by clear and convincing<sup>26</sup> evidence that the speaker acted with actual malice.<sup>27</sup> Moreover, on appeal, judges have a “constitutional

when the First Amendment was adopted, and their constitutionality is now beyond question.”); *Bose*, 466 U.S. at 504 (“Nevertheless, there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they ‘are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’ Libelous speech has been held to constitute one such category; others that have been held to be outside the scope of the freedom of speech are fighting words, incitement to riot, obscenity, and child pornography.” (citations omitted) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); *Donaldson v. Read Magazine, Inc.* 333 U.S. 178, 190 (1948) (“[T]he government’s power to protect people against fraud has always been recognized in this country and is firmly established.” (internal quotation marks omitted)).

24. See *Sullivan*, 376 U.S. at 269.

25. *Id.* (footnotes omitted) (internal citation omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963) (plurality opinion)).

26. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (“In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* ‘clear and convincing’ evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.”); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986) (“That [actual malice] showing must be made with ‘convincing clarity,’ or, in a later formulation, by ‘clear and convincing proof.’” (quoting *Sullivan*, 376 U.S. at 285–86, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974))); *Bose*, 466 U.S. at 511 n.30 (“The burden of proving ‘actual malice’ requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.”); *Sullivan*, 376 U.S. at 285–86 (“Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law.”).

27. *Gertz*, 418 U.S. at 342 (“The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office may recover for injury to



responsibility that cannot be delegated to the trier of fact” to exercise independent judgment to assess whether the record establishes actual malice by clear and convincing evidence.<sup>28</sup>

A public official for purposes of the *Sullivan* standard is a government employee, including the quintessential example of a politician. It remains unsettled how low in the ranks this designation extends.<sup>29</sup> Public figures for purposes of the *Sullivan* standard achieve that status “by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention.”<sup>30</sup> This classification is sub-divided between unlimited public figures, who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes,” and limited public figures, who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>31</sup>

The actual malice standard requires a showing that the defamatory falsehood was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>32</sup> The actual malice standard, which is “largely a judge-made rule of law,”<sup>33</sup> does not depend on the speaker’s bad motive or ill will.<sup>34</sup> In addition, although the motive to earn a profit from the speech is potentially relevant evidence, it is not sufficient to establish actual malice.<sup>35</sup>

The trio of *Sullivan* protections—the actual malice standard, the clear and convincing evidence standard, and the independent appellate review

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reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.”); *Sullivan*, 376 U.S. at 279 (“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’ . . .”).

28. *Bose*, 466 U.S. at 501, 514.

29. *Sullivan*, 376 U.S. at 283 n.23 (“We have no occasion here to determine how far down into the lower ranks of government employees the ‘public official’ designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.”).

30. *Gertz*, 418 U.S. at 342.

31. *Id.* at 345.

32. *Sullivan*, 376 U.S. at 279–80.

33. *Bose*, 466 U.S. at 502.

34. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (“Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.”); *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989) (“The phrase ‘actual malice’ is unfortunately confusing in that it has nothing to do with bad motive or ill will.”).

35. *Harte-Hanks*, 491 U.S. at 667 (“Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice. The allegedly defamatory statements at issue in the *New York Times* case were themselves published as part of a paid advertisement. If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.” (citation omitted)); *id.* at 668 (“[I]t cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.”).

requirement—is the result of a careful balance between the interests of the state in imposing liability and the fundamental goals of the First Amendment. In what this Article refers to as the *Sullivan* balancing test, the Court weighed, on one side, the state’s interest in imposing defamation liability—“the compensation of individuals for the harm inflicted on them by defamatory falsehood”<sup>36</sup>—against, on the other side, the First Amendment interest in encouraging free speech. These two interests are in tension because heightened protection of speech—including by imposing an “actual malice” standard—means that some harmed individuals will not be able to recover damages for injury to their reputations.<sup>37</sup>

Applying the *Sullivan* balancing test, the Supreme Court has reasoned that the interest in compensating individuals whose reputations are harmed is weaker when the individuals are public officials or public figures rather than private individuals. First, as the Court explained in *Gertz v. Robert Welch, Inc.*, public officials and public figures are more likely than private individuals to have the power to restore their own reputations:

[W]e have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements [than] private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.<sup>38</sup>

Second, unlike private individuals, most public officials and public figures have voluntarily entered the public eye, thus assuming the risk of defamation alongside the benefits of notoriety.<sup>39</sup> Third, because private

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36. *Masson*, 501 U.S. at 516 (1991) (quoting *Gertz*, 418 U.S. at 341); see also *Time, Inc. v. Hill*, 385 U.S. 374, 391 (1967) (“Were this a libel action, . . . the additional state interest in the protection of the individual against damage to his reputation would be involved.”).

37. *Gertz*, 418 U.S. at 342 (“Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.”).

38. *Id.* at 344 (internal footnote omitted); see also *Time*, 385 U.S. at 391 (“Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane.”).

39. *Gertz*, 418 U.S. at 345 (“[T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an ‘influential role in ordering society.’ He has relinquished no part of his interest in the protection of his good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also

individuals are less likely to be the subject of frequent publicity, the individuals themselves are likely to be more sensitive to negative coverage, and the public is less likely to view the coverage of them with skepticism.<sup>40</sup> Therefore, the Court has recognized that the interest in compensating public officials and figures for defamation is more vulnerable to countervailing First Amendment considerations than the state's interest in compensating private individuals for defamation.<sup>41</sup>

Under the *Sullivan* balancing test, the compensation interest is in tension with the First Amendment goals of encouraging an “unfettered interchange of ideas” and permitting personal expression.<sup>42</sup> Defamatory falsehoods are, by definition, false statements, which—in and of themselves—further neither goal of the First Amendment.<sup>43</sup> Yet, the possibility of liability for defamatory falsehoods has a potential chilling effect on truthful speech. In short, the potential for defamation liability encourages self-censorship of speech that the First Amendment values.<sup>44</sup> First, because erroneous statements are inevitable, a speaker may choose to remain silent rather than inadvertently incur defamation liability.<sup>45</sup>

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more deserving of recovery.” (citation omitted) (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)); *Time*, 385 U.S. at 408–09 (Harlan, J., concurring in part and dissenting in part) (“[T]here is a vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official. In *New York Times* we acknowledged public officials to be a breed from whom hardness to exposure to charges, innuendoes, and criticisms might be demanded and who voluntarily assumed the risk of such things by entry into the public arena. But Mr. Hill came to public attention through an unfortunate circumstance not of his making rather than his voluntary actions and he can in no sense be considered to have ‘waived’ any protection the State might justifiably afford him from irresponsible publicity.” (citation omitted)).

40. *Time*, 385 U.S. at 409 (Harlan, J., concurring in part and dissenting in part) (“Not being inured to the vicissitudes of journalistic scrutiny such an individual is more easily injured and his means of self-defense are more limited. The public is less likely to view with normal skepticism what is written about him because it is not accustomed to seeing his name in the press and expects only a disinterested report.”).

41. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

42. *Id.* at 269 (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’ *Roth v. United States*, 354 U.S. 476, 484 [(1957)] . . . . “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions,’ *Bridges v. California*, 314 U.S. 252, 270 [(1941)] . . . . (alteration in original)).

43. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”). *But see Gertz*, 418 U.S. at 341 (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”).

44. *Gertz*, 418 U.S. at 340 (“And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”).

45. *Id.* (“Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate.”); *Time*, 385 U.S. at 406 (Harlan, J., concurring in part and

Moreover, a speaker may fear that he or she would be unable to prove the truth of a statement in court and thus choose not to speak.<sup>46</sup> Further, especially when speech concerns a controversial issue, a speaker's reliance on the jury to discern the truth may be of cold comfort. As explained by Justice Harlan, "[I]n many areas which are at the center of public debate 'truth' is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship."<sup>47</sup> Finally, if the speech were critical of multiple persons, the speaker might be subject to a crushing succession of lawsuits, compounding the chilling effect.<sup>48</sup> Encouraging truthful speech—especially if it is controversial or critical—is fundamental to the First Amendment. This speech, by its very nature, expands the scope of ideas in the marketplace. Moreover, this speech allows for personal expression of unpopular ideas. Therefore, there is a countervailing First Amendment interest in limiting liability for defamation in order to prevent the chilling of valuable, truthful speech.

This First Amendment goal of preventing the chilling of truthful speech is especially pronounced when the subject of that speech is a public official or public figure.<sup>49</sup> Speech about public officials is essential to allow the public to exercise its democratic rights, including voting, in an informed manner and to prevent official corruption.<sup>50</sup> Speech about public figures is

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dissenting in part) ("Two essential principles seem to underlie the Court's rejection of the mere falsity criterion in *New York Times*. The first is the inevitability of some error in the situation presented in free debate especially when abstract matters are under consideration.").

46. *Sullivan*, 376 U.S. at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' . . . [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.'" (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))).

47. *Time*, 385 U.S. at 406 (Harlan, J., concurring in part and dissenting in part).

48. *Sullivan*, 376 U.S. at 278 ("And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." (footnote omitted)).

49. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15 (1990) ("As Chief Justice Warren noted in concurrence, 'Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials.'" (alteration in original) (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result))); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) ("The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants.").

50. See D. Mark Jackson, Note, *The Corporate Defamation Plaintiff in the Era of SLAPPS: Revisiting New York Times v. Sullivan*, 9 WM. & MARY BILL RTS. J. 491, 516 (2001) ("First, . . . government functions best when it broadly allows for dissenting opinions, knowing that some communications may be false. Second, those in the public arena, entrusted with power, require greater accountability.").

equally as important, especially as power has “become much more organized in what we have commonly considered to be the private sector.”<sup>51</sup> As explained by Chief Justice Warren, “[P]olicy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government.”<sup>52</sup> Indeed, Justice Brennan went so far as to suggest that the “public official/figure” designation is merely a convenient proxy for the more fact-specific determination that a topic is of public importance.<sup>53</sup>

Therefore, under the *Sullivan* balancing test, weighing the interest in compensating public officials or figures for defamatory falsehoods against the First Amendment’s interest in preventing the chilling of truthful speech about public officials or figures, the Supreme Court fashioned the “actual malice” standard. Public officials and figures are not barred from recovering in defamation, but their ability to do so is limited by the First Amendment.<sup>54</sup> A person speaking about public officials and figures has a “breathing space” in which to speak because the speaker is protected from liability unless he or she acted “with knowledge [of the statement’s falsity] or reckless disregard” for the truth.<sup>55</sup>

The “clear and convincing” evidence standard is a further tilt of this balance away from the state’s compensation interest in favor of the First Amendment’s interest in encouraging speech. As the plurality explained in *Rosenbloom v. Metromedia, Inc.*, in an ordinary civil lawsuit applying the preponderance of the evidence standard, “[W]e view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than

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51. *Curtis*, 388 U.S. at 163 (Warren, C.J., concurring in the result).

52. *Id.*

53. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 780–81 n.5 (1985) (Brennan, J., dissenting) (“The decision in *Gertz* is also susceptible of an alternative justification. Speech allegedly defaming a private person will generally be far less likely to implicate matters of public importance than will speech allegedly defaming public officials or public figures. In light of the problems inherent in case-by-case judicial determination of what is in the public interest, the Court’s result could be explained as a decision that the cost of case-by-case evaluation could be avoided without significant chilling of speech involving matters of public importance.”).

54. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.”); *Garrison*, 379 U.S. at 75 (“Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.”).

55. *United States v. Alvarez*, 132 S. Ct. 2537, 2563 (2012) (Alito, J., dissenting); *id.* at 2553 (Breyer, J., concurring in the judgment) (“[T]he Court emphasizes *mens rea* requirements that provide ‘breathing room’ for more valuable speech by reducing an honest speaker’s fear that he may accidentally incur liability for speaking.”); *see also* Gary Anthony Paranzino, Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of United States, Inc.*, 71 CORNELL L. REV. 477, 480 (1986) (“Penalizing only subjectively culpable publishers protects innocent mistakes and avoids chilling public debate of important issues.”).

for there to be an erroneous verdict in the plaintiff's favor."<sup>56</sup> In a defamation suit, however, the risk of error has implications far beyond the parties to the suit because it chills everyone's speech.<sup>57</sup> The "clear and convincing" evidence standard protects speakers from erroneous verdicts, thus preventing self-censorship.

Finally, the "independent review" standard recognizes the constitutional importance of the "clear and convincing" evidence and "actual malice" standards.<sup>58</sup> The safety net of independent review affords a speaker confidence that, even if the trier of fact were to be influenced by prejudice, the "clear and convincing" evidence and "actual malice" standards would be subject to a non-deferential review on appeal.<sup>59</sup> This independent appellate review "provides assurance that the foregoing determinations will be made in a manner so as not to 'constitute a forbidden intrusion of the field of free expression.'"<sup>60</sup>

### B. *Public Companies Should Qualify as Public Figures*

The *Sullivan* protections—the "actual malice," "clear and convincing" evidence, and "independent appellate review"—apply only when the subject of the defamatory falsehood is a "public official" or "public figure."

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56. 403 U.S. 29, 50 (1971) (plurality opinion) (quoting *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring)).

57. *Id.*

58. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685–86 (1989) ("The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." (footnote omitted) (citation omitted) (quoting *Gertz*, 418 U.S. at 342); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510–11 (1984) ("The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'").

59. See *Bose*, 466 U.S. at 505 ("Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas. The principle of viewpoint neutrality that underlies the First Amendment itself also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected." (footnote omitted) (citation omitted)); Paranzino, *supra* note 55, at 478 ("[I]ndependent appellate review of actual malice determinations under *Sullivan* remains, at least for the foreseeable future, the single most important guarantor of the press's [F]irst [A]mendment rights.").

60. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (quoting *Bose*, 466 U.S. at 499).

If the defamation plaintiff is an entity, rather than a natural person, one must determine when, if ever, an entity qualifies as a public figure.<sup>61</sup> Although lower courts have routinely extended these protections to those who speak about entities,<sup>62</sup> the Supreme Court has not yet addressed this issue.<sup>63</sup> This Part agrees with the lower courts that entities can qualify as public figures and further contends that public companies (and companies that are in the process of going public) are per se public figures.

Each of the reasons for impinging on public figures' ability to recover compensation for injury to reputation applies with at least equal force when the figure is an entity rather than a natural person. First, with respect to the importance of encouraging speech about public figures, entities are equally as capable as individuals to be the subject of speech of public importance.<sup>64</sup> As the recent financial crisis has shown, the conduct of entities—for example, American International Group, Bear Stearns, Countrywide Financial, Fannie Mae, Freddie Mac, Goldman Sachs, Lehman Brothers, Merrill Lynch, Morgan Stanley, and Washington Mutual—has far-reaching implications for the country as a whole.<sup>65</sup> The holding in *Citizens United v. Federal Election Commission* that “the Government may not suppress political speech on the basis of the speaker’s corporate identity”<sup>66</sup> only heightens the importance of encouraging speech about entities, which are increasingly powerful political forces.<sup>67</sup> In the same way that speech about

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61. It is unlikely that an entity plaintiff would qualify as a “public official.” Although certain entities might conceivably qualify as “public officials,” such as the Federal Reserve Board or SIPC, it is unlikely that one of these entities would seek redress via a defamation suit.

62. See, e.g., *Contemporary Mission, Inc. v. N.Y. Times Co.*, 842 F.2d 612, 620 (2d Cir. 1988) (holding that the Contemporary Mission, Inc. was a limited public figure); *Nat’l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc.*, 705 F.2d 98, 101 (4th Cir. 1983) (holding that the National Foundation for Cancer Research, Inc. was a public figure); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir. 1980) (holding that Steaks Unlimited, Inc. was a limited public figure); *Reliance Ins. Co. v. Barron’s*, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (holding that Reliance Insurance Company was a public figure).

63. In *Bose*, the parties assumed that Bose Corporation qualified as a “public figure,” and thus the Supreme Court did not reach the issue of whether a corporation’s ability to recover in defamation could be limited by these First Amendment protections. *Bose*, 466 U.S. at 513 (assuming without deciding that Bose Corporation was a “public figure”).

64. See Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 MINN. L. REV. 455, 456 (2013) (“Corporations no longer exist in a purely commercial world. . . . Like other public figures, corporations affect public affairs, take political positions, engage in matters of public concern and controversy, and have reputations.”); Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment “Public Figure”: Nailing the Jellyfish*, 68 IOWA L. REV. 35, 63 (1982) (“With growth of corporate influence has come a greater resemblance to public sectors of power.”).

65. FIN. CRISIS INQUIRY COMM’N, FINANCIAL CRISIS INQUIRY REPORT xv–xxviii (Jan. 2011) (presenting the commission’s conclusions about the role these various entities played in causing the financial crisis).

66. 558 U.S. 310, 365 (2010).

67. In fact, it would be somewhat unbalanced to reinstate the distinction between individuals and entities in a context where the First Amendment operates to limit the rights of entities (such as in the

public officials informs citizens' voting and prevents official corruption, speech about entities informs citizens' consumer and investment decisions and prevents corporate corruption.<sup>68</sup>

With respect to the countervailing interest in compensating entities for damage to their reputations, entities are capable of protecting themselves to the same degree as individuals by combatting negative speech with their own speech.<sup>69</sup> Indeed, entities have a protected First Amendment right to engage in speech.<sup>70</sup> For example, although potentially subject to less protection than noncommercial speech, commercial speech is not outside the purview of the First Amendment.<sup>71</sup> Additionally, corporate political speech is subject to First Amendment protection equal to that afforded to individual political speech.<sup>72</sup> Not only do entities have the right to engage in speech, they are equally as likely as individuals to have the means to do so. In the modern era, most entities have websites, if not Twitter accounts, on which they can publish their own rebuttals. Moreover, just like individuals with clout, a company can reach out to reporters or even buy responsive advertising.<sup>73</sup> Of course, the public may not believe the defamed entity's defense, especially if the defamation relates to indicia of

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context of recovering for defamation), while removing it in a context where the First Amendment operates to expand the rights of entities (such as in the context of political speech). *See* Desai, *supra* note 64, at 495 ("If corporations are afforded the same speech rights as and against individuals and across all mediums, individuals should have the same rights against corporations.").

68. Jackson, *supra* note 50, at 520 ("Speech critical of corporations gives citizens key information on goods and services and helps define consumer preferences. Moreover, consumer safety may depend on an informed public. Finally, controlling corporate action [through] the product market depends on an educated populace.").

69. Desai, *supra* note 64, at 469 ("Given corporations' concentrated wealth, newfound power to create super PACS, and ability to employ sophisticated public relations and communications campaigns either through in-house or hired companies, corporations can rival, if not exceed, the access many human political figures can afford.").

70. *Citizens United*, 558 U.S. at 342 (citing twenty-two previous Supreme Court cases and noting that "[t]he Court has recognized that First Amendment protection extends to corporations"); Fetzer, *supra* note 64, at 54 ("The Supreme Court has recognized a corporate right to 'speak out' on a range of issues and has expanded first amendment protection of commercial speech. As a result, the corporation now has increased and more meaningful access to channels of communication for rebutting defamatory falsehood.").

71. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) ("In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms.").

72. *Citizens United*, 558 U.S. at 365.

73. *See, e.g., Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980) ("[I]f it had so desired, Steaks could have purchased additional advertising in order to respond to or seek to refute Deaner's charges. Under these circumstances, Steaks does not have as compelling a claim for judicial relief as it might, had it not possessed alternative means of challenging the defendants' allegations.").

*But see* Norman Redlich, *The Publicly Held Corporation as Defamation Plaintiff*, 39 ST. LOUIS U. L.J. 1167, 1170 (1995) ("Not all companies, however, have the financial resources required to mount a broad media campaign.").



truthfulness,<sup>74</sup> but this problem applies equally to defamed entities and defamed individuals.

Further, entities are just as likely as natural persons to have assumed the risk of negative coverage. First, merely by creating themselves and thereby reaping the benefits of formation, most entities have made a public filing with the state of formation,<sup>75</sup> thereby disclosing their registered office, registered agent, nature and purpose, and—depending on the entity formed—the identity of the incorporator, the general partner, the organizer, or the initial manager.<sup>76</sup> Moreover, entities ordinarily seek out the benefits of notoriety to attract customers, investors, or donors.<sup>77</sup>

Finally, entities—which by their very nature have a more limited reputational interest than individuals because they do not have purely personal reputations—may be less deserving of compensation for reputational injury than individuals.<sup>78</sup> Therefore, the *Sullivan* protections

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74. Redlich, *supra* note 73, at 1170 (“In many cases, those who hear the defamed corporation’s side of the story may not believe it. Ironically, the damage caused by the defamation may impair a corporation’s ability to effectively refute the falsehood . . .”).

75. See Fetzer, *supra* note 64, at 63 (citing “the voluntariness of corporate formation” as a reason why corporations may be public figures); Jackson, *supra* note 50, at 514 (“By taking the purposeful action of operating under a state granted charter, the corporation knowingly assumes the risk of being an object of public debate.”).

76. See DEL. CODE ANN. tit. 8, § 102 (2011) (listing the contents required in the certification of incorporation); REVISED UNIF. LTD. P’SHP ACT § 201 (2001) (listing the contents required in the certificate of limited partnership); UNIF. LTD. LIAB. CO. ACT § 203 (1996) (listing the contents required in the articles of organization). Sole proprietorships and partnerships, unlike other entities, can be formed without a filing. See REV. UNIF. P’SHP ACT § 202 (1997).

77. See *Contemporary Mission, Inc. v. N.Y. Times Co.*, 842 F.2d 612, 620 (2d Cir. 1988) (citing the corporation’s “over 12 million solicitations for its various mail-order products” as evidence supporting its status as a limited public figure); *Nat’l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc.*, 705 F.2d 98, 101 (4th Cir. 1983) (“[T]he Foundation had thrust itself into the public eye, not only through its massive solicitation efforts (almost 68 million pieces of direct mail solicitation in the past three years), but also through the claims and comments it made in many of these solicitations . . .”); *Steaks Unlimited*, 623 F.2d at 274 (“In short, through its advertising blitz, Steaks invited public attention, comment, and criticism.”).

78. Fetzer, *supra* note 64, at 52–54 (“It is uniformly held that a corporation does not have a private life or a purely personal reputation that may be defamed . . . Hence, . . . there is more justification for speech and press intrusion into corporate, as opposed to individual, affairs.”); Jackson, *supra* note 50, at 511 (“A corporation does not have social relationships and cannot suffer the same emotions that a natural person may suffer. They do not have a private life. Nor do they have a purely personal reputation.” (footnotes omitted)); Keith A. Dotseth, Note, *Redefining the Corporate “Jellyfish”: Corporate Plaintiffs in Defamation Actions*, 14 J. CORP. L. 907, 915 (1989) (noting that a corporation is “a legally fictionalized person that does not possess the same reputational or emotional interests as a natural person”). *But see* *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 269 (7th Cir. 1983) (Posner, J.) (recognizing that a “corporation cannot have a reputation for chastity but it can have a reputation for adhering to the moral standards of the community”); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 590 (1st Cir. 1980) (disagreeing with the “assumption that a corporation’s interest in protecting its reputation is less important than that of an individual person” because it “would suggest that any plaintiff, whether a corporation, unincorporated business, sole proprietorship, or even a private individual, would have to meet the public figure’s burden of proof wherever the aspects of the plaintiff’s reputation that was allegedly damaged were economic or pecuniary, as opposed to personal”).

should apply to defamation suits asserted by all public figures, whether they are entities or individuals.

Public companies (including those that are in the process of going public), which are a subset of the entities that could conceivably be classified public figures, should be recognized as per se unlimited public figures.<sup>79</sup> A “public company” has made a registered offering of its securities,<sup>80</sup> registered its securities on a national exchange,<sup>81</sup> or distributed its equity securities in such a way that there are now 2,000 accredited or 500 non-accredited holders of record.<sup>82</sup> The importance of speech about public companies is paramount because the financial health of public companies—whose investors include retirees, pension funds, and parents saving for college—has ripple effects throughout the economy.<sup>83</sup> Indeed, because there is such a strong public interest in speech about these companies, all public companies must file in-depth, publicly available periodic reports about themselves with the Securities and Exchange Commission.<sup>84</sup>

With respect to the state’s countervailing interest in permitting public companies to recover in defamation, these plaintiffs share the ability of individual public figures to engage in self-help, thereby limiting their need to resort to a defamation suit to obtain compensation. In fact, public

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79. See *Brown*, 713 F.2d at 273 (Posner, J.) (dictum) (“[W]e observe in passing that if the purpose of the public figure–private person dichotomy is to protect the privacy of individuals who do not seek publicity or engage in activities that place them in the public eye, there seems no reason to classify a large corporation as a private person.”); *Reliance Ins. Co. v. Barron’s*, 442 F. Supp. 1341, 1349 (S.D.N.Y. 1977) (“By its very nature as a large publicly held, government-regulated corporation, and additionally because of its voluntary decision to make a public stock offering, Insurance has, in fact, thrust itself into the public eye.”); Fetzer, *supra* note 64, at 85 (“A corporation is also highly susceptible to all-purpose public figure status. Large, public offering corporations are uniformly vulnerable to this status . . . .”); see also *Bruno & Stillman*, 633 F.2d at 592 n.9 (contrasting the privately held company at issue in that case with a “billion dollar, publicly held corporation, subject to federal and state regulatory bodies, proposing a fifty million dollar stock offering”).

80. Securities Exchange Act § 15(d), 15 U.S.C. § 78o(d) (2012).

81. Securities Exchange Act § 13(a), 15 U.S.C. § 78m(a) (2012); Securities Exchange Act § 12(a), (b), 15 U.S.C. § 78l(a), (b) (2012).

82. 15 U.S.C. § 78m(a); *id.* § 78l(g)(1).

83. See *Reliance Ins.*, 442 F. Supp. at 1349 (“We must acknowledge that the public interest is well served by encouraging the free press to investigate and comment on business and corporate affairs in the same manner as it would report on other public issues.”). *But see* *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 688 (4th Cir. 1989) (“We do not believe that the existence of an ongoing public interest in the stability of society’s financial institutions and markets . . . elevates every member of the regulated class to public figure status.”).

84. 15 U.S.C. § 78o(d) (“[E]ach issuer which shall . . . file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title . . . .” (citation omitted)); SEC Rule 15d-1, 17 C.F.R. § 240.15d-1 (2014) (annual reports requirement); SEC Rule 15d-11, 17 C.F.R. § 240.15d-11 (2014) (current reports requirement); SEC Rule 15d-13, 17 C.F.R. § 240.15d-13 (2014) (quarterly reports requirement).

companies usually have public relations departments.<sup>85</sup> In addition, like individual public figures, public companies voluntarily reap the benefits of notoriety, thus assuming the risk of being the subject of public criticism.<sup>86</sup> Among the benefits of “going public” are access to capital, liquidity, and visibility.<sup>87</sup> Further, unlike limited public figures who have only “thrust themselves to the forefront of particular public controversies,”<sup>88</sup> public companies must publicly file in-depth reports that cover virtually every aspect of their businesses,<sup>89</sup> including “[m]anagement’s discussion and analysis of financial condition and results of operations.”<sup>90</sup> Therefore, it is virtually impossible to imagine a scenario in which the subject matter of a defamatory report would be sufficiently relevant to a public corporation’s business to harm its reputation while not being within the scope of the company’s comprehensive self-reporting.<sup>91</sup>

Finally, treating public companies as public figures for all purposes would promote predictability about how this class of defamation plaintiffs will be categorized, which is essential to preventing self-censorship of speech about public companies.<sup>92</sup> In fact, for this reason, one commentator has suggested that all corporations, including those that are privately held, should be treated as per se public figures.<sup>93</sup> In light of the vast distinction between a mom-and-pop corporation—which has not publicly solicited investors, does not have the resources to defend itself in the media, and does not implicate issues of public importance—and a public corporation—which seeks public investors, has the ability to defend itself, and impacts

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85. Lyryssa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 910 (2000) (“The corporation can also issue press releases to counteract any defamatory statements, and many publicly held corporations can even finance intensive media campaigns to rehabilitate a damaged corporate reputation.”).

86. *See id.* at 911 (“Publicly held corporations must make an affirmative decision to ‘take the company public’ in order to solicit money from investors.”); *see also Reliance Ins.*, 442 F. Supp. at 1348 (“Insurance was, at the time of the libel, offering to sell its stock to the public, thereby voluntarily thrusting itself into the public arena, at least as to all issues affecting that proposed stock sale.”).

87. Richard A. Mann, Michael O’Sullivan, Larry Robbins & Barry S. Roberts, *Starting from Scratch: A Lawyer’s Guide to Representing a Start-Up Company*, 56 ARK. L. REV. 773, 840–41 (2004).

88. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *see Jackson, supra* note 50, at 505 (citing cases requiring “a nexus between the subject of [a corporation’s] self-promotion and the subject of the defamation suit”).

89. *See* 15 U.S.C. § 78o(d).

90. Regulation S-K Item 303, 17 C.F.R. § 229.303 (2014).

91. *See Lidsky, supra* note 85, at 908–09 (“[I]t is fair to conclude that a corporation should be treated as a public figure when the alleged defamation appears in a forum dedicated to discussion of the corporation’s management and operation and is reasonably related to that subject.”).

92. *See Jackson, supra* note 50, at 508–09 (“A general rule, however, more appropriately governs the interests at stake in corporate defamation cases. . . . Unpredictability means that litigants will not be able to act in reliance on well-supported expectations.”).

93. *Id.* at 522 (“A per se public figure status for the corporate plaintiff properly balances the interests of reputation and speech.”).

the overall economy—this Article does not go so far.<sup>94</sup> Instead, this Article contends that entities can be public figures and that a subset of entities—namely, public companies—are per se unlimited public figures.

*C. The Sullivan Protections Should Apply Equally to Media and Non-Media Defendants*

This Article argues that the “actual malice,” “clear and convincing evidence,” and “independent appellate review” standards should apply in any defamation suit asserted by a public official or public figure, regardless of whether the defendant is media or non-media.<sup>95</sup> Therefore, for example, an independent securities analyst who publishes research about a public company, although not a member of the traditional media, should be able to rely on these protections to the same extent as a financial journalist who publishes a comparable article.

The Supreme Court has not yet addressed whether the *Sullivan* protections afforded a defendant in a public official or public figure defamation case apply equally to media and non-media defendants.<sup>96</sup> Because the precedent in this area has arisen in the context of media defendants (or non-media defendants whose speech was published in the media),<sup>97</sup> the Court’s holdings are often stated as limited to media defendants.<sup>98</sup> These holdings, which are merely narrowly tailored to the

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94. *Accord* Long v. Cooper, 848 F.2d 1202, 1205–06 (11th Cir. 1988) (holding that Long’s Electronics, a closely held corporation, was not a public figure, even though it was “successful and a leader in its field”); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 589 (1st Cir. 1980) (“We recognize the attraction of broad and clearcut definitions in terms of simplifying litigation, but we cannot see how corporations as a class can be said to be ‘public figures’ for First Amendment purposes.”); *cf.* Jackson, *supra* note 50, at 521 (“A per se public figure status is appropriate because it functions well as a general rule. That a per se standard may work less well for smaller corporations may be disagreeable in certain instances, but is nevertheless justified because of its value in most cases.”).

95. *Accord* Milkovich v. Lorain Journal Co., 497 U.S. 1, 23–24 n.2 (1990) (Brennan, J., dissenting) (“The defendant in the *Hepps* case was a major daily newspaper and, as the majority notes, the Court declined to decide whether the rule it applied to the newspaper would also apply to a nonmedia defendant. I continue to believe that ‘such a distinction is irreconcilable with the fundamental First Amendment principle that [t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.’” (alteration in original) (citations omitted) (internal quotation marks omitted)).

96. *Id.* at 20 n.6 (“In *Hepps* the Court reserved judgment on cases involving nonmedia defendants, and accordingly we do the same.” (citation omitted)); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986) (“Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant . . .”).

97. Katherine W. Pownell, Comment, *Defamation and the Nonmedia Speaker*, 41 FED. COMM. L.J. 195, 197 (1989) (recognizing that the Supreme Court has applied these constitutional protections “[i]n cases in which media entities are not defendants, but serve as vehicles for nonmedia entities’ criticism of public officials or figures”).

98. *See, e.g.,* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 499 (1991) (in a case involving a media defendant, limiting the rule to media defendants) (“The First Amendment protects *authors and journalists* who write about public figures by requiring a plaintiff to prove that the

facts before the Court, should not be interpreted as resolving the issue of whether these protections apply to non-media defendants.<sup>99</sup>

In a variety of other related First Amendment contexts, however, the Supreme Court has declined to distinguish between media and non-media defendants. First, in *Dun & Bradstreet, Inc. v. Greenmoss Building, Inc.*, a splintered Court addressed the extent of First Amendment overlay in defamation cases asserted by private persons.<sup>100</sup> Although the defendant at issue in that case was Dun & Bradstreet, Inc.—a non-media credit reporting agency—five Justices explicitly declined to rely on this distinction, stating that the First Amendment affords media and non-media defendants identical protections in defamation cases.<sup>101</sup> Second, more recently in *Citizens United v. FEC*, the Court struck down a law prohibiting corporations from using general treasury funds to engage in political speech, even though the law included an exemption for the media: “‘We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.’”<sup>102</sup>

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defamatory statements were made with what we have called ‘actual malice,’ a term of art denoting deliberate or reckless falsification.” (emphasis added)); *Hepps*, 475 U.S. at 777 (in a case involving a media defendant) (“[W]e hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a *media defendant* for speech of public concern.” (emphasis added)).

99. Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 119 (1987) (“The repeated references in these cases to the freedom of speech clause justify the conclusion that ‘media-type’ terms were employed in *New York Times* and *Gertz* simply because the cases involved media defendants, and that the constitutional fault requirements enunciated in these cases should apply regardless of the defendant’s media or nonmedia status.” (footnotes omitted)).

100. 472 U.S. 749, 763 (1985) (plurality opinion) (“We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”); see also *id.* at 764 (Burger, C.J., concurring in the judgment).

101. See *id.* at 763 (plurality opinion) (not using the media/non-media defendant distinction to resolve the case); *id.* at 764 (Burger, C.J., concurring in the judgment) (not explicitly addressing the media/non-media defendant issue); *id.* at 773 (White, J., concurring in the judgment) (“Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants. On that issue, I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech.”); *id.* at 783–84 (Brennan, J., dissenting) (“Accordingly, at least six Members of this Court (the four who join this opinion and Justice White and The Chief Justice) agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.”); see also 1 RODNEY SMOLLA, RIGHTS AND LIABILITIES IN MEDIA CONTENT: INTERNET, BROADCAST, AND PRINT § 6:48 (2d ed. 2012) (“[A]ll the [J]ustices in *Dun & Bradstreet* either explicitly or implicitly rejected the media/nonmedia distinction.”).

102. 558 U.S. 310, 352 (2010) (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)); see also *id.* at 352 (“The media exemption [from the ban on corporate expenditures for electioneering] discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”).

This Article, consistent with the Court's refusal to distinguish between media and non-media defendants in other First Amendment contexts, argues that there is no distinction between these types of defendants in the defamation context. Looking first at the First Amendment value of non-media speech about public figures, non-media speakers perform an informative function comparable to that of the traditional media,<sup>103</sup> especially in the modern world of Internet speech.<sup>104</sup> For example, financial message boards "allow those interested in a particular corporation to gather information that may not be supplied by traditional media outlets."<sup>105</sup> Moreover, the fear of defamation liability has the potential to chill non-media speech to the same extent as media speech. In fact, the chilling effect arguably is more acute for non-media defendants, who may be less likely to be able to defend the suit, let alone pay the judgment.<sup>106</sup>

Turning to the countervailing interest in allowing injured plaintiffs to recover from non-media defendants, the harm to reputation caused by non-media speech would not exceed that caused by media speech—and, indeed, non-media speech might be less harmful.<sup>107</sup> Additionally, one of the major criticisms of the "actual malice" standard is that it replaces the chilling effect of defamation liability with the chilling effect of a searching inquiry into editorial processes.<sup>108</sup> This criticism is arguably less pointed when

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103. See *Dun & Bradstreet*, 472 U.S. at 773 n.4 (White, J., concurring in the judgment) ("And this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten."); *id.* at 781 (Brennan, J., dissenting) ("Such a [media/non-media] distinction is irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.'" (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978))); John J. Watkins & Charles W. Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH. L. REV. 823, 849 (1984) ("It would indeed be a mistake to assume that contributions to the democratic dialogue can come only from the institutional news media.").

104. See generally GLENN REYNOLDS, AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT, AND OTHER GOLIATHS 89–114 (2006) (discussing how Internet journalism by the masses is revolutionizing "Big Media" by scooping it, correcting it, and supplementing it).

105. Lidsky, *supra* note 85, at 899.

106. *Id.* at 891 (arguing that the high cost of libel litigation is even more daunting for nonmedia Internet users, who "are unlikely to have enough money even to defend against a libel action").

107. See *Dun & Bradstreet*, 472 U.S. at 773 (White, J., concurring in the judgment) ("[I]t makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation."); Langvardt, *supra* note 99, at 122 ("Further, a false and defamatory statement published by a media defendant has a greater potential for doing widespread harm to the plaintiff's reputation than does the typical false and defamatory statement by the nonmedia defendant because of the broader circulation the media defendant's statement would get.").

108. See, e.g., Dotseth, *supra* note 78, at 919–20 ("Prior to the advent of the constitutional privilege, the media theoretically were chilled by the threat of large jury awards. Now, because the libel suit inquires into whether the publisher exercised actual malice in its editorial process, the courts focus directly on the exercise of editorial decisions. Fearing the chilling effect jury awards could have on editorial decisions, the courts adopted a system that cuts to the chase—one that requires a heavy-handed

applied to non-media defendants, whose editorial processes are historically less sacrosanct than those of media defendants. Further, on a practical level—in this modern era of Internet publications,<sup>109</sup> specialized publications,<sup>110</sup> and interplay between traditional and nontraditional media<sup>111</sup>—the attempt to distinguish between media and non-media speech is itself anachronistic.<sup>112</sup> Finally, although this issue touches on the unresolved debate about whether the Free Press Clause extends greater protections to the press than afforded to the general public by the Free Speech Clause,<sup>113</sup> that issue need not be resolved here. In this context, the Free Speech Clause and the Free Press Clause likely afford coextensive protection.<sup>114</sup>

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review of the editorial process. . . . [T]ruth and free debate are not encouraged by the constitutional privilege system. Instead, truth and debate are casualties.” (footnotes omitted)); Paranzino, *supra* note 55, at 495 (explaining that the “actual malice” standard has been criticized as undermining the constitutional values that it is meant to protect because it allows “extensive discovery into the editorial processes of publishers,” which has its own chilling effect).

109. See Lidsky, *supra* note 85, at 889 n.174 (“To call [Internet posters] nonmedia defendants is something of a misnomer, since the Internet is the ultimate medium of mass communication.”).

110. See Langvardt, *supra* note 99, at 122 (recognizing the potential for “inconsistent outcomes for sources such as specialized publications with a narrow audience, company newsletters, trade union publications, credit reports, [and] handbills and brochures distributed by a group”).

111. Pownell, *supra* note 97, at 210 (“The interrelationship between media and nonmedia speech is an important factor that has been largely ignored . . . . Individual speech can be a prelude to media speech. . . . More importantly, nonmedia speech often results from media speech.”).

112. *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (“With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”); *Dun & Bradstreet*, 472 U.S. at 782–83 (Brennan, J., dissenting) (“First Amendment difficulties lurk in the definitional questions such an approach would generate. And the distinction would likely be born an anachronism.” (footnote omitted)).

113. Compare *Citizens United*, 558 U.S. at 390 (Scalia, J., concurring) (“And the notion which follows from the dissent’s view, that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind.”), and *id.* at 390–91 n.6 (“The dissent seeks to avoid this conclusion . . . by interpreting the Freedom of the Press Clause to refer to the institutional press . . . . It is passing strange to interpret the phrase ‘the freedom of speech, or of the press’ to mean, not everyone’s right to speak or publish, but rather everyone’s right to speak or the institutional press’s right to publish.” (citation omitted)), with *id.* at 431 n.57 (Stevens, J., dissenting) (“[T]he Court’s strongest historical evidence all relates to the Framers’ views on the press, yet while the Court tries to sweep this evidence into the Free Speech Clause, the Free Press Clause provides a more natural textual home. The text and history highlighted by our colleagues suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status, and therefore why some kinds of ‘identity’-based distinctions might be permissible after all.” (citations omitted)).

114. SMOLLA, *supra* note 101, § 6:48 (“The Court has thus not, for the most part, breathed life into the Press Clause of the First Amendment but rather has treated it as rhetorical flourish that adds nothing to protection for the press that it would not otherwise enjoy under the Speech Clause.”); Langvardt, *supra* note 99, at 121 (“Nothing would be taken away from the press under this approach. Rather, there would be a recognition, at least with regard to defamation liability, that the constitutional interests of media and nonmedia defendants are identical . . . .”); Watkins & Schwartz, *supra* note 103, at 847–48 (suggesting that, in the defamation context, the speech clause and the press clause afford identical protections to media and nonmedia defendants).

*D. The Sullivan Protections Should Apply Only to Noncommercial Speech*

Although the Supreme Court has not addressed this issue, this Article agrees with most commentators and lower courts that the *Sullivan* protections do not apply to “commercial speech.” Under current Supreme Court precedent, commercial speech, while no longer devoid of First Amendment protection,<sup>115</sup> is less deserving of First Amendment protection than noncommercial speech.<sup>116</sup> The resolution of whether the *Sullivan* standards apply to commercial speech requires an analysis of two issues: (1) where the dividing line between commercial and noncommercial speech is located; and (2) whether the rationales for the *Sullivan* protections apply to commercial speech as so defined. These two issues are interrelated because the classification of speech as commercial is guided by whether the rationales for First Amendment protection are implicated by the speech.

*1. Commercial Speech “Merely Proposes a Commercial Transaction”*

The traditional definition of commercial speech is speech that “merely proposes a commercial transaction.”<sup>117</sup> Therefore, the quintessential example of commercial speech is an advertisement for a product or

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115. Compare *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that “commercial speech, like other varieties, is protected”), with *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942) (“We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. . . . If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct.”).

116. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”); *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 n.24 (“In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does ‘no more than propose a commercial transaction’ and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.” (citation omitted)).

117. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978) (“We have not discarded the ‘common-sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”); *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (in context of holding that commercial speech is entitled to some First Amendment protection) (“Our question is whether speech which does ‘no more than propose a commercial transaction’ is so removed from any ‘exposition of ideas’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,’ that it lacks all protection.” (citations omitted)).



service.<sup>118</sup> As the Supreme Court explained in *Ohralik v. Ohio State Bar Ass'n*, when a person engages in commercial speech, the speech is “an essential but subordinate component.”<sup>119</sup> In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, however, in addition to citing the traditional definition of commercial speech,<sup>120</sup> the Court stated a broader definition of commercial speech: “expression related solely to the economic interests of the speaker and its audience.”<sup>121</sup> This broader definition, on its face, would appear to expand the classification of commercial speech to encompass a wide variety of speech that is indisputably noncommercial, such as financial journalism.<sup>122</sup> For this reason, Professor Eugene Volokh noted that:

[T]his can't be right. Consider again the newspaper that discusses business affairs, almost entirely in order to make money by helping its readers do well in business. Consider a product review written by its author because he wants to be paid, published by the newspaper because it wants to keep its paying subscribers, and read by readers because they want to know how to best spend their money. Consider a union buying TV ads urging people to “Buy American” because that's the best way of maintaining the viewers' (and the union members') standard of living.

Such economic commentary, it seems to me, is as protected as political, religious, social, or artistic commentary.<sup>123</sup>

Indeed, subsequent to *Central Hudson*, the Court has reaffirmed the traditional definition as the “core notion of commercial speech,”<sup>124</sup> even on one occasion referring to it as “the test.”<sup>125</sup>

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118. See, e.g., *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985) (“Whatever else the category of commercial speech may encompass, it must include appellant's advertisements.” (citation omitted)); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998) (“Commercial advertising constitutes paradigmatic commercial speech under the Supreme Court's standard because its fundamental purpose is to propose an economic transaction.”).

119. 436 U.S. at 457.

120. See 447 U.S. at 562 (citing precedent for “the ‘commonsense’ distinction between speech proposing a commercial transaction . . . and other varieties of speech” (quoting *Ohralik*, 436 U.S. at 455–56)); *id.* at 563 n.5 (“There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions.”).

121. *Id.* at 561.

122. See, e.g., *Commodity Trend Serv.*, 149 F.3d at 684; *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733, 740 (D. Md. 1995); *Nat'l Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. 627, 643 (D. Md. 1992); *Lacoff v. Buena Vista Publ'g, Inc.*, 705 N.Y.S.2d 183, 190 (N.Y. Sup. Ct. 2000).

123. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1081–82 (2000).

124. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

125. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989) (“There is no doubt that the AFS ‘Tupperware parties’ the students seek to hold ‘propose a commercial transaction,’

As further guidance on where to draw the admittedly imprecise line<sup>126</sup> between commercial and noncommercial speech, the Court in *Bolger v. Young Drug Products Corp.* identified three characteristics that, if all were present, would provide “strong support” for the characterization of the speech as commercial: (1) whether the speech is an advertisement; (2) whether the speech refers to a specific product; and (3) whether the speaker had an economic motivation.<sup>127</sup> The Court cautioned that one should not, however, draw a negative inference from the absence of one or more of these characteristics.<sup>128</sup>

These three interrelated factors determine whether the speech was primarily motivated by a financial interest in the goods or services discussed. Therefore, on the one hand, even if the speech were not an advertisement “in the classic sense,” it would qualify if the primary purpose of the speech was to encourage the purchase of the speaker’s goods or services.<sup>129</sup> On the other hand, even if the speech were run as an advertisement in a media publication, it would not be commercial speech if the speech was not intended to promote the purchase of the speaker’s goods or services.<sup>130</sup> By the same token, the relevant “economic motivation” is not whether the speaker was financially motivated to sell the speech<sup>131</sup> but

which is the test for identifying commercial speech.” (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)); see also *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (noting that the *Central Hudson* test encompassed “a somewhat larger category of commercial speech” and that the Court “did not, however, use that definition” in *Bolger* or *Fox*).

126. See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985) (“More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech . . .”).

127. See 463 U.S. at 66–67.

128. *Id.* at 67 n.14 (“Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial.”).

129. *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 552 (5th Cir. 2001) (“Certainly the repetition of the rumor via AmVox was not an advertisement in the classic sense, but whether it could be considered as a negative advertisement against P&G seems to depend on the determination of the third factor—whether the speaker had an economic motivation for the speech. If Haugen or others who repeated this rumor did have economic motivations, then the message resembles an advertisement seeking to encourage downline distributors to eschew P&G and buy Amway.”).

130. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (“The publication here was not a ‘commercial’ advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.” (italics added to case name)); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001) (holding that, even though the magazine identified the apparel products in its altered photograph and listed them in a “shopper’s guide,” the photo did not rise to the level of “a traditional advertisement printed merely for the purpose of selling a particular product”).

131. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 789 (1985) (Brennan, J., dissenting) (“Time and again we have made clear that speech loses none of its constitutional protection ‘even though it is carried in a form that is “sold” for profit.’”) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976)); *Va. State Bd. of Pharmacy*, 425 U.S. at 761 (“Speech likewise is protected even though it is carried in a form that is

whether the speaker was financially motivated to sell the goods or services about which the speech was made.<sup>132</sup>

Finally, the Court's rationales for extending lesser First Amendment protection to commercial speech than to noncommercial speech help guide the classification of borderline speech as commercial or noncommercial.<sup>133</sup>

If the speech in question does not need the greater First Amendment protection afforded noncommercial speech, then it should be classified as commercial speech. The following rationales are generally cited for treating commercial speech to lesser First Amendment protections than noncommercial speech: (1) commercial speech is more durable because the speaker has an economic incentive to speak;<sup>134</sup> and (2) a commercial speaker is speaking about itself and is thus uniquely situated to assess truthfulness, making erroneous statements less inevitable<sup>135</sup> and making corrective statements by third parties less feasible.<sup>136</sup> Therefore, if these rationales are implicated, the speech should be classified as commercial.

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'sold' for profit . . ."); *Sullivan*, 376 U.S. at 266 (differentiating "commercial advertising" that, under then-current precedent, was not entitled to any First Amendment protection from protected speech) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998) ("A long line of Supreme Court cases, however, confirms that speech does not become 'commercial' simply because it concerns economic subjects or is sold for a profit.").

132. *Time, Inc. v. Hill*, 385 U.S. 374, 405 (1967) (Harlan, J., concurring in part and dissenting in part) ("There is no evidence to show that Time, Inc., had any financial interest in the production or even that the article was published as an advertisement. Thus the question whether a State may apply more stringent limitations to the use of the personality in 'purely commercial advertising' is not before the Court." (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942))); *Facenda v. NFL Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008) (holding that the NFL had an economic interest in a video game promoted in one of its programs because the licensing agreement gave the NFL "a direct financial interest in sales of the video game"); *Commodity Trend Serv.*, 149 F.3d at 685-86 ("The publications advertised in the exhibits submitted by the CFTC do not appear to propose commercial transactions between CTS and any customers. Rather, they appear to provide information on commodity trading in general and leave any actual trading to other parties.").

133. *See, e.g., Procter & Gamble*, 242 F.3d at 550 (applying these rationales to the speech in question in order to determine whether the speech was appropriately classified as commercial); *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 935 (3d Cir. 1990) (same).

134. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 n.6 (1980) ("Two features of commercial speech permit regulation of its content. . . . In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977))); *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24 ("Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.").

135. *Cent. Hudson*, 447 U.S. at 564 n.6 ("Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity.").

136. Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1223 (2012) ("Commercial speech is much less likely to be challenged by, critically responded to, or corrected by third parties."); Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 433

Applying the definition of commercial speech in the securities context, three distinct categories emerge: (1) speech that is clearly commercial; (2) speech that is clearly noncommercial; and (3) borderline speech whose classification will depend on a detailed analysis of the facts and circumstances. First, speech by the issuer about the issuer's business would undoubtedly qualify as commercial speech. Thus, for example, issuer statements in SEC filings like prospectuses and periodic reports would qualify as commercial speech.<sup>137</sup> This speech, which is made in order for investors to assess whether to buy, hold, or sell the issuer's securities, falls within the traditional definition of speech that merely "propos[es] a commercial transaction."<sup>138</sup> Moreover, most of this speech satisfies the three *Bolger* characteristics because the issuer's speech is primarily motivated by a financial interest in the securities discussed. The issuer has an economic interest in the sale of its securities, both in order to raise money and, in the after-market, in order to promote liquidity. Finally, the rationales for extending lesser First Amendment protection to commercial speech are implicated by an issuer's SEC filings. An issuer's SEC filings are a durable form of speech. Not only are disclosures in the issuer's interest in order to entice investors, the SEC mandates extensive disclosures. Moreover, an issuer, who is making statements about itself and has internal controls in place in order to audit the truthfulness of its public disclosures, is less likely to make erroneous statements. Thus, an issuer's disclosures about its securities constitute commercial speech, explaining why the vast majority of securities regulations do not run afoul of the First Amendment.<sup>139</sup>

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(2012) (arguing that commercial speech is especially prone to abuse "because the commercial speaker always has more information about his products and services than the listener").

137. See Pomeranz, *supra* note 136, at 405 (identifying the Exchange Act's mandatory disclosure requirements as an example of compulsory commercial speech); Volokh, *supra* note 123, at 1081 ("Commercial advertisements for products or services are classic examples [of commercial speech]. So are stock prospectuses, which propose the purchase of stock . . .").

138. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); see also *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

139. See *Ohralik*, 436 U.S. at 456 ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities . . . Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."); Heyman, *supra* note 3, at 217 ("Concerns over extending [First Amendment] protections are tempered by the fact that most securities regulations would survive First Amendment review under the commercial speech doctrine."); Volokh, *supra* note 123, at 1081 (explaining that, because prospectuses are commercial speech, "fairly heavy SEC regulation of speech in such prospectuses is largely permissible, while similar SEC regulation of newsletters or newspapers that discuss stocks is not"); Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 287 (1988) ("The justification for this regulation of speech is the commercial speech doctrine. Modern constitutional doctrine, although it gives some protection to that speech, appears to still permit prior restraint of corporate prospectuses and registration statements that offer securities for sale."). But see BUTLER & RIBSTEIN, *supra* note 3, at 103 (1995) (arguing that "the 1933 act should not only be subject to more

On the other end of the spectrum, a financial journalist's article about offered securities or their issuer would not qualify as commercial speech. First, the journalist is not proposing a commercial transaction, any more so than a movie or restaurant reviewer.<sup>140</sup> Moreover, the *Bolger* characteristics are not satisfied because the speaker is not primarily motivated by a financial interest in the goods or services discussed. Although an article might focus on a company's products or securities, an independent journalist has no economic interest in the sale of the covered securities. Any economic interest of the journalist is in selling the journalism—not the securities. Finally, the rationales for affording commercial speech less protection are not implicated. A journalist, who risks being sued by the covered company or the SEC, is the quintessential speaker subject to chilling. Moreover, because the journalist is an outsider, erroneous statements are inevitable. For these reasons, courts have held that financial journalism does not constitute commercial speech.<sup>141</sup>

Finally, securities analysts' reports and credit ratings fall somewhere in the middle, necessitating an analysis of the facts and circumstances surrounding the specific speech in question. Both securities analysts and rating agencies are supposed to be independent, akin to financial journalists. Yet, evidence has emerged that some analysts and credit rating agencies are often so economically aligned with the issuer as to infect their speech with bias.<sup>142</sup> Therefore, the classification of securities analysis and credit ratings as commercial or noncommercial speech will depend on whether the speaker in question is unduly aligned with the issuer—thereby

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intense First Amendment scrutiny than ordinary advertising regulation, but is probably unconstitutional even under the standard applied to advertising”).

140. *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 686 (7th Cir. 1998) (“Just like a restaurant review does not propose a transaction between the individual reader and the restaurant, the publications themselves do not propose any commodity transaction.”).

141. *See, e.g., Commodity Trend Serv.*, 149 F.3d at 684 (holding that various publications providing impersonal advice about the commodity futures markets were noncommercial speech); *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733, 739–40 (D. Md. 1995) (“[T]here is considerable authority . . . for the proposition that investment newsletters are subject to the same protection under the First Amendment as any other publication.”); *Nat'l Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. 627, 644 (D. Md. 1992) (holding that a financial news analyst and editor's statements printed in the newsletter *Profitable Investing*, and the promotional materials marketing the newsletter, were noncommercial speech); *Lacoff v. Buena Vista Publ'g, Inc.*, 705 N.Y.S.2d 183, 185, 190 (N.Y. Sup. Ct. 2000) (holding that a book entitled *The Beardstown Ladies' Common-Sense Investment Guide* was noncommercial speech).

142. *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 65, at xxv (concluding that “the failures of credit rating agencies were essential cogs in the wheel of financial destruction” and identifying “the pressure from financial firms that paid for the ratings” and “the relentless drive for market share” as forces leading to the credit rating agencies' failures); SEC, SEC FACT SHEET ON GLOBAL ANALYST RESEARCH SETTLEMENTS (April 28, 2003), *available at* <http://www.sec.gov/news/speech/factsheet.htm> (summarizing a series of structural reforms to prevent analysts from publishing conflicted research).

rendering the speech akin to an advertisement—or is truly independent—thereby rendering the speech akin to financial journalism.<sup>143</sup>

If the analyst's or rating agency's compensation were linked to the success of the offering, the report or credit rating would seem to do little more than "propose a commercial transaction." In that circumstance, all three *Bolger* characteristics would likely be satisfied because the speaker would be primarily motivated by a financial interest in the securities discussed. Moreover, the rationales for limiting First Amendment protection would be implicated. This type of conflicted speech, like that of the issuer itself, is more durable because of the direct economic incentive to

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143. See Dodd-Frank Act § 931(3), 15 U.S.C. § 78o-7 (2012), editor's note ("Because credit rating agencies perform evaluative and analytical services on behalf of clients, much as other financial 'gatekeepers' do, the activities of credit rating agencies are fundamentally commercial in character and should be subject to the same standards of liability and oversight as apply to auditors, securities analysts, and investment bankers." (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1872 (2010))); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 792 (1985) (Brennan, J., dissenting) ("Credit reports are not commercial advertisements for a good or service or a proposal to buy or sell such a product. We have been extremely chary about extending the 'commercial speech' doctrine beyond this narrowly circumscribed category of advertising because often vitally important speech will be uttered to advance economic interests and because the profit motive making such speech hardly dissipates rapidly when the speech is not advertising."); *Commercial Fin. Servs., Inc. v. Arthur Andersen LLP*, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (refusing to afford First Amendment protections to a credit rating agency paid by the issuer) ("While the Rating Agencies gave 'opinions,' they did so as professionals being paid to provide their opinions to a client. If a journalist wrote an article for a newspaper about the bonds, the First Amendment would presumably apply. But if CFS hired that journalist to write a company report about the bonds, a different standard would apply. Similarly, CFS and the Rating Agencies can be said to be in privity through an agreement that both sides are entitled to enforce."); Gregory Husisian, *What Standard of Care Should Govern the World's Shortest Editorials?: An Analysis of Bond Rating Agency Liability*, 75 CORNELL L. REV. 410, 454-55 (1990) ("It is apparent, therefore, that bond ratings are indeed the world's shortest editorials. As editorials, courts should grant them the same deference they grant any other protected [F]irst [A]mendment publication. Ratings merely provide a simple means for consumers to compare rough levels of risk among varying companies and industries."); Caleb Deats, Note, *Talk That Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies From Regulation?*, 110 COLUM. L. REV. 1818, 1850 (2010) ("[C]ourts should analyze ratings as commercial speech. This approach is appropriate because (1) rating agencies rely on confidential information in formulating their ratings; (2) rating agencies advise issuers on how to obtain top ratings; (3) issuers include the resulting ratings in investments' informational memoranda and selling documents; and (4) the commercial speech framework prioritizes listeners' interests in receiving truthful information over speakers' interests in expressing opinions."); Jonathan W. Heggen, Note, *Not Always the World's Shortest Editorial: Why Credit-Rating-Agency Speech Is Sometimes Professional Speech*, 96 IOWA L. REV. 1745, 1766 (2011) ("Courts should not apply the actual-malice standard whenever a CRA is a defendant; rather, courts should perform a functional analysis to determine what role the CRA played. If the CRA played its traditional role and merely published an opinion, courts should apply the actual-malice standard because the marketplace-of-ideas theory justifies First Amendment protection. If the CRA played an active role in structuring the deal, however, its speech is professional speech, and as such, the First Amendment does not protect it."); Theresa Nagy, Note, *Credit Rating Agencies and the First Amendment: Applying Constitutional Journalistic Protections to Subprime Mortgage Litigation*, 94 MINN. L. REV. 140, 167 (2009) ("Although Moody's, S&P, and Fitch have been successful in defending past suits using the First Amendment, courts should not ignore the major differences between the rating agencies and the traditional press. The three major rating agencies are paid by the issuers, take an active role in the structuring of transactions, and their ratings are more akin to certifications than opinions.").

speak. Moreover, the analyst's or rating agency's alignment with the issuer would probably bring with it access to information, making it less likely that the speaker would make an inadvertent error. Therefore, this type of conflicted securities analysis or credit rating should be classified as commercial speech.

If, on the other hand, the analyst's or rating agency's compensation were independent of the success of the offering, the report or credit rating should not fall within the scope of the definition of commercial speech.<sup>144</sup> The *Bolger* characteristics would not be satisfied because the speaker would not be primarily motivated by a financial interest in the securities discussed. The speaker's economic incentive would relate to the sale of its speech, just like a financial journalist, rather than to whether the speech accomplishes the sale of securities. Moreover, the rationales for treating commercial speech to lesser First Amendment protection would not be implicated. This speech, without the enhanced economic motive of conflicted speech, would be subject to chilling, just like financial journalism. Moreover, as independent third parties, these speakers would inevitably make erroneous statements.

## 2. *The Sullivan Protections Should Not Apply to Commercial Speech*

The Supreme Court has not addressed whether the *Sullivan* protections apply to commercial speech,<sup>145</sup> but most lower courts to have addressed the issue have declined to extend these protections to commercial speech.<sup>146</sup> This Article agrees with these lower courts that the *Sullivan* protections should not apply to commercial speech because the balance of interests underlying these protections does not apply to commercial speech. Under *Sullivan* and its progeny, the state's interest in compensating public figures

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144. See, e.g., *Commodity Trend Serv.*, 149 F.3d at 684 (holding that a "hot picks" telephone hotline, which provided impersonal trading recommendations about the commodity futures markets, was noncommercial speech).

145. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per curiam) (dismissing writ of certiorari as improvidently granted); Petition for Writ of Certiorari, *Nike*, 539 U.S. 654 (No. 02-575), 2002 WL 32101098 (presenting the question of whether First Amendment protections such as the *Sullivan* protections apply to commercial speech).

146. *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185 (9th Cir. 2001) (dictum) ("When speech is properly classified as commercial, a public figure plaintiff does not have to show that the speaker acted with actual malice."); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 557 (5th Cir. 2001) (holding that "false commercial speech cannot qualify for the heightened protection of the First Amendment, so P&G is not required to show actual malice in proving its Lanham Act claim"); *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 932 (3d Cir. 1990) ("We recognize that the Supreme Court cases creating the commercial speech doctrine all involve some form of government regulation of speech and that none involve defamation actions. Further, the focus in the commercial speech cases is on First Amendment protection itself, not the heightened protection afforded by the actual malice standard. However, we believe the subordinate valuation of commercial speech is not confined to the government regulation line of cases.").

for injury to reputation gives way somewhat because (1) erroneous statements about public officials and figures are inevitable; (2) the potential for liability has a chilling effect when erroneous statements are inevitable; and (3) speech about public officials and figures is so important to society that the liability standards should be raised in order to prevent this chilling effect. When the speech is commercial, each of these rationales is lessened.

First, in most commercial speech, the speaker is speaking about itself or its market, thus lessening the inevitability of erroneous statements.<sup>147</sup> Indeed, the quintessential example of commercial speech—an advertisement of one’s goods or services—involves speech by a company about itself.<sup>148</sup> Second, commercial speech is less likely to be chilled than noncommercial speech. For one, because erroneous statements are less inevitable, the risk of inadvertently incurring liability is lessened.<sup>149</sup> Moreover, commercial speakers have an economic incentive to promote their goods and services.<sup>150</sup> As such, their speech is more durable.<sup>151</sup>

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147. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 n.6 (1980) (“Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976) (“The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.”).

148. *Va. State Bd. of Pharmacy*, 425 U.S. at 777–78 (Stewart, J., concurring) (“In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser’s access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction ‘some falsehood in order to protect speech that matters.’” (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974))).

149. *See id.* at 776 (“[T]he Court’s decision calls into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising. I write separately to explain why I think today’s decision does not preclude such governmental regulation.”); *id.* at 777–78 (“The advertiser’s access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction ‘some falsehood in order to protect speech that matters.’” (quoting *Gertz*, 418 U.S. at 341)).

150. *Cent. Hudson*, 447 U.S. at 564 n.6 (“Two features of commercial speech permit regulation of its content. . . . In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not ‘particularly susceptible to being crushed by overbroad regulation.’” (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977))).

151. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762–63 (1985) (plurality opinion) (“In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental ‘chilling’ effect of libel suits would be of decreased significance.” (citations



Finally, although self-interested speech about goods and services is of some value to both the listener and the speaker,<sup>152</sup> it is generally of lesser value to the listener than disinterested speech<sup>153</sup> and less likely to be of expressive value to the speaker.<sup>154</sup> Therefore, because the rationales for raising the liability standards are less implicated in the context of commercial speech, the state's interest in compensating for injury to reputation should not give way when the speech in question is commercial as opposed to noncommercial.

This Article's conclusion is buttressed by several hints from the Supreme Court about the First Amendment protections afforded commercial speech. First, in *Sullivan*, before setting forth the "actual

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omitted)); *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24 ("Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.").

152. *Va. State Bd. of Pharmacy*, 425 U.S. at 762 ("[W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment."); *id.* at 763 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); *id.* at 765 ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." (footnote omitted) (citations omitted)).

153. *Id.* at 779–80 (Stewart, J., concurring) ("[T]here are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. . . . Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement because of the 'information of potential interest and value' conveyed, rather than because of any direct contribution to the interchange of ideas." (footnote omitted) (citations omitted) (quoting *Bigelow v. Virginia*, 421 U.S. 809, 822 (1974))); *id.* at 787 (Rehnquist, J., dissenting) (arguing that First Amendment protections should not extend to commercial speech) ("It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment."); *Associated Press v. U.S. Tribune Co.*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) ("Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.").

154. See C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 997 (2009) ("[C]ommercial speech is not an exercise of freedom because market forces dictate its content. . . . [C]ommercial speech is not an exercise of constitutionally protected freedom because of its integral relation to market transactions that structurally involve exercises of power subject to state regulation rather than embodying individual autonomy.").

malice” standard, the Court rejected the argument that the speech in question was commercial:

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, “commercial” advertisement. . . .

The publication here was not a “commercial” advertisement in the sense in which the word was used in *Chrestensen*.<sup>155</sup>

The Court’s clarification that the speech was not commercial suggests that, if it had been, the Court would not have applied the “actual malice” standard.<sup>156</sup> This suggestion is speculative, however, because when the Court decided *Sullivan*, commercial speech was still afforded no First Amendment protection.<sup>157</sup> Even if the *Sullivan* Court would not have applied the “actual malice” standard to commercial speech, that does not mean that the Court would not do so now that commercial speech is entitled to at least some First Amendment protection.

Second, in *Time, Inc. v. Hill*, the Court applied the “actual malice” standard to a “false light” right of privacy statute.<sup>158</sup> Before doing so, however, the Court carefully noted that, despite its narrow text, the statute reached noncommercial speech:

The text of the statute appears to proscribe only . . . the appropriation and use in advertising or to promote the sale of goods, of another’s name, portrait or picture without his consent. An application of that limited scope would present different questions of violation of the constitutional protections for speech and press.<sup>159</sup>

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155. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964) (italics added to case name).

156. *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 932–33 (3d Cir. 1990) (“[T]he *New York Times* decision indicated that the importance of the First Amendment interests in defamation actions would be reduced in the commercial speech context. . . . While the Court ultimately determined that the speech was properly characterized as an ‘editorial’ rather than a ‘commercial’ advertisement and therefore deserving of constitutional protection, its analysis indicates that commercial speech, in a libel suit, would receive some, albeit less than heightened, constitutional protection.” (citing *Sullivan*, 376 U.S. at 266)).

157. *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”), *overruled by Va. State Bd. of Pharmacy*, 425 U.S. at 770 (holding that “commercial speech, like other varieties, is protected”).

158. 385 U.S. 374, 381 (1967).

159. *Id.* (footnote omitted) (citing *Valentine*, 316 U.S. 52, and *Sullivan*, 376 U.S. 254, with the introductory signal “compare”).

This analysis, like that in *Sullivan*, suggests that, if the statute had been confined to commercial speech, the Court would not have applied the “actual malice” standard. The same caveat also applies, however. When this case was decided, commercial speech was not afforded any First Amendment protection, and thus this case’s reasoning may no longer apply now that commercial speech is protected by the First Amendment.

Third, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court finally extended First Amendment protection to commercial speech, albeit a lesser protection.<sup>160</sup> The Court explained that “the greater objectivity and hardiness of commercial speech [] may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”<sup>161</sup> Then, the Court cited *Sullivan* with the introductory signal “compare.”<sup>162</sup> With this discussion, the Court suggested that, although commercial speech was no longer devoid of First Amendment protection, the *Sullivan* protections might not be necessary to prevent the chilling of commercial speech.

Fourth, in *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, the Court set forth a four-part test to analyze whether regulation of commercial speech violates the First Amendment.<sup>163</sup> The first part of the test asks whether the speech is misleading.<sup>164</sup> If the commercial speech is misleading—as is all speech actionable in defamation<sup>165</sup>—the regulation is per se constitutional under *Central Hudson*.<sup>166</sup> In this context, at least, the Court is apparently unconcerned with the potential chilling effect that regulation of misleading speech might have on non-misleading commercial speech. The *Central Hudson* test does not govern whether the First Amendment affords protection to commercial speech in the defamation context because these are two different lines of cases.<sup>167</sup> By extension, however, the Court is apparently less concerned

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160. 425 U.S. at 771.

161. *Id.* at 772 n.24 (asking readers to “compare” *Sullivan*, 376 U.S. 254, with *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898 (1971)).

162. *Id.*

163. 447 U.S. 557, 566 (1980) (“In commercial speech cases, then, a four-part analysis has developed.”).

164. *Id.* (“At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.”).

165. See RESTATEMENT (SECOND) OF TORTS § 558 (1977) (“To create liability for defamation there must be: (a) a false and defamatory statement concerning another . . .” (emphasis added)).

166. *Cent. Hudson*, 447 U.S. at 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.” (citation omitted)).

167. See *Nat’l Life Ins. Co. v. Phillips Pub’g, Inc.*, 793 F. Supp. 627, 647 (D. Md. 1992) (“Applying the *Central Hudson* commercial speech test to defamation underscores an inherent difficulty when these two lines of analysis are conflated. While defamation tolerates some false

about the chilling effect on commercial speech, whether that chilling effect is caused by regulation or by potential defamation liability.<sup>168</sup>

Finally, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court held that the First Amendment did not restrict the damages that a private plaintiff could recover in defamation when the speech did not involve a matter of public concern.<sup>169</sup> Although the plurality did not characterize the speech at issue as commercial, the plurality compared it to commercial speech as an example of another kind of speech that is “less central to the interests of the First Amendment than others.”<sup>170</sup> By extension, therefore, the Court suggested that the *Sullivan* protections should not apply to commercial speech.<sup>171</sup>

Therefore, consistent with the lower courts to have addressed this issue and with these hints from the Supreme Court, this Article contends that the *Sullivan* protections do not apply to commercial speech. Although this Article’s contention that the *Sullivan* protections are per se inapplicable to commercial speech facially contradicts the compelling proposal of

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statements, in order to give the First Amendment the ‘breathing space’ it requires, commercial speech apparently does not forgive false speech so easily.”); *Q-Tone Broad. Co. v. Musicradio of Md., Inc.*, No. 93C-09-021-WTQ, 1995 WL 875438, at \*10 (Del. Super. Ct. Dec. 22, 1995) (“The United States Supreme Court has articulated two distinct lines of cases addressing First Amendment jurisprudence. One strain of cases involves defamation law and the other involves the government regulation of commercial speech.”).

168. See *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 548 (5th Cir. 2001) (“If commercial speech receives less protection from government regulation, then it also should receive less protection from private suits, which are not much more likely than are government regulation to infringe on those values the First Amendment seeks to protect. Furthermore, private suits can be a form of government regulation.”); *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 932 (3d Cir. 1990) (“We recognize that the Supreme Court cases creating the commercial speech doctrine all involve some form of government regulation of speech and that none involve defamation actions. Further, the focus in the commercial speech cases is on First Amendment protection itself, not the heightened protection afforded by the actual malice standard. However, we believe the subordinate valuation of commercial speech is not confined to the government regulation line of cases.”).

169. 472 U.S. 749, 761 (1985) (Powell, J., plurality opinion); *id.* at 764 (Burger, J., concurring in the judgment); *id.* at 774 (White, J., concurring in the judgment).

170. *Id.* at 762 n.5 (1985) (Powell, J., plurality opinion); *id.* at 763 n.8 (“We also do not hold, as the dissent suggests we do that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.” (citation omitted)); *id.* at 762–63 (“In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental ‘chilling’ effect of libel suits would be of decreased significance.” (citations omitted)).

171. See *U.S. Healthcare*, 898 F.2d at 932 (“In *Dun & Bradstreet*, the Court held that speech on matters of private concern, such as a credit report for business, receives less First Amendment protection than speech on matters of public concern. More significantly for our purposes, the Court justified its decision to allow less protection for speech of private concern by drawing an analogy to the reduced First Amendment protection afforded commercial speech . . . .” (citation omitted)).

Professor Alan Howard to apply a “relational framework” to deceptive speech regulation rather than the distinction between commercial and noncommercial speech, upon further analysis, the conflict is largely one of terminology. Professor Howard contends that, when analyzing the constitutionality of deceptive speech regulation, the distinction between commercial and noncommercial speech should be rejected in favor of the following nuanced relational framework, which would apply to all speech: “(1) the extent to which the regulation impinges upon protected speech, (2) the nature of the protected speech, and (3) the justification for protection in terms of the relationship between the speaker and the listener, and the allocation of the ‘truth burden’ between them.”<sup>172</sup> This Article agrees with Professor Howard that the analysis of deceptive speech regulation should involve a nuanced analysis incorporating these considerations. Rather than rejecting the distinction between commercial and noncommercial speech, however, this Article contends that the analysis of that distinction should itself involve this nuanced inquiry. Only speech that does not implicate these concerns should be categorized as commercial and thus outside the reach of the *Sullivan* protections.

Applying this recommendation in the securities context, therefore, this Article argues that the *Sullivan* protections should not apply if an issuer is sued for defamation; should apply if a financial journalist is sued for defamation of a public company; and might apply if a securities analyst or credit rating agency is sued for defaming a public company, depending on whether the analyst or agency were sufficiently independent from the issuer to qualify as a noncommercial speaker.

### III. THE SECURITIES FRAUD LIABILITY STANDARDS, AS APPLIED TO NONCOMMERCIAL SPEECH, ARE LOWER THAN THE *SULLIVAN* PROTECTIONS

This Part establishes that noncommercial speakers are potentially subject to securities fraud liability based on standards that are lower than those imposed in the defamation context. As demonstrated in Part II of this Article, the *Sullivan* protections apply if a noncommercial speaker is sued for defamation by a public company. Namely, the plaintiff must prove “actual malice,” by “clear and convincing” evidence, subject to “independent appellate review.” In this Part, this Article demonstrates that if the very same noncommercial speaker were sued in securities fraud for the very same speech about public companies, the plaintiff would have a

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172. Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1097 (1991).

lower burden of proof. In particular, although the securities fraud “scienter” element is virtually identical to the actual malice standard, the plaintiff in a securities fraud case need only prove scienter by a “preponderance of the evidence,” rather than by clear and convincing evidence. Further, this scienter finding would be subject to deferential appellate review rather than independent appellate review. In sum, therefore, a noncommercial speaker is potentially exposed to liability in securities fraud for the very same speech that would be protected under *Sullivan* and its progeny.

### A. *The Securities Fraud Statute Applies to Noncommercial Speech*

Noncommercial speech is potentially within the reach of securities fraud, as prohibited by § 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.<sup>173</sup> The prohibition applies to any fraudulent speech “in connection with” the purchase or sale of securities.<sup>174</sup> Recognizing that this is “ambiguous text,”<sup>175</sup> the Supreme Court has broadly interpreted it, consistent with the securities fraud statute’s “catchall” role,<sup>176</sup> as merely requiring the fraud to “touch”<sup>177</sup> or “coincide”<sup>178</sup> with the securities transaction.

The dominant “in connection with” test, which was first stated by the Second Circuit, en banc, in *SEC v. Texas Gulf Sulphur Co.*, is whether the speech would “cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation’s securities.”<sup>179</sup> According to the Fourth Circuit in *SEC v. Pirate Investor LLC*, the core of this test is notice to potential defendants:

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173. Securities Exchange Act § 10(b), 15 U.S.C. § 78j (2012); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2014); *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002) (“The scope of Rule 10b-5 is coextensive with the coverage of § 10(b) . . .”).

174. 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5.

175. *Zandford*, 535 U.S. at 819.

176. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 (1976).

177. *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12–13 (1971).

178. *Zandford*, 535 U.S. at 825.

179. 401 F.2d 833, 860 (2d Cir. 1968) (en banc); *see also* *Basic Inc. v. Levinson*, 485 U.S. 224, 235 n.13 (1988) (in dicta, citing the *Texas Gulf* test); *SEC v. Wolfson*, 539 F.3d 1249, 1262 (10th Cir. 2008) (applying the *Texas Gulf* test) (“[T]he SEC need only show that the documents are reasonably calculated to influence investors, and that the misrepresentations are material to an investor’s decision to buy or sell the security.”); *Semerenco v. Cendant Corp.*, 223 F.3d 165, 176 (3d Cir. 2000) (adopting the *Texas Gulf* test in the context of information publicly disseminated into an efficient securities market) (“[T]he Class may establish the ‘in connection with’ element simply by showing that the misrepresentations in question were disseminated to the public in a medium upon which a reasonable investor would rely, and that they were material when disseminated.”); *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 156–57 (2d Cir. 1998) (applying the *Texas Gulf* test) (“We hold, therefore, that false advertisements in technical journals may be ‘in connection with’ a securities transaction if the proof at trial establishes that the advertisements were used by market professionals in evaluating the stock of the company.”); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993) (applying the *Texas Gulf* test) (“Where the fraud alleged involves public dissemination in a document such as a press

[A]ttaching liability under the securities laws for statements made in any medium, no matter how tangentially related to the securities markets, would run the risk of roping in speakers who had no idea that their conduct might implicate Section 10(b). Thus, by requiring that misstatements be communicated in a medium upon which a *reasonable* investor would rely, the *Texas Gulf* standard protects these unknowing speakers from liability and ensures that there is a sufficient nexus between the misrepresentations and the securities sales that they induce to satisfy the Supreme Court’s command that the fraud and securities sales “coincide.”<sup>180</sup>

As explained by the Ninth Circuit, the *Texas Gulf* test “strikes a reasonable balance, applying liability under § 10(b) to those who make public statements reasonably calculated to influence those who trade securities, whether or not such persons actually trade securities.”<sup>181</sup>

Included within the broad net of speakers on whose speech a reasonable investor would rely are quintessential commercial speakers—such as the issuer and its officers—and some noncommercial speakers—such as securities analysts,<sup>182</sup> credit rating agencies,<sup>183</sup> and even financial journalists.<sup>184</sup> For example, courts have held the following speech to be in connection with the purchase or sale of securities:

A “Super Insider Tip Email” sent by a publisher of investment newsletters, without any allegations that the publisher traded in the subject securities or breached any fiduciary duties.<sup>185</sup>

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release, annual report, investment prospectus or other such document on which an investor would presumably rely, the ‘in connection with’ requirement is generally met by proof of the means of dissemination and the materiality of the misrepresentation or omission.”); Lewis D. Lowenfels & Alan R. Bromberg, *Rule 10b-5’s “In Connection With”: A Nexus for Securities Fraud*, 57 BUS. LAW. 1, 4, 24 (2001) (characterizing *Texas Gulf Sulphur* as the “leading” decision and its broad standard as “clearly the predominant line of authority”).

180. 580 F.3d 233, 250–51 (4th Cir. 2009).

181. *McGann v. Ernst & Young*, 102 F.3d 390, 394 (9th Cir. 1996); *see also* Lowenfels & Bromberg, *supra* note 179, at 24 (“Perhaps in the final analysis when one half of the equation is the presence of fraud, it is not unacceptable for the other half of the equation, ‘in connection with,’ to tilt a bit in the direction of coverage.”).

182. *See Swack v. Credit Suisse First Bos.*, 383 F. Supp. 2d 223, 247 (D. Mass. 2004) (denying a motion to dismiss a putative securities fraud class action asserted by an investor in Razorfish against an investment banking firm for allegedly false and misleading research reports about Razorfish and not addressing the “in connection with” element because the defendants did not raise it in their motion to dismiss the complaint).

183. *See Genesee Cnty. Emps’ Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3*, 825 F. Supp. 2d 1082, 1231–32 (D. N.M. 2011) (relying on authority under § 10(b) and holding that the comparable in connection with element of the New Mexico Securities Act was satisfied with respect to credit rating agencies).

184. *Pirate Investor LLC*, 580 F.3d at 253 (“[T]he text and purpose of § 10(b) admit of no exclusion for ‘disinterested publishers’ of financial news and commentary . . .”).

185. *Id.* at 254–55.

A press release issued by a business and financial consultant about a proposed buy-out offer, where neither the consultant nor the proposed acquirer traded in the target company's securities.<sup>186</sup>

Analyst research reports, which were allegedly biased in favor of the firm's investment banking clients.<sup>187</sup>

Allegedly biased investment advice, disseminated online to paying subscribers.<sup>188</sup>

Indeed, in light of the potential breadth of the "in connection with" element, media organizations often appear as *amici curiae* when the "in connection with" element is litigated in order to argue that the element should be interpreted more narrowly to take into account First Amendment considerations.<sup>189</sup> With few exceptions,<sup>190</sup> courts have not been receptive to this argument and continue to interpret the "in connection with" element broadly enough to encompass noncommercial speakers.<sup>191</sup>

### B. *The Securities Fraud Liability Standards Are Lower Than The Sullivan Protections*

Although noncommercial speech about public companies is potentially within the scope of the securities fraud statute, that speech is subject to lower liability standards than mandated in defamation cases by *Sullivan* and its progeny. The *Sullivan* actual malice standard is essentially identical to the scienter element of securities fraud because both standards require a

186. SEC v. Rana Research, Inc., 8 F.3d 1358, 1360–63 (9th Cir. 1993).

187. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 75, 89 (2006); Rowinski v. Salomon Smith Barney Inc., 298 F.3d 294, 302 (3d Cir. 2005). The "in connection with" element in these cases arose in the context of Securities Litigation Uniform Standards Act preemption, not § 10(b), but this element is defined identically in both contexts. *Merrill Lynch*, 547 U.S. at 86.

188. SEC v. Park, 99 F. Supp. 2d 889, 900 (N.D. Ill. 2000) ("The subscribers paid Defendants to get advice on what stocks to purchase. Having paid Defendants for that advice, it was expected that the subscribers acted on it.").

189. See, e.g., Brief for Forbes LLC et al. as Amici Curiae at \*7–18, *Pirate Investor LLC*, 580 F.3d 233 (No. 08-1037), 2008 WL 2307442 (arguing that, because of the First Amendment implications, "disinterested publishers and writers" should be excluded from the scope of § 10(b)); Letter Brief of Bloomberg News as Amicus Curiae at Part III, *SEC v. Agora, Inc.*, No. MJG 03-1042, 2003 WL 23325424 (D. Md. Oct. 31, 2003) ("The publication of news by a disinterested, *bona fide* publisher concerning a publicly-held company or its securities—even if that news is erroneous—does not satisfy the 'in connection with' requirement.").

190. See *SEC v. Wall St. Pub'g Inst., Inc.*, 664 F. Supp. 554, 556 (D.D.C. 1986) (holding that the representations of a bona fide publisher with a general and regular circulation are not "in connection with" the purchase or sale of a security), *rev'd on other grounds*, 851 F.2d 365 (D.C. Cir. 1988); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1358 (S.D.N.Y. 1977) (dictum) (suggesting that § 10(b) did not reach publishing defendants who did not purchase or sell the securities at the time of the article's publication, were not in collusion with those who did, and did not effect a manipulation for their own financial gain).

191. See, e.g., *Pirate Investor LLC*, 580 F.3d at 252–55 (refusing to incorporate a First Amendment overlay on the broad interpretation of the "in connection with" element).



showing of knowledge or reckless disregard of falsity,<sup>192</sup> but the burden of proof and appellate review standard are lower in securities fraud cases than under *Sullivan* and its progeny.

First, *Sullivan* requires actual malice to be shown by clear and convincing evidence.<sup>193</sup> In the securities fraud context, however, scienter need merely be proven by a preponderance of the evidence.<sup>194</sup> This differential evidentiary burden, which is incorporated into the summary judgment inquiry,<sup>195</sup> is potentially outcome-determinative.<sup>196</sup>

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192. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007) (“Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly . . .”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (explaining that the “actual malice” standard requires a showing that the defamatory falsehood was made “with knowledge that it was false or with reckless disregard of whether it was false or not”); *Reliance Ins. Co.*, 442 F. Supp. at 1353 (dismissing both a libel claim and a securities fraud claim asserted by Reliance Insurance Company against Barron’s, premised on an article critical of Reliance’s proposed public offering of stock) (“We have already found that neither Dr. Briloff nor Barron’s acted with such reckless disregard for the truth. Therefore, for that reason alone, plaintiff is unable to sustain a cause of action based on Rule 10b-5.”). Indeed, the Court drew on common-law fraud precedent when drafting the actual malice standard. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 & n.19 (1984) (“The earlier defamation cases, in turn, have a kinship to English cases considering the kind of motivation that must be proved to support a common-law action for deceit. . . . Under what has been characterized as the ‘honest liar’ formula, fraud could be proved ‘when it is shewn [sic] that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.’”); *see also* Nan S. Ellis, Lisa M. Fairchild & Frank D’Souza, *Is Imposing Liability on Credit Rating Agencies A Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis*, 17 *STAN. J.L. BUS. & FIN.* 175, 219 (2012) (“It seems likely, however, that in the case of securities fraud if a plaintiff can prove ‘reckless or knowing’ breaches of CRA defendant behavior, the plaintiff could prove the actual malice needed to overcome the privilege. In such situations, plaintiffs would be successful under common-law provisions, under current law, and the statutory provision just adds one more weapon in the already existing arsenal.”).

193. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (“In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* ‘clear and convincing’ evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.”); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986) (“That [actual malice] showing must be made with ‘convincing clarity,’ or, in a later formulation, by ‘clear and convincing proof.’” (citation omitted)); *Bose*, 466 U.S. at 511 n.30 (“The burden of proving ‘actual malice’ requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.”).

194. *See Tellabs*, 551 U.S. at 328–29 (“At trial, she must then prove her case by a ‘preponderance of the evidence.’ Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter.”).

195. *Anderson*, 477 U.S. at 255–56 (“[W]here the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.”).

196. *See, e.g., Compuware Corp. v. Moody’s Investors Servs., Inc.*, 499 F.3d 520, 526 (6th Cir. 2007) (“We nevertheless agree that Compuware has failed to produce sufficient evidence of actual malice to withstand summary judgment, especially in light of the clear-and-convincing evidentiary standard.”).

Second, under *Sullivan*, a finding of actual malice is subject to independent appellate review.<sup>197</sup> By contrast, in the securities fraud context, a finding of scienter is subject to ordinary deferential appellate review.<sup>198</sup> The availability of independent appellate review in the defamation context is often outcome-determinative, with one source calculating that “[u]sing independent appellate review, the courts of appeals have reversed approximately seventy percent of the libel judgments entered against publishers.”<sup>199</sup> Therefore, the absence of independent appellate review in the context of securities fraud is also potentially outcome-determinative.

Part III concludes, therefore, that noncommercial speech about public companies potentially gives rise to securities fraud liability based on standards that are lower than those imposed in the defamation context.

#### IV. THE *SULLIVAN* BALANCING TEST SHOULD APPLY TO SECURITIES FRAUD CLAIMS BASED ON NONCOMMERCIAL SPEECH ABOUT PUBLIC COMPANIES

This Part argues that the “*Sullivan* balancing test,” which the *Sullivan* Court applied to analyze the First Amendment overlay on defamation claims, should apply to analyze the First Amendment overlay on securities fraud claims. First, this Part demonstrates that the *Sullivan* balancing test has been applied to assess the First Amendment overlay on other non-defamation causes of action. Second, this Part shows that securities fraud liability, unlike some other types of civil liability, implicates First Amendment concerns. Third, this Part argues that, despite authority for the proposition that “fraud has no First Amendment value,” securities fraud claims nonetheless implicate the First Amendment. Finally, this Part argues that the contention that securities regulation operates in a First Amendment-free zone is unconvincing and inapplicable to this Article’s inquiry.

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197. *Bose*, 466 U.S. at 501, 514 (explaining that judges have a “constitutional responsibility that cannot be delegated to the trier of fact” to exercise independent judgment to assess whether the record establishes actual malice by clear and convincing evidence).

198. *See Baisden v. I’m Ready Prods., Inc.*, 693 F.3d 491, 498 (5th Cir. 2012) (“Although we review *de novo* the denial of a motion for judgment as a matter of law, we apply the same legal standard as the district court. We will consider all of the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non-moving party.” (citation omitted)); *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 431 (7th Cir. 2012) (“We review *de novo* the district court’s denial of the Defendants’ Motion for Judgment as a Matter of Law. Our inquiry is limited to the question whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed.” (citation omitted) (internal quotation marks omitted)).

199. Paranzino, *supra* note 55, at 483 (citing authority).

A. *The Sullivan Balancing Test Applies to Non-Defamation Causes of Action*

The Supreme Court has on at least seven occasions subsequent to *Sullivan* analyzed whether First Amendment protections like those in *Sullivan* should apply to various causes of action that impose liability for false speech, including claims for false light right of privacy and claims for intentional infliction of emotional distress premised on false speech.<sup>200</sup> The Court does not “blindly” incorporate the *Sullivan* protections into these new causes of action.<sup>201</sup>

Rather, each time, the Court applies the *Sullivan* balancing test to weigh the interests that the particular cause of action implicates. In particular, the Court first identifies the interests in favor of imposing liability for the false speech. Second, the Court identifies the interests in encouraging the identified type of speech. Third, the Court assesses the degree to which the potential for liability has a chilling effect on the speech. Finally, the Court balances these interests and determines whether the *Sullivan* protections, or any other First Amendment protections, should apply.<sup>202</sup>

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200. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (analyzing whether the *Sullivan* protections apply in intentional infliction of emotional distress claims asserted by public figures and public officials and premised on false speech); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) (revisiting the degree to which First Amendment protections apply in defamation actions brought by private plaintiffs); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (Powell, J., plurality opinion) (same); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (revisiting the degree to which First Amendment protections apply in defamation actions asserted by private plaintiffs); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (plurality opinion) (analyzing whether the *Sullivan* protections apply in defamation actions brought by private plaintiffs about matters of public concern); *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967) (analyzing whether the *Sullivan* protections apply in false light right of privacy actions applied to speech of public interest); *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (analyzing whether the *Sullivan* protections apply in criminal libel actions premised on speech about public officials).

201. *Hustler Magazine*, 485 U.S. at 56 (“This is not merely a ‘blind application’ of the *New York Times* standard, it reflects our considered judgment that such a standard is necessary to give adequate ‘breathing space’ to the freedoms protected by the First Amendment.” (citation omitted)); *Rosenbloom*, 403 U.S. at 49–50 (plurality opinion) (“[W]e adhere to the caution . . . against ‘blind application’ of the *New York Times* standard.”); *Time*, 385 U.S. at 390 (“We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times* . . . , but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals.”).

202. *Hustler Magazine*, 485 U.S. at 50, 56 (balancing “a State’s interest in protecting public figures from emotional distress” against “the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern” and holding that a public figure cannot recover for intentional infliction of emotional distress without showing that the speech contains a false statement of fact made with actual malice); *Hepps*, 475 U.S. at 768–69, 777 (balancing the interest in compensating private plaintiffs against “the need to encourage debate on public issues” and holding that a private plaintiff must prove the falsity of speech of public concern before recovering damages); *Dun & Bradstreet*, 472 U.S. at 757, 761 (Powell, J., plurality opinion) (balancing “the State’s interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression” and holding that, when the speech does not involve matters of public

Admittedly, applying the nuanced *Sullivan* balancing test on a cause-of-action by cause-of-action basis—rather than applying a uniform liability standard to all causes of action premised on false speech—makes this area of law less predictable, at least in the near term, as the courts wrestle with the application of this balancing test in various contexts. Indeed, as Professor Christopher P. Guzelian has argued, in favor of a uniform “predictable negligence” standard, predictable liability for false speech is essential to upholding the Rule of Law.<sup>203</sup> Yet, applying a one-size-fits-all standard ignores the very different interests implicated by various causes of action. Therefore, this Article argues that the costs of this short-term instability are outweighed by the benefits of a more nuanced, cause-of-action-specific First Amendment overlay. Indeed, perhaps the *Sullivan* balancing test supports a predictable negligence standard in some contexts and an actual malice standard in others.

### B. *Securities Fraud Liability Implicates First Amendment Concerns*

Under Supreme Court precedent, some types of civil liability implicate First Amendment concerns, while others do not. At one extreme, under *Sullivan*, the First Amendment is an overlay on the elements of defamation, protecting speech by heightening the liability standards.<sup>204</sup> At the other extreme, under *Cohen v. Cowles Media Co.*, the First Amendment does not prohibit a source from recovering in promissory estoppel from a publisher

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interest, a private plaintiff may recover presumed and punitive damages even absent a showing of actual malice); *Gertz*, 418 U.S. at 341, 348 (balancing “the legitimate state interest in compensating private individuals for wrongful injury to reputation” against the “need to avoid self-censorship” and holding that, although the *Sullivan* protections do not apply in defamation cases asserted by private plaintiffs, states cannot impose liability without fault and may not award more than actual damages absent a showing of actual malice); *Rosenbloom*, 403 U.S. at 49–50 (plurality opinion) (balancing “society’s interest in protecting individual reputation” against “the vital needs of freedom of the press and freedom of speech” and holding that the *Sullivan* protections apply in defamation cases asserted by private plaintiffs about speech of public interest); *Time*, 385 U.S. at 384 n.9, 389 (balancing “a grave hazard of discouraging the press from exercising the constitutional guarantees” about matters of public interest against “the mental distress from having been exposed to public view” and holding that the *New York Times* protections apply in false light right of privacy actions about matters of public interest); *Garrison*, 379 U.S. at 67, 74 (holding that, because there is “no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws,” the reasons underlying the balance struck in *New York Times* “apply with no less force merely because the remedy is criminal”).

203. Christopher P. Guzelian, *True and False Speech*, 51 B.C. L. REV. 669, 718 (2010) (“But predictable liability—the sole means to upholding the Rule of Law—is a concept far older than the Constitution, and one with which the Constitution, properly interpreted, surely does not interfere. What we simply cannot afford to lose sight of in all of this is that the problem of false speech is quite real and has been immeasurably enabled by the proliferation of communication technologies. It must be addressed, and it must be addressed predictably. Formal, predictable liability for false scientific speech is a first step in remedying the currently unpredictable state of First Amendment affairs.”); *id.* at 705 (“False-speech liability, therefore, should be associated with predictable negligence, rather than with strict liability or actual malice standards.”).

204. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

that breaches a promise to keep the source's identity confidential.<sup>205</sup> Professors Daniel J. Solove and Neil M. Richards go so far as to contend that these "two opposing rules for determining when the First Amendment applies to civil liability are on a collision course."<sup>206</sup>

Courts and scholars have applied a number of different tests to differentiate civil liability that implicates the First Amendment from civil liability that does not.<sup>207</sup> This Article adds to the literature by identifying an additional distinction that is consistent with the case law to date and that helps guide whether a civil cause of action should be analyzed under the *Sullivan* balancing test. Regardless of the test applied, however, securities fraud liability is subject to First Amendment review.

As one test, the Supreme Court has suggested that "laws of general applicability," which "affect[] speech and non-speech activity in a neutral way,"<sup>208</sup> do not require First Amendment scrutiny.<sup>209</sup> As examples of laws of general applicability, the Court cited laws against breaking and entering, the obligation to respond to a grand jury subpoena, the copyright laws, the National Labor Relations Act, the Fair Labor Standards Act, the antitrust laws, and the requirement to pay nondiscriminatory taxes.<sup>210</sup> Securities fraud, which is premised on allegedly deceptive statements or conduct,<sup>211</sup> always implicates speech activity and thus is not a law of general applicability. Therefore, under this test, securities fraud liability implicates First Amendment concerns.

As another well-received test, Professor Eugene Volokh, among others, has argued that one test is whether the speaker has expressly or impliedly contracted away the right to free speech, with a confidentiality agreement as an example.<sup>212</sup> In the securities fraud context, the noncommercial

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205. 501 U.S. 663, 665 (1991).

206. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1672 (2009).

207. *See id.* at 1673–85 (identifying approaches that courts and scholars have applied to determine when and how the First Amendment applies to civil liability).

208. *Id.* at 1673.

209. *See Cohen*, 501 U.S. at 669 (addressing whether the First Amendment barred an informant for suing a newspaper for truthfully disclosing his identity, in violation of a promise of confidentiality) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.").

210. *Id.* at 669–70.

211. *See Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158–59 (2008) (clarifying that securities fraud liability can be premised on deceptive statements or deceptive conduct, as long as the deception is communicated to investors).

212. *See Cohen*, 501 U.S. at 671 ("The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed."); Solove & Richards, *supra* note 206, at 1675–77 (summarizing the consensual waiver approach and identifying Professor Volokh as one of its proponents); Volokh, *supra* note 123, at 1057 ("I think that ultimately the free speech right must turn on the rights of the speakers, and that it's

speaker whose speech is potentially subject to securities fraud liability has not consented to waive First Amendment protection, let alone entered into a contract to do so. Therefore, under this test, securities fraud liability implicates the First Amendment.

As another compelling test, Professors Daniel J. Solove and Neil M. Richards recently argued that the First Amendment is implicated only if the civil liability enforces government-defined duties (such as in the context of defamation) as opposed to non-government-defined duties (such as in the context of nondisclosure agreements between private parties).<sup>213</sup> Securities fraud is premised on a statutorily imposed duty not to make misrepresentations in connection with the purchase or sale of securities.<sup>214</sup> Therefore, under this test, First Amendment protections potentially apply to securities fraud liability because it enforces a government-defined duty.

Finally, this Article adds to the literature in this area by identifying another key distinction that separates the *Sullivan* line of cases, to which the *Sullivan* balancing test applies, from other lines of cases analyzing the potential First Amendment overlay on civil liability: liability in the *Sullivan* line of cases is premised on *false* speech.<sup>215</sup> The Court has applied the *Sullivan* balancing test to determine whether the First Amendment requires heightened liability standards in cases alleging defamation, false light right of privacy, and intentional infliction of emotional distress premised on an allegedly false publication.<sup>216</sup> Each of these claims is premised on an allegedly false statement. By contrast, the cases following *Cowles*, which hold that the First Amendment is largely inapplicable to claims of general applicability, are all premised on truthful speech. In particular, the Court has rejected the applicability of the First Amendment in cases alleging violation of a promise to keep a source's identity confidential, the obligation to respond to a grand jury subpoena, the copyright laws, the

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proper to let speakers contract away their rights . . . . And such protection ought not be limited to express contracts, but should also cover implied contracts . . . .").

213. Solove & Richards, *supra* note 206, at 1686–97.

214. See 15 U.S.C. § 78j(b) (2012).

215. See Guzelian, *supra* note 203, at 681 (“Defamation is a fascinating speech tort. Besides being the most constitutionalized, it belongs to a class of speech torts called the false speech torts (e.g. defamation, fraud, false advertising, false light, or some fear or emotional distress lawsuits). Because the question of a speech’s falsity or truthfulness arises commonly in speech torts, it is a core question in First Amendment cases.”).

216. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress claims asserted by public figures and public officials and premised on false speech); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) (defamation actions brought by private plaintiffs); *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (Powell, J., plurality opinion) (defamation actions brought by private plaintiffs); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (same); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (plurality opinion) (defamation actions brought by private plaintiffs about matters of public concern); *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967) (false light right of privacy); *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964) (criminal libel).

National Labor Relations Act, the Fair Labor Standards Act, the antitrust laws, the requirement to pay nondiscriminatory taxes,<sup>217</sup> and the appropriation of publicity value by broadcasting a performer's act.<sup>218</sup> None of these claims is premised on allegedly false speech. Additionally, a third line of cases, which applies strict scrutiny to civil liability imposed on newspapers for publishing truthful information about matters of public significance, is similarly premised on truthful speech.<sup>219</sup> Therefore, these three lines of cases suggest that the imposition of liability for false speech is a prerequisite to the applicability of the *Sullivan* balancing test.<sup>220</sup> Indeed, the *Sullivan* balancing test, which pivots on the tension caused by the chilling effect of liability for false speech, is nonsensical where the subject speech is truthful. Moreover, the *Sullivan* protections, which center on proof that the speaker acted with reckless disregard for the truth or falsity of his or her statement, are only relevant in the context of allegedly false speech. Therefore, to the extent that the issue is whether to impose *Sullivan*-like protections (such as a mandatory mental state subject to a heightened standard of proof and a more searching appellate review) in a civil cause of action, the cause of action must be premised on false speech. Applying this distinction, securities fraud liability falls within the *Sullivan* line of cases because falsity is a prerequisite to liability.<sup>221</sup>

In sum, regardless of the test applied to differentiate between the *Sullivan* line of cases and the *Cowles* line of cases, securities fraud liability falls within the *Sullivan* line of cases, potentially implicating First Amendment protections. Of course, the First Amendment does not necessarily thereby alter the current securities fraud liability scheme. Rather, securities fraud liability—like defamation liability, false light right of privacy liability, and intentional infliction of emotional distress liability premised on a false statement—is subject to First Amendment scrutiny under the *Sullivan* balancing test.

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217. See *Cohen*, 501 U.S. at 665, 669–70 (reviewing precedent).

218. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977) (“Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.”).

219. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989).

220. See *SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1292–93 (D. Utah 2010) (discussing *Zacchini*, 433 U.S. at 574–75) (“Importantly, that case [*Zacchini*] did not involve an allegedly wrongful statement.”).

221. See 15 U.S.C. § 78j(b) (2012) (premiering liability on the usage of “any manipulative or deceptive device or contrivance”).

C. *The First Amendment Is Applicable to “Fraud” Claims*

Before applying the *Sullivan* balancing test to analyze whether the First Amendment mandates any changes to the securities fraud liability scheme, this Article must counter the additional argument, asserted by several courts and commentators, that the First Amendment is *per se* inapplicable to “fraud” claims. Indeed, for this reason, the Fourth Circuit rejected an argument, very similar to the assertion in this Article, that the *Sullivan* protections should apply to a securities fraud claim asserted against the publisher of an investment tip email and special report:

[I]n this case Appellants argue that the district court should have found that the Super Insider Tip E-mail and USEC Special Report were entitled to the heightened protections for expression that the Supreme Court recognized in *New York Times* . . . .

We cannot agree with Appellants. Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment. . . . The Supreme Court has stated the principle almost as directly: “[T]he First Amendment does not shield fraud.” *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003). Of course, the government cannot label certain speech as fraudulent so as to deprive it of its constitutional protections, *id.* at 617, 123 S.Ct. 1829, but we need not worry about such strategic labeling here because § 10(b) clearly forbids actual fraud. Thus, Appellants’ First Amendment argument fails.<sup>222</sup>

Several other courts have similarly ruled that the First Amendment is anathema to fraud claims.<sup>223</sup>

This Article contends that the First Amendment is potentially applicable to fraud claims.<sup>224</sup> The courts imposing a *per se* rule that the First Amendment is inapplicable to claims of fraud are incorrect because (1) they misunderstand the purpose of the *Sullivan* protections; (2) they misread *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*;<sup>225</sup> and (3)

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222. SEC v. Pirate Investor LLC, 580 F.3d 233, 255 (4th Cir. 2009).

223. See, e.g., *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 233 F.3d 981, 993 (7th Cir. 2000) (“Section 60(1)(A) and Regulation 4.41(a)(1) require scienter and do no more than prohibit common law fraud in commodities transactions. Explicit antifraud measures such as these do not violate the First Amendment.”).

224. *Accord La Luna Enters., Inc. v. CBS Corp.*, 74 F. Supp. 2d 384, 392 (S.D.N.Y. 1999) (dismissing the plaintiff’s fraud claim) (“Nevertheless, where a plaintiff brings a tort claim other than defamation to impose liability on the press for the publication of allegedly false and harmful statements, these claims may be subject to the strictures of the First Amendment.”).

225. 538 U.S. 600 (2003).



they are inconsistent with recent Supreme Court precedent affording First Amendment protections even to false speech.

First, these courts misunderstand the point of potentially applying the *Sullivan* protections in securities fraud cases, and thus their reliance on the proposition that fraudulent speech is devoid of First Amendment protection is inapposite. As proposed in this Article, the *Sullivan* protections are not meant to protect “fraudulent” speech, which has little—if any—First Amendment value. Rather, these protections are meant to prevent the chilling of non-fraudulent speech, which has First Amendment value. Indeed, when adopting the *Sullivan* protections, the Supreme Court, in the context of defamation, rejected an argument very similar to the one asserted by these courts. Just as there is a line of cases stating that fraudulent speech has no First Amendment value, there is a line of cases stating that defamatory speech has no First Amendment value. Yet, the Court adopted the *Sullivan* protections—not to protect low-value defamatory speech—but to prevent the chilling of valuable non-defamatory speech:

Nevertheless, there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Libelous speech has been held to constitute one such category; others that have been held to be outside the scope of the freedom of speech are fighting words, incitement to riot, obscenity, and child pornography. In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.<sup>226</sup>

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226. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504–05 (1984) (internal footnote omitted) (internal citations omitted) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); *see also* *Garrison v. Louisiana*, 379 U.S. 64, 67 n.3 (1964) (“In affirming appellant’s conviction, before *New York Times* was handed down, the Supreme Court of Louisiana relied on statements in *Roth v. United States* and *Beauharnais v. Illinois* to the effect that libelous utterances are

In other words, the protection of some low-value speech, whether it be defamatory or fraudulent, is necessary to prevent the chilling of valuable speech.<sup>227</sup>

Second, these courts misinterpret *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*,<sup>228</sup> a case that actually lends support for applying the *Sullivan* protections to fraud claims. In *Madigan*, the Supreme Court held that the imposition of fraud liability on charitable donations fundraisers did not violate the First Amendment. First, unsurprisingly, the Court classified fraudulent charitable solicitation as unprotected speech.<sup>229</sup> The Court's analysis did not stop there, however. Rather, the Court then considered whether the bounds of fraud liability were appropriately drawn so as not to chill non-fraudulent charitable solicitation: "Of prime importance, and in contrast to a prior restraint on solicitation, or a regulation that imposes on fundraisers an uphill burden to prove their conduct lawful, in a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a fundraiser to fraud liability."<sup>230</sup> And, the Court specifically recognized that the Illinois statute afforded defendants protections similar to those afforded by *Sullivan* and its progeny:

As restated in Illinois case law, to prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the

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not within the protection of the First and Fourteenth Amendments, and hence can be punished without a showing of clear and present danger. For the reasons stated in *New York Times*, nothing in *Roth* or *Beauharnais* forecloses inquiry into whether the use of libel laws, civil or criminal, to impose sanctions upon criticism of the official conduct of public officials transgresses constitutional limitations protecting freedom of expression. Whether the libel law be civil or criminal, it must satisfy relevant constitutional standards." (citations omitted); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963))); *id.* at 268 ("Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." (footnotes omitted)).

227. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters.").

228. *Madigan*, 538 U.S. at 612.

229. *Id.* at 612 ("The First Amendment protects the right to engage in charitable solicitation. . . . But the First Amendment does not shield fraud. . . . Like other forms of public deception, fraudulent charitable solicitation is unprotected speech." (citations omitted)).

230. *Id.* at 620.

listener, and succeeded in doing so. Heightening the complainant's burden, these showings must be made by clear and convincing evidence.

Exacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room for protected speech. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (action for defamation of public official); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502, and n. 19, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (noting “kinship” between *New York Times* standard and “motivation that must be proved to support a common-law action for deceit”). As an additional safeguard responsive to First Amendment concerns, an appellate court could independently review the trial court's findings. Cf. *Bose Corp.*, 466 U.S., at 498–511, 104 S.Ct. 1949 (*de novo* appellate review of findings regarding actual malice).<sup>231</sup>

Therefore, while *Madigan* stands for the proposition that fraud liability can be consistent with the First Amendment, it does not stand for the proposition that all fraud liability is consistent with the First Amendment. Rather, the fraud liability provision at issue must afford sufficient breathing room for protected speech.<sup>232</sup> Further, the Court suggested that the *Sullivan* protections, which afford the requisite breathing room in the context of defamation, might also be necessary in the context of fraud.

Finally, these courts' holdings fail to anticipate the Supreme Court's recent suggestion that, in some contexts, false speech might itself have independent value worthy of First Amendment protection. In *United States v. Alvarez*, the Court struck down the Stolen Valor Act, which criminalized false claims about receipt of military decorations or medals, because it violated the First Amendment.<sup>233</sup> In the plurality opinion, Justice Kennedy rejected the notion that false speech is per se devoid of First Amendment

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231. *Id.* at 620–21 (internal footnote omitted) (some internal citations omitted).

232. See *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (Kennedy, J., plurality opinion) (“Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”); *id.* at 2563–64 (Alito, J., dissenting) (“While we have repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to ‘extend a measure of strategic protection’ to these statements in order to ensure sufficient ‘breathing space’ for protected speech. . . . And we have imposed ‘[e]xacting proof requirements’ in other contexts as well when necessary to ensure that truthful speech is not chilled. . . . All of these proof requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other, valuable speech.” (alteration in original) (citations omitted) (quoting *Madigan*, 538 U.S. at 620)).

233. *Id.* at 2551, 2556.

protection: “The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.”<sup>234</sup> Justice Breyer’s concurring opinion went even further, suggesting that false speech might have some First Amendment value: “False factual statements can serve useful human objectives, for example: . . . in technical, philosophical, and scientific contexts, where (as Socrates’ methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.”<sup>235</sup> Therefore, although the *Sullivan* protections are not intended to protect false speech “for its own sake,”<sup>236</sup> this recent precedent suggests that the dichotomy between unprotected false speech and protected truthful speech might be less rigid than previously believed.

*D. The First Amendment Is Applicable to Securities Regulation of Noncommercial Speech*

Finally, before applying the *Sullivan* balancing test to analyze whether the First Amendment mandates any changes to the securities fraud liability scheme, this Article must address the notion that securities regulation is somehow immune from any First Amendment scrutiny. First, the Supreme Court dictum cited for this proposition, even if afforded weight, is inapplicable to the noncommercial speech that is within the scope of the securities fraud statute. Second, the leading theoretical argument for this First Amendment-free zone, the “institutional approach,” is similarly inapplicable to the non-corporate speech that is the subject of this Article.

The idea that securities regulation is somehow outside the bounds of First Amendment review derives from the following dictum in *Ohralik v. Ohio State Bar Association*:

Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers’ threats of retaliation for the labor activities of employees. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates*

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234. *Id.* at 2545 (Kennedy, J., plurality opinion).

235. *Id.* at 2553 (Breyer, J., concurring).

236. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”).

purported to cast doubt on the permissibility of these kinds of commercial regulation.<sup>237</sup>

*Ohralik*'s statement that the "exchange of information about securities"<sup>238</sup> can be regulated without offending the First Amendment, which some have interpreted as meaning that all securities regulation is consistent with the First Amendment,<sup>239</sup> is triply inapplicable to the analysis in this Article.

First, *Ohralik*'s characterization of securities regulation as constitutional is obiter dictum.<sup>240</sup> The issue in *Ohralik* was whether a state could discipline a lawyer for soliciting clients in person, for pecuniary gain, and the Court held that a state may do so "under circumstances likely to pose dangers that the State has a right to prevent."<sup>241</sup> The Court cited securities regulation merely to exemplify that states have significant latitude when regulating commercial speech. As such, the issue of the First Amendment's application to securities regulation was not necessary to the case's holding, thus constituting dictum.<sup>242</sup> Moreover, because the issue of the constitutionality of securities regulation was not even briefed or argued, the remark constitutes obiter dictum rather than arguably more persuasive judicial dictum.<sup>243</sup> Therefore, *Ohralik*'s passing reference to the appropriateness of securities regulation suffers from the same problems as all obiter dictum: a lack of consideration.<sup>244</sup>

Second, *Ohralik* predates the Court's pronouncement of the *Central Hudson* test to analyze the constitutionality of regulations on commercial

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237. 436 U.S. 447, 456 (1978) (citations omitted).

238. *Id.*

239. See, e.g., Brief for Law Professors as Amicus Curiae in Opposition to Motion to Dismiss at 17, 20, *SEC v. Siebel Syst., Inc.*, 384 F. Supp. 2d 694 (S.D.N.Y. 2005) (No. 04-5130) (opposing a First Amendment challenge to Regulation FD, citing *Ohralik* and arguing that "securities law's commercial regulation [sic] lie outside the boundaries of the First Amendment"); see also Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 797 n.47 (2007) (characterizing the 22 signatories of the Law Professors Brief as Amicus Curiae as "like a listing from a Who's Who of securities professors").

240. See Page, *supra* note 239, at 802 ("Even if the Supreme Court's nearly thirty-year-old dictum in *Ohralik* once foreclosed application of the First Amendment to securities regulation, that does not necessarily foreclose its application now.").

241. *Ohralik*, 436 U.S. at 449.

242. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

243. See David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 725 & n.61 (2007) (discussing the distinction between *obiter dicta* and *judicial dicta*).

244. See *Cohens v. Virginia*, 19 U.S. 264, 399–400 (1821) (Marshall, C.J.) ("The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.").

speech.<sup>245</sup> Indeed, the *Central Hudson* Court cited *Ohralik* as one of the cases informing its pronounced test.<sup>246</sup> Under current law, therefore, the *Central Hudson* test should govern the constitutionality of securities regulation of commercial speech. Indeed, numerous scholars—including Professors Henry N. Butler,<sup>247</sup> Lloyd L. Drury, III,<sup>248</sup> Susan B. Heyman,<sup>249</sup> Antony Page,<sup>250</sup> Larry E. Ribstein,<sup>251</sup> and Eugene Volokh<sup>252</sup>—have analyzed whether various securities regulations pass muster under the *Central Hudson* test, at least implicitly rejecting the suggestion that securities regulation—even of commercial speech—is wholly immune from First Amendment review.

Third, the discussion in *Ohralik* is limited to the securities regulation of commercial speech.<sup>253</sup> Indeed, the vast majority of speech subject to securities regulation is commercial, and thus most securities regulation likely satisfies the *Central Hudson* test (consistent with the dictum in *Ohralik*).<sup>254</sup> This Article establishes, however, that the securities fraud

245. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (“In commercial speech cases, then, a four-part analysis has developed.”).

246. *Id.* at 563 (citing *Ohralik* in support of the proposition that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity”).

247. See BUTLER & RIBSTEIN, *supra* note 3, at 102–04 (applying the *Central Hudson* test to the 1933 Act’s restrictions on general advertising and the 1934 Act’s continuous reporting requirements).

248. See Drury, III, *supra* note 3, at 779–88 (applying the *Central Hudson* test to various securities regulations).

249. See Heyman, *supra* note 3, at 218–24 (analyzing whether the Quiet Period Rules satisfy the *Central Hudson* test).

250. See Page, *supra* note 239, at 829 (“Broadly speaking, the least important provisions of the securities regulation regime, like those burdening the disclosure of nonmisleading information, are most likely to be struck down [under *Central Hudson*]. The most important of these provisions, such as those mandating disclosure of material commercial information, appear unlikely to be struck down.”).

251. See BUTLER & RIBSTEIN, *supra* note 3, at 102–04.

252. See Volokh, *supra* note 123, at 1081 (explaining that, because prospectuses are commercial speech, “fairly heavy SEC regulation of speech in such prospectuses is largely permissible”).

253. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457 (1978) (“In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny.”).

254. See Drury, III, *supra* note 3, at 785 (“The second type of SEC regulation, that which requires disclosure of certain types of information, is the most common type of SEC regulation. This type of regulation is not problematic from a commercial speech perspective.”); Page, *supra* note 239, at 829 (“It seems more likely that most securities regulations facing First Amendment scrutiny would survive.”); Volokh, *supra* note 123, at 1081 (“Commercial advertisements for products or services are classic examples [of commercial speech]. So are stock prospectuses, which propose the purchase of stock; this is why fairly heavy SEC regulation of speech in such prospectuses is largely permissible, while similar SEC regulation of newsletters or newspapers that discuss stocks is not.”); Russell Gerard Ryan, Note, *The Federal Securities Laws, the First Amendment, and Commercial Speech: A Call for Consistency*, 59 ST. JOHN’S L. REV. 57, 81 (1984) (“Since the 1933 and 1934 Acts regulate only commercial speech, the proper test for their constitutional validity is the four-part analysis set forth in *Central Hudson* . . .”).

statute extends beyond commercial speech to noncommercial speech, and this Article's First Amendment inquiry focuses on the First Amendment implications of regulating this noncommercial speech. Therefore, even if *Ohralik* could be read to suggest that all securities regulation of commercial speech is consistent with the First Amendment, this suggestion would not foreclose this Article's inquiry.

The leading scholarly argument in favor of insulating securities regulation from First Amendment scrutiny is Professor Frederick Schauer's institutional approach to the First Amendment. Under this theory, First Amendment protections should vary depending on whether the affected institution's role in society implicates First Amendment values, with lines drawn "between the institutional press and the lone pamphleteer, between the Internet and an adult theater, between libraries and medical clinics, and between the National Endowment for the Arts and the National Institutes of Health."<sup>255</sup> Under this theory, the vast majority of securities regulation is left untouched by the First Amendment because the institution of "the corporation" does not implicate First Amendment values to the same degree as other institutions like "the media."<sup>256</sup>

The institutional approach, albeit compelling, is subject to criticism, and its premise has been repeatedly rejected by the Supreme Court, including in *Citizens United*. Perhaps the strongest criticism of the institutional approach, as articulated by Professor Dale Carpenter, is that the process of "favoring some speakers and institutions over others risks reintroducing the problems of partisanship, entrenchment, and incompetence."<sup>257</sup> In other words, the institutional approach, which is intended to better effectuate the values embedded in the First Amendment, might, in practice, undercut those very values.<sup>258</sup> Moreover, although the institutional approach has garnered some support among scholars, the

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255. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1260 (2005) ("Carving First Amendment doctrine across rather than along the distinction between speech and action may yield a First Amendment with less coherence as a matter of abstract principle, but may also give us a First Amendment with greater ability to deal with the genuine issues of institutional autonomy that lie at the heart of the multiple but overlapping background justifications for the idea of freedom of speech.").

256. See Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1753 (2007) (identifying legislatures, banks, schools, universities, nonprofit organizations, corporations, and newspapers as examples of "institutions"); Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 651 (2006) (applying the institutional approach to securities regulation and concluding that "very strong institutional arguments seem to exist for permitting extensive regulation of corporate political speech in order to preserve the integrity of the U.S. capital markets").

257. Dale Carpenter, *The Value of Institutions and the Value of Free Speech*, 89 MINN. L. REV. 1407, 1410 (2005).

258. See *id.* at 1411 ("Agnosticism and skepticism counsel against introducing yet another chance for more such carving up to erode the pluralistic values of the First Amendment, at least unless we have a very good reason to do so.").

Supreme Court continues to reject the premise of this approach, including recently in *Citizens United* by refusing to distinguish between individuals and corporate institutions for purposes of First Amendment protection of political speech.<sup>259</sup>

Moreover, the institutional approach does not foreclose this Article's application of the *Sullivan* balancing test to noncommercial speech in the securities fraud context. This Article does not analyze the free speech rights of issuing corporations—institutions that arguably do not implicate First Amendment values. Rather, this Article analyzes the free speech rights of those noncommercial speakers whose speech might be subject to securities fraud liability, including financial journalists. Under the institutional approach, then, the institution of the financial press merits First Amendment protections, whether in the context of defamation suits (as in *Sullivan*) or in the context of securities fraud suits (as analyzed in this Article).<sup>260</sup>

Therefore, because securities fraud regulation implicates the First Amendment, because securities fraud claims do not have talismanic immunity from First Amendment scrutiny, and because the securities regulation of noncommercial speech is not outside the scope of First Amendment review, this Article will apply the *Sullivan* balancing test to securities fraud claims imposing liability for noncommercial speech about public companies.

#### V. THE *SULLIVAN* PROTECTIONS SHOULD APPLY TO SECURITIES FRAUD CLAIMS BASED ON NONCOMMERCIAL SPEECH ABOUT PUBLIC COMPANIES

This Part applies the *Sullivan* balancing test to securities fraud claims, concluding that the *Sullivan* protections should apply to securities fraud claims premised on noncommercial speech about public companies. This Part also discusses some additional policy benefits of this proposal, separate and apart from the First Amendment interests that this proposal supports. Finally, this Part explains how this proposal adds to the body of literature about the First Amendment implications of securities regulation.

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259. *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (“Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster. The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” (citation omitted) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cali.*, 475 U.S. 1, 8 (1986) (Powell, J., plurality opinion))).

260. *See Schauer, supra* note 6, at 1780 (“Although the Supreme Court and the lower courts occasionally brandished the First Amendment when securities regulation appeared to trench upon the editorial content of newspapers and newsletters or upon the behavior of journalists, a frontal First Amendment assault on the securities regulation system never got off the ground.” (footnotes omitted)).



A. *The Sullivan Balancing Test Supports the Application of the Sullivan Protections in Securities Fraud Cases*

The *Sullivan* balancing test supports the importation of the *Sullivan* protections into securities fraud liability. Interests weigh in favor of imposing securities fraud liability on noncommercial speech about public companies, and countervailing interests weigh in favor of encouraging this type of speech. These interests are in tension because there is a high risk of chilling noncommercial speech about public companies. On balance, the *Sullivan* protections should apply to noncommercial speech about public companies, with the effect of raising the evidentiary burden for scienter to clear and convincing evidence and mandating independent appellate review of the scienter finding.

1. *Interests Weigh in Favor of Imposing Securities Fraud Liability on Noncommercial Speech About Public Companies*

The Securities Exchange Act of 1934, of which the securities fraud provision is a key part, was enacted in order to “insure the maintenance of fair and honest markets” because securities transactions “upon securities exchanges and over-the-counter markets are effected with a national public interest.”<sup>261</sup> Congress delineated a number of ways that securities markets affect the public interest, but perhaps the most pressing reason—both in the midst of the Great Depression when the statute was enacted and now in the wake of the so-called “Great Recession”<sup>262</sup>—is the relationship between the securities markets and the overall economy:

National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.<sup>263</sup>

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261. 15 U.S.C. § 78b (2012).

262. *The Great Recession, Five Years Later*, NAT’L PUB. RADIO (Dec. 8, 2012, 8:00 AM), <http://www.npr.org/2012/12/08/166784038/the-great-recession-five-years-later> National Public Radio (“This December is the fifth anniversary of the start of the Great Recession, which officially ran from December 2007 to June 2009.”).

263. 15 U.S.C. § 78b(4).

The importance of the securities markets to the overall economy, which Congress recognized in 1934, is even more pronounced today.

The prohibition on securities fraud furthers the goal of maintaining fair and honest markets in three ways. First, the Securities and Exchange Commission is authorized to bring an action for a “permanent or temporary injunction or restraining order” when “any person is engaged or is about to engage in acts or practices constituting” a violation of the securities fraud provision.<sup>264</sup> Therefore, the SEC can use the securities fraud statute to specifically deter fraud.<sup>265</sup> Second, the SEC is authorized to bring an action to impose a civil penalty on any person who has violated the securities fraud provision.<sup>266</sup> Therefore, the SEC can also use the securities fraud statute to generally deter fraud by those who would fear civil penalties.<sup>267</sup> Finally, individual investors who have bought or sold securities in reliance on fraudulent misrepresentations possess an implied private right of action against primary violators of the securities fraud provision.<sup>268</sup> Like the potential for civil penalties, the potential for private civil liability serves to generally deter fraud.

Although the primary goal of the prohibition on securities fraud is to deter fraud, it also serves the secondary interest of compensating injured investors. First, in an innovation added by the Sarbanes-Oxley Act, civil penalties collected by the SEC may be added to “a disgorgement fund or other fund established for the benefit of the victims of such violation.”<sup>269</sup> Second, in private rights of action, injured investors are entitled to recover damages for their economic loss.<sup>270</sup>

The interests underlying securities fraud liability differ from the interests underlying defamation liability in several ways. First, as explained above, the primary interest underlying securities fraud liability is the deterrence of fraud in order to promote fair and honest markets, with the compensation of injured investors as merely a secondary interest. By contrast, the primary interest underlying defamation liability is the compensation of injured plaintiffs.<sup>271</sup> This distinction, while worthy of

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264. 15 U.S.C. § 78u(d)(1) (2012).

265. See 2 J. LEE & BARRY LINDAHL, *MODERN TORT LAW: LIABILITY AND LITIGATION* § 21:4 (2d ed. 2008) (“The issue is one of special deterrence versus general deterrence, with the former being targeted at the defendant alone . . .”).

266. 15 U.S.C. § 78u(d)(3).

267. See LEE & LINDAHL, *supra* note 265, § 21:4 (“The issue is one of special deterrence versus general deterrence, with . . . the latter [targeted] at society more generally, or at those similarly situated as the defendant who might engage in similar conduct if not deterred by the penalty imposed on the defendant.”).

268. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731–32 (1975).

269. Sarbanes-Oxley Act § 308, 15 U.S.C. § 7246(a) (2012).

270. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 338 (2005).

271. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

note, is less marked than it first appears because defamation liability also has a deterrence interest—namely, the deterrence of defamatory speech. Therefore, the *Sullivan* protections have been applied to the detriment of a deterrence interest. Indeed, in *Garrison v. Louisiana*, the Supreme Court applied the *Sullivan* protections in a criminal libel suit,<sup>272</sup> even though the primary goals of criminal prosecution are deterrence and retribution, not compensation.<sup>273</sup> Moreover, the Court has not been unaware of the deterrence interest underlying defamation liability. Rather, on a number of occasions in concurring and dissenting opinions, members of the Court—in an unsuccessful effort to curb the application of First Amendment protections in defamation cases—have highlighted that the deterrence of defamatory speech is a secondary goal of defamation liability.<sup>274</sup> Therefore, if the *Sullivan* protections were incorporated into the securities fraud context, thereby undercutting some of the deterrent effect of the securities fraud statute, this would not be an unprecedented application of these protections.

Second, the compensation interest in securities fraud cases, to the extent it is implicated, is for economic harm.<sup>275</sup> By contrast, the compensation interest in the defamation context is for harm to reputation.<sup>276</sup> This distinction, while worthy of note, should not be outcome-determinative.<sup>277</sup> In fact, the Supreme Court has previously applied the *Sullivan* protections to the detriment of a non-reputational compensation interest. In *Time, Inc. v. Hill*, the Supreme Court applied the *Sullivan* protections in a “false light” right of privacy action, even though “the

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272. 379 U.S. 64, 74–75 (1964).

273. Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1383 (2002) (“[T]he overarching goals of criminal law are primarily deterrence, retribution, or some mixture of the two.”).

274. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 782 (1986) (Stevens, J., dissenting) (arguing that private plaintiffs should not bear the burden of proving falsity) (“Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950’s taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.” (internal quotation marks omitted)); *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769, 771 (1985) (White, J., concurring in the judgment) (arguing that the *Sullivan* rule should be replaced by a limitation on “recoverable damages to a level that would not unduly threaten the press”) (“The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts.”).

275. See *Dura Pharm.*, 544 U.S. at 338.

276. *Masson*, 501 U.S. at 516 (quoting *Gertz*, 418 U.S. at 341).

277. See Solove & Richards, *supra* note 206, at 1681 (“[T]he nature of the injury approach does not tell us which kinds of injuries count and which do not for First Amendment purposes. Even if one could accurately identify different theories of damages that different forms of civil liability remedy (for example, economic, reputational, hedonic), the nature of the injury approach fails to explain why certain kinds of damages threaten the First Amendment while others do not . . .”).

primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage.”<sup>278</sup> Subsequently, however, in *Zacchini v. Scripps-Howard Broadcasting Co.*, a right of publicity case, the Court recast the compensation interest in *Time, Inc.* as reputational in an attempt to differentiate the two cases.<sup>279</sup> A better differentiation, as noted above, would have been to note that liability in *Time* was premised on falsity, while liability in *Zacchini* was not.<sup>280</sup> The Court also applied the *Sullivan* protections to the detriment of a non-reputational compensation interest in *Hustler Magazine, Inc. v. Falwell*, an intentional infliction of emotional distress case, where the primary compensation interest identified was “not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication.”<sup>281</sup> In addition to the Supreme Court precedent suggesting that the interest in compensating injury to reputation is not the only interest that could ever give way to First Amendment consideration, there is no policy rationale for treating the interest in compensating injury to reputation as especially vulnerable. To the contrary, because one’s reputation is so fragile and cannot be easily repaired, it would seem that a reputational compensation interest would be especially strong in the face of competing First Amendment considerations. Finally, lower courts have not shied away from applying the *Sullivan* protections in cases where the compensation interest was not for reputational harm.<sup>282</sup>

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278. *Time, Inc. v. Hill*, 385 U.S. 374, 386–87 n.9 (1967) (“Moreover, . . . the published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery.”); *id.* at 389 (noting that, under the statute, “nondefamatory matter” was potentially actionable); *id.* at 391 (“Were this a libel action, . . . the additional state interest in the protection of the individual against damage to his reputation would be involved.”).

279. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (distinguishing *Time*, which extended the *Sullivan* protections to “false light” right of privacy claims asserted by private individuals based on a public interest, from the instant case, involving a “right of publicity” claim) (“[T]he State’s interests in providing a cause of action in each instance are different. ‘The interest protected’ in permitting recovery for placing the plaintiff in a false light ‘is clearly that of reputation, with the same overtones of mental distress as in defamation.’ By contrast, the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.” (citation omitted)).

280. *See SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1292–93 (D. Utah 2010) (“Importantly, that case [*Zacchini*] did not involve an allegedly wrongful statement.”).

281. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

282. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001) (applying the actual malice standard in a “right of publicity” case where the plaintiff alleged that the defendant had appropriated his name and likeness); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522–24 (4th Cir. 1999) (applying the actual malice standard to claims for breach of loyalty and trespass because, although these are non-reputational tort claims, the plaintiff sought “publication damages”); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (applying the actual malice standard to a tortious interference claim, where the plaintiff sought to recover damages for lost business resulting from the publication); *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 511 F. Supp. 2d 742, 825–26 (S.D. Tex. 2005) (applying the actual

Third, the private plaintiff who asserts a securities fraud suit is not the subject of the speech, unlike the private plaintiff in a defamation suit. To date, no Supreme Court case has applied the *Sullivan* protections in a private action where the injured plaintiff was not the subject of the false speech at issue. This distinction, although again worthy of note, should not be outcome-determinative. For one, as noted above, the Court has applied the *Sullivan* standard in a criminal libel case, where the State was not the subject of the alleged defamation.<sup>283</sup> Additionally, lower courts have not been averse to extending the *Sullivan* protection to claims where the plaintiff is not the subject of the speech.<sup>284</sup>

Finally, the private plaintiff in a securities fraud case is not completely disconnected from the false speech at issue. In order to have standing to assert a securities fraud claim, a private plaintiff must have been a purchaser or seller of the subject security.<sup>285</sup> Therefore, although a private plaintiff is not personally the subject of the speech at issue, the plaintiff, to the extent the subject security was an equity security like common stock, is or was an owner of the company who was the subject of the speech.

In sum, there are differences between the interests in favor of imposing securities fraud liability and those in favor of imposing defamation liability, but these differences do not necessarily mean that the balance of interests does not support the importation of the *Sullivan* protections into securities fraud cases. Rather, they merely reinforce that the *Sullivan* standard should not be incorporated “blindly” into the securities fraud context without performing a balancing test specific to the implicated interests.<sup>286</sup>

## 2. *Interests Weigh in Favor of Encouraging Noncommercial Speech About Public Companies*

Balanced against the interests in favor of imposing securities fraud liability are the First Amendment interests in favor of encouraging this type of speech. Noncommercial speech—such as by securities analysts, credit rating agencies, or financial journalists—about public companies is an essential voice in the “marketplace of ideas”:

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malice standard in a negligence action asserted by one of Enron’s lenders against Enron’s rating agencies); *County of Orange v. McGraw Hill Cos., Inc.*, 245 B.R. 151, 154, 157 (C.D. Cal. 1999) (applying the actual malice standard to breach of contract and professional negligence claims asserted by a bond issuer against a bond rating service for allegedly inaccurate ratings).

283. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

284. *See, e.g., Enron*, 511 F. Supp. 2d at 825–26 (applying the actual malice standard in a negligence action asserted by one of Enron’s lenders against Enron’s rating agencies).

285. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731 (1975).

286. *Hustler Magazine*, 485 U.S. at 56; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 49–50 (1971) (Brennan, J., plurality opinion); *Time Inc. v. Hill*, 385 U.S. 374, 390 (1967).

The public interest is served equally when reporters find a “Deep Throat” in the executive suite, and when an accounting professor spotlights for the financial press, in common language, business dealings he regards as improper, improvident or unfair to investors. Whether his conclusions are right is to be resolved generally in the free market place of ideas.<sup>287</sup>

This noncommercial speech about public companies promotes honest and efficient markets.

First, this disinterested speech—which is often the product of in-depth information gathering and analysis<sup>288</sup>—serves to balance out the interested speech of companies, thus promoting honest markets.<sup>289</sup> Honest markets are important for several reasons. First, when markets are honest, they are less likely to swing wildly, which is essential to economic stability.<sup>290</sup> Additionally, potential investors are more likely to invest in honest markets, so honest markets are essential to promoting capital-raising and liquidity.<sup>291</sup>

Second, noncommercial speech about public companies, often by financial experts, serves as an essential conduit between publicly disclosed information and market prices, thus promoting market efficiency.<sup>292</sup> Efficient markets, which reflect all publicly available information,<sup>293</sup> are

287. *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 205 (S.D.N.Y. 1977); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 791 (1985) (Brennan, J., dissenting) (“The economic information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to this private discourse essential to our well-being.”).

288. *Dirks v. SEC*, 463 U.S. 646, 658 (1983) (discussing how securities analysts “ferret out and analyze information” (internal quotation marks omitted)).

289. *See id.* at 659 n.18 (describing how a securities analyst’s “careful investigation brought to light a massive fraud at the corporation” which “might well have gone undetected longer” without his efforts); *In re Time Warner Sec. Litig.*, 9 F.3d 259, 265 (2d Cir. 1993) (“[T]he function of financial reporters and security analysts is to determine the truth about the affairs of publicly traded companies.”).

290. 15 U.S.C. § 78b(3) (2012) (identifying the economic impacts of “sudden and unreasonable fluctuations in the prices of securities,” including the contraction of available credit).

291. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 235 n.12 (2010) (citing authority that investors are less likely to invest if they cannot trust the honesty of markets, “thereby reducing the liquidity of the securities markets to the detriment of investors and issuers alike” (quoting *In re Carnation Co.*, Exchange Act Release No. 22214, 33 SEC Docket 1025, 1030 (July 8, 1985))); *United States v. O’Hagan*, 521 U.S. 642, 658 (1997) (“[A]n animating purpose of the Exchange Act [was] to insure honest securities markets and thereby promote investor confidence.”).

292. *See Basic*, 485 U.S. at 246 n.24 (recognizing the role of market professionals in considering “most publicly announced material statements about companies, thereby affecting stock market prices”); *Dirks*, 463 U.S. at 658 n.17 (citing the SEC’s briefing for the proposition that securities analysis enhances market efficiency, which “redounds to the benefit of all investors”); *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 905 n.9 (1971) (Douglas, J., dissenting) (explaining that credit reports “facilitate through the price system the improvement of human welfare”).

293. *Basic*, 485 U.S. at 247 (explaining that in an efficient market, all publicly available information is reflected in the market price).

more stable markets, which inure to the benefit of all. In addition, an efficient market conveys important information to investors, ““acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.””<sup>294</sup>

### 3. *There Is a High Risk of Chilling Noncommercial Speech About Public Companies*

Next, after identifying the interests in favor of imposing securities fraud liability and those in favor of encouraging the subject speech, one must determine the degree to which the threat of securities fraud liability has a chilling effect. This analysis involves two inquiries: (1) the likelihood of erroneous speech and (2) the costs of securities fraud liability.

First, there is a high risk of error in noncommercial speech about public companies, which increases the chilling effect of potential securities fraud liability. Noncommercial speech, by definition, is by disinterested third parties, thus heightening the risk of erroneous speech. Additionally, speech about public companies, whose financial statements are often incredibly complicated, is especially prone to error. Indeed, companies themselves are often forced to restate their own financials in the wake of erroneous disclosures.<sup>295</sup> When the speaker is an independent third party, the risk of erroneous speech increases exponentially. In a recent example, David Cay Johnston, a Pulitzer-prize winning financial journalist and Reuters columnist, misread News Corp’s annual reports and reported that the company had received a \$4.8 billion tax refund during the period from 2007 through 2010 rather than paying that much in taxes during the period.<sup>296</sup>

Second, the costs of securities fraud liability are daunting, thus increasing the chilling effect of that liability. The Supreme Court has repeatedly bemoaned that, because of the high costs of securities litigation,<sup>297</sup> defendants may be forced to settle even unmeritorious cases.

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294. *Id.* at 244 (quoting *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 (N.D. Tex. 1980)).

295. See Lynn E. Turner & Thomas R. Weirich, *A Closer Look at Financial Statement Restatements*, CPA J., Dec. 2006, at 12, 14 (“*Exhibit 1* presents a restatements scorecard for 2005. Companies with U.S.-listed securities filed 1,295 financial restatements, nearly double the previous year’s mark. This represents about one restatement for every 12 public companies (up from one for every 23 in 2004).”).

296. David Cay Johnston, *How I Misread New Corp’s Taxes*, REUTERS (July 13, 2011), [www.reuters.com/assets/print?aid=USN1E76C25320110713](http://www.reuters.com/assets/print?aid=USN1E76C25320110713) (explaining that he misread the parentheses in the “cash paid for taxes” line in the financial statements as reflecting a tax refund rather than a tax payment).

297. See, e.g., *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 189 (1994) (There has been widespread recognition that “litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.” (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975))).

The Court has used similar rhetoric when discussing the reasons why the potential for defamation liability has such a strong chilling effect on speech.<sup>298</sup> Admittedly, this Author has previously argued that, in light of the various judicial and legislative restrictions on private securities fraud suits over the past thirty-eight years, securities fraud litigation no longer poses a danger of vexatiousness *greater* than that posed by other types of high-dollar litigation.<sup>299</sup> That is not to say, however, that securities fraud liability is no longer costly; undoubtedly it is.

Therefore, the high risk of erroneous speech, combined with the high costs of securities fraud litigation and liability, operate to create a chilling effect on noncommercial speech about public companies. For example, after the Supreme Court denied certiorari in *Pirate Investor LLC v. SEC*,<sup>300</sup> the *New York Times* published an editorial, titled “The Right to Be Wrong,” in which it warned: “[I]f the S.E.C. does not begin to stick to actual securities fraud and stop whittling at the First Amendment, financial journalism could become more cautious and less robust.”<sup>301</sup>

As another example of the potentially chilling effect of potential securities liability, consider the fall-out from the Dodd-Frank Act’s nullification of Securities Act Rule 436(g).<sup>302</sup> Rule 436(g) had exempted credit ratings included in registration statements from liability under § 11 of the Securities Act.<sup>303</sup> Under § 11, an expert is strictly liable for its false or misleading statements included in a registration statement, subject to a due diligence defense.<sup>304</sup> Upon the nullification of Rule 436(g), credit rating agencies, chilled by the potential for liability, began refusing to consent to the inclusion of their ratings within registration statements. In turn, the asset-backed securities issue market froze because Regulation AB requires the inclusion of credit ratings in the prospectuses of asset-backed securities.<sup>305</sup> As a short-term solution, the SEC issued a no-action letter,

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298. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (“The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.”).

299. See Wendy Gerwick Couture, *The End of the Vexatiousness Rationale*, 41 SEC. REG. L.J. 301 (2013) (“The vexatiousness rationale is no longer viable. As explained above, the bases for the Supreme Court’s adoption of this policy heuristic are now largely defunct, and there is not an intervening basis for the rationale.”).

300. *Pirate Investor LLC v. SEC*, 130 S. Ct. 3506 (2010) (denying petition for writ of certiorari).

301. Editorial, *The Right to Be Wrong*, N.Y. TIMES, July 3, 2010, at WK6.

302. Dodd-Frank Act § 939G (“Rule 436(g), promulgated by the Securities and Exchange Commission under the Securities Act of 1933, shall have no force or effect.”).

303. 17 C.F.R. § 230.436(g)(1) (2014).

304. 15 U.S.C. § 77k (2012).

305. Gretchen Morgenson, *Hey, S.E.C., That Escape Hatch Is Still Open*, N.Y. TIMES, Mar. 6, 2011, at BUI (“The agencies responded by refusing to allow their ratings to be disclosed in asset-backed securities deals. As a result, the market for these instruments froze on July 22.”).



stating that, “[p]ending further notice, the Division will not recommend enforcement action to the Commission if an asset-backed issuer . . . omits the ratings disclosure required by Item 1103(a)(9) and 1120 of Regulation AB from a prospectus that is part of a registration statement relating to an offering of asset-backed securities.”<sup>306</sup> Although this example arose in the context of § 11 liability rather than § 10(b) liability, it demonstrates the chilling effect of the potential of securities liability for allegedly false or misleading statements.

#### 4. *On Balance, the Sullivan Protections Should Apply*

Finally, one must balance these competing interests. On the one hand, the imposition of securities fraud liability promotes honest markets through deterrence and compensates injured investors. On the other hand, noncommercial speech about public companies promotes honest and efficient markets. These interests are in tension because erroneous statements are inevitable and because securities liability is costly. Therefore, the threat of potential securities fraud liability has a chilling effect on noncommercial speech. The central issue is whether the current liability scheme appropriately balances these competing considerations or whether the scale is tipped too far in one direction.

The competing interests in the securities fraud context are especially interesting because both sides seek to promote honest markets, merely via different means. The imposition of securities fraud liability promotes honest markets by deterring fraud, while encouraging noncommercial speech promotes honest markets by adding to the marketplace of ideas. While both means of promoting honest markets are important, the policy underlying the First Amendment is to trust the marketplace of ideas to out the truth, rather than to rely on the stifling of speech: “[T]he ultimate good desired is better reached by free trade in ideas— . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>307</sup>

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306. Ford Motor Credit Company LLC, SEC No-Action Letter (Nov. 23, 2010), *available at* <http://www.sec.gov/divisions/corpfin/cf-noaction/2010/ford072210-1120.htm>. (“We understand that the rating agencies continue to indicate that that [sic] they are not willing to provide their consent at this time, and that without an extension of our no-action position, offerings of asset-backed securities would not be able to be conducted on a registered basis.”).

307. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (alteration in original) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); *see also* Desai, *supra* note 64, at 508 (“The Supreme Court’s preference for increased speech by all, and its embrace of information technology and counter-speech to correct a false claim instead of banning the speech, points to a new world where all speak, and it is believed that the mixing and mashing of ideas will allow the best answers to arise to correct falsehoods and lead our decisions.”).

Therefore, consistent with the policy underlying the First Amendment, one must determine whether the current securities fraud liability scheme affords sufficient breathing room, so as to encourage contributions to the marketplace of ideas. Compellingly, under current precedent, a securities fraud defendant could be subject to liability at a lower standard than if the defendant were sued for defamation. Of course, there are other protections in place in a securities fraud case—including the heightened pleading standards<sup>308</sup> and the element of materiality<sup>309</sup>—which could conceivably add to the breathing space afforded those who speak about securities.<sup>310</sup> Despite these additional protections, however, this Article contends that securities fraud liability should not be imposed at standards lower than would apply if the very same defendant were sued for defamation. When the securities markets fail to reflect accurate information about companies, the ripple effects impact the entire economy, with Enron as a quintessential example. These external impacts are perhaps even more harmful to society than the impacts when the truth about a public figure is not exposed via speech. Therefore, to the extent that a noncommercial speaker is sued for securities fraud premised on speech about public companies, this Article contends that the *Sullivan* protections should apply.<sup>311</sup>

This Article's recommendation is consistent with several lower courts that have applied the *Sullivan* protections in similar contexts. For example,

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308. 15 U.S.C. § 78u-4(b)(2)(A) (2012) (requiring a private plaintiff to plead “with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind”); FED. R. CIV. P. 9(b) (requiring a party to “state with particularity the circumstances constituting fraud”). *But see* 15 U.S.C. § 78u-4(b)(2)(B) (2012) (“In the case of an action for money damages brought against a credit rating agency or a controlling person under this chapter, it shall be sufficient, for purposes of pleading any required state of mind in relation to such action, that the complaint state with particularity facts giving rise to a strong inference that the credit rating agency knowingly or recklessly failed—(i) to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or (ii) to obtain reasonable verification of such factual elements (which verification may be based on a sampling technique that does not amount to an audit) from other sources that the credit rating agency considered to be competent and that were independent of the issuer and underwriter.”).

309. *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (explaining that the materiality element of a securities fraud claim is satisfied if there is a significant likelihood that a reasonable investor would consider the misrepresentation important in deciding how to invest).

310. *See United States v. Alvarez*, 132 S. Ct. 2537, 2553–54 (2012) (Breyer, J., concurring with plurality) (“I . . . must concede that many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. These prohibitions, however, tend to be narrower than the statute before us, in that they limit the scope of their application . . . . Fraud statutes, for example, typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.”).

311. Note that, in the defamation context, all of the potentially actionable statements are, by definition, harmful to the public company's reputation. In the securities fraud context, on the other hand, both unduly positive and unduly negative statements are potentially actionable, with both buyers and sellers having standing to sue. Therefore, if the *Sullivan* protections were imported into the securities fraud context, they would prevent the chilling of both positive and negative speech about public companies. Because both types of speech are essential to an efficient market, this difference should not be determinative.

in *First Equity Corp. of Florida v. Standard & Poor's Corp.*, plaintiff investors asserted common law fraud claims against Standard & Poor's for publishing an allegedly inaccurate description of a company's convertible bonds.<sup>312</sup> Relying on *Time, Inc. v. Hill*, the court held that "the First Amendment requires a demonstration of actual malice where plaintiff seeks to impose liability on a newspaper for publication of a non-defamatory misstatement."<sup>313</sup> Similarly, in *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, the court applied the "actual malice" standard in a negligent misrepresentation action asserted by one of Enron's lenders against Enron's rating agencies.<sup>314</sup>

There are two alternative means of incorporating this Article's recommendation that the *Sullivan* protections apply in securities fraud claims asserted against noncommercial speakers. First, in light of the constitutional overlay, courts could re-interpret the "in connection with" requirement as coextensive with commercial speech. This solution is arguably consistent with the general canon that statutes should be construed so as to be constitutional,<sup>315</sup> but it would cut a broad swathe of speakers completely out of the reach of the securities fraud laws. All noncommercial speech would be outside the scope of the securities fraud statute, obliterating any chilling effect but also any deterrence effect. Moreover, without any textual basis in the statute for this interpretation,<sup>316</sup> this general canon of constitutional avoidance is likely inapplicable.<sup>317</sup> Second, courts could—as in the defamation context—superimpose the *Sullivan* protections only in circumstances involving public figures and noncommercial speakers. Although this solution is more unwieldy, it is closest to Congress's intention of subjecting any speech in connection with the purchase or sale of securities to potential securities fraud liability. This Article recommends the latter solution, as the least drastic and the most consistent with congressional intent.

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312. 690 F. Supp. 256, 257 (S.D.N.Y. 1988).

313. *Id.* at 258–59.

314. 511 F. Supp. 2d 742, 825–26 (S.D. Tex. 2005).

315. See *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (explaining that the constitutional avoidance canon is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

316. See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute.").

317. See *Boumediene v. Bush*, 553 U.S. 723, 787 (2008) ("The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation. We cannot ignore the text and purpose of a statute in order to save it." (citation omitted)); *SEC v. Pirate Investor LLC*, 580 F.3d 233, 253 (4th Cir. 2009) ("[T]he text and purpose of § 10(b) admit of no exclusion for 'disinterested publishers' of financial news and commentary, thus rendering constitutional avoidance arguments irrelevant."); cf. *Lowe v. SEC*, 472 U.S. 181, 104–11 (1985) (interpreting the breadth of the statutory exclusion from the investment Advisors Act for bona fide publishers against the backdrop of First Amendment precedent).

*B. This Article's Recommendation Serves Important Additional Policy Goals*

This Article's recommendation that the *Sullivan* protections should apply to noncommercial speech in the context of securities fraud, in addition to achieving the appropriate balance between deterring fraud and encouraging speech, serves several other important policy goals.

First, this Article's recommendation would incentivize gatekeepers, like securities analysts and credit rating agencies, to avoid conflicts of interest. These important market professionals have been plagued with charges that their speech has been conflicted in favor of the covered companies, with analysts allegedly motivated to please their firms' investment banking clients<sup>318</sup> and with credit rating agencies allegedly motivated to compete for issuers' business.<sup>319</sup> As discussed above, conflicted analysis or credit ratings should be classified as commercial speech because conflicted analysts and credit rating agencies act more like selling agents for the covered companies, thus "merely proposing a commercial transaction," rather than like disinterested third-party commenters.<sup>320</sup> This Article recommends that the *Sullivan* protections only apply to securities fraud claims premised on noncommercial speech—and thus not to securities fraud claims asserted against conflicted credit rating agencies and securities analysts. Therefore, the adoption of this Article's recommendation would serve as an incentive for these gatekeepers to avoid conflicts of interest, in addition to their "reputational capital" incentive.<sup>321</sup>

Second, in the wake of *Citizens United*, this recommendation encourages the addition of more non-corporate speech to the marketplace of ideas, which runs the risk of being overrun by corporate speech. This recommendation is consistent with, albeit perhaps more limited than, other scholars' proposals to balance out the corporate speech unleashed by *Citizens United*. For example, Professor Deven R. Desai argues for the recognition of a "corporate public figure doctrine," which would apply the *Sullivan* protections to all speech about public figure corporations, including commercial speech.<sup>322</sup> This Article's recommendation is more limited than Professor Desai's because it retains the distinction between commercial and noncommercial speech (in light of the lesser risk of

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318. See generally SEC, *supra* note 142..

319. See FIN. CRISIS INQUIRY COMM'N, *supra* note 65, at xxv.

320. Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n, 870 F. Supp. 2d 477, 486 (W.D. Mich. 2012).

321. See Ellis, Fairchild, & D'Souza, *supra* note 192, at 211 ("This section addresses whether or not imposition of civil liability upon CRAs is desirable. To some extent, any discussion of imposition of civil liability on CRAs is part of a larger discussion of whether regulation is needed or whether CRAs are sufficiently incentivized by their desire to protect their reputational capital.")

322. Desai, *supra* note 64, at 459.

chilling commercial speech) and because it argues that the application of *Sullivan* protections should be analyzed on a cause-of-action by cause-of-action basis (in light of the unique interests that are balanced by every cause of action). This Article agrees with Professor Desai, however, that current regulation of speech about corporations is out of balance and that expansion of the *Sullivan* protections is a solution.<sup>323</sup> This Article responds to this imbalance in the context of securities fraud regulation.

*C. This Article's Recommendation Adds to the Literature About the  
Constitutionality of Securities Regulation*

Finally, this Article's recommendation contributes to the literature about the constitutionality of securities regulation. First, this Article adds to the scholarship about the First Amendment implications of securities regulation by demonstrating that securities regulation is not limited to commercial speech. Second, this Article's analysis of the constitutionality of securities fraud liability builds upon the few scholarly discussions about the First Amendment implications of § 10(b) by demonstrating that the *Sullivan* protections should apply to securities fraud claims premised on noncommercial speech about public companies. Finally, this Article complements the scholarship discussing the potential applicability of the *Sullivan* protection to claims under § 11 of the Securities Act and § 14(a) of the Exchange Act, providing guidance to scholars engaged in this parallel inquiry.

This Article adds to the body of scholarship about the First Amendment implications of securities regulation by demonstrating that securities regulation is not limited to commercial speech. Most scholarship about the First Amendment implications of securities regulation focuses on whether various provisions pass muster under the *Central Hudson* test that applies to the regulation of commercial speech, with most scholars concluding that the vast majority of securities regulation passes muster.<sup>324</sup> The securities regulations most likely to fail the *Central Hudson* test are “those that prohibit the disclosure of truthful, non-misleading, and

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323. See *id.* at 509 (“Corporations thus have increased speech rights while speech about them is unduly limited.”).

324. See, e.g., Drury, III, *supra* note 3, at 785 (“The second type of SEC regulation, that which requires disclosure of certain types of information, is the most common type of SEC regulation. This type of regulation is not problematic from a commercial speech perspective.”); Page, *supra* note 239, at 829 (“It seems more likely that most securities regulations facing First Amendment scrutiny would survive.”); Ryan, *supra* note 254, at 81 (“Since the 1933 and 1934 Acts regulate only commercial speech, the proper test for their constitutional validity is the four-part analysis set forth in *Central Hudson* . . . .”); Volokh, *supra* note 123, at 1081 (“Commercial advertisements for products or services are classic examples [of commercial speech]. So are stock prospectuses, which propose the purchase of stock; this is why fairly heavy SEC regulation of speech in such prospectuses is largely permissible, while similar SEC regulation of newsletters or newspapers that discuss stocks is not.”).

sometimes material speech based on paternalistic concerns.”<sup>325</sup> For example, various scholars have contended that the Quiet Period Rules<sup>326</sup> and Regulation FD,<sup>327</sup> which regulate truthful speech, constitute impermissible regulation of commercial speech. This Article adds to this body of scholarship about the First Amendment implications of securities regulation by demonstrating that securities regulation reaches noncommercial speech. In particular, the securities fraud statute, which applies to all speech in connection with the purchase or sale of securities, reaches beyond commercial speech to regulate some noncommercial speech.

This Article also adds to the much smaller body of scholarship focusing on the First Amendment implications of the securities fraud statute. First, several scholars have argued that the securities fraud statute, in the context of insider trading, arguably reaches beyond noncommercial speech and violates the First Amendment.<sup>328</sup> Second, several scholars have concluded that the statute, in the context of affirmative misrepresentations, likely satisfies the *Central Hudson* test.<sup>329</sup> This Article builds on this

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325. Heyman, *supra* note 3, at 217; *see also* Drury, III, *supra* note 3, at 780 (“If the courts ever were to consider securities regulations to be commercial speech, SEC rules that prohibit the dissemination of truthful information ought not withstand any serious scrutiny. The commercial speech cases do not allow a paternalistic concern for whether hearers can handle truthful information to serve as the basis for prohibition of this type of speech.”).

326. *See* BUTLER & RIBSTEIN, *supra* note 3, at 102 (“[U]nder *Central Hudson*, the constitutionality of the 1933 act is doubtful to the extent that the act prohibits statements that are neither unlawful nor misleading—any statements made before the statutory prospectus is available, and written statements not accompanied or preceded by a statutory prospectus.”); Drury, III, *supra* note 3, at 780 (“This combination of authority puts SEC regulations forbidding accurate speech on very weak footing. Examples of these types of regulations are the rules relating to the offering of securities, such as the ‘gun jumping’ rules . . . .”); Heyman, *supra* note 3, at 189 (“The Quiet Period Rules are also problematic from a First Amendment perspective. . . . If challenged under the commercial speech doctrine, the broad prophylactic restrictions on the scope and timing of promotional activity in the capital markets would unlikely withstand First Amendment scrutiny.”).

327. Drury, III, *supra* note 3, at 788 (“If a litigant can provide courts with the empirical evidence that Regulation FD stifles a substantial amount of truthful speech by issuers, the courts should give serious consideration to whether it should strike down the regulation as an unlawful prohibition of commercial speech under the First Amendment.”); Page & Yang, *supra* note 4, at 83 (“Even assuming that the SEC’s interests are substantial or compelling, Regulation FD appears both fatally underinclusive and overinclusive at the same time. There are also other less restrictive alternatives. The courts should not uphold the SEC’s choice to regulate speech rather than actual securities trading, which is the source of the perceived underlying harm.”).

328. *See, e.g.*, Wolfson, *supra* note 139, at 299 (“The *Winans* case is a good reminder that there are many instances in which a fraud prosecution will seriously impinge on traditional press media and their control over news content. . . . Extension of SEC fraud and criminal doctrine to the *Wall Street Journal* reporter is dangerous since it serves as the camel’s nose under the tent for legislation regulating considerable areas of newspaper coverage.”).

329. *See, e.g.*, BUTLER & RIBSTEIN, *supra* note 3, at 105 (“To the extent that the antifraud rules impose federal liability for fraudulent statements, they may withstand constitutional scrutiny under *Central Hudson*.”); Thomas J. Pate, *Triple-A Ratings Stench: May the Credit Rating Agencies Be Held Accountable?*, 14 BARRY L. REV. 25, 46 (2010) (“In particular, the Supreme Court has made it clear that commercial speech can be regulated to the extent that it is false or misleading. In fact, the

literature by demonstrating that the securities fraud statute reaches noncommercial speech outside of the insider-trading context by imposing liability on alleged misrepresentations in connection with the purchase or sale of securities. As such, this Article asserts the new arguments that: (1) the *Sullivan* balancing test should apply to securities fraud claims premised on allegedly false noncommercial speech about public companies; and (2) pursuant to that test, the *Sullivan* protections should be imported into securities fraud cases to the extent they impose liability on noncommercial speech about public companies.

Finally, this Article complements the literature discussing whether the *Sullivan* protections should apply to other securities claims premised on misrepresentations, such as claims asserted under § 11 of the Securities Act and § 14(a) of the Exchange Act.<sup>330</sup> As this Article demonstrates, the first step of this analysis is to determine whether these claims reach beyond commercial speech to impose liability on noncommercial speech. In a very limited fashion, § 11 may do so to the extent that it now imposes liability on credit ratings agencies for ratings included in registration statements.<sup>331</sup> Similarly, § 14(a), which imposes liability for misleading proxy solicitations, may also reach some noncommercial speech, especially in light of the political nature of much proxy speech.<sup>332</sup> The second step, assuming that the claim potentially reaches noncommercial speech, is to apply the *Sullivan* balancing test to the unique interests implicated by the subject cause of action.<sup>333</sup> This Article's application of the *Sullivan* balancing test in the context of securities fraud, therefore, serves merely as an example of how to perform this analysis, not as a prediction of whether the *Sullivan* protections should apply to other types of securities liability.

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regulation of false or misleading statements is the essence of the Securities laws and, in particular, is the characteristic that makes Rule 10b-5 claims possible.”).

330. See Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 322 (1990) (analyzing whether the “actual malice” standard should apply to claims asserted under § 14(a) of the Exchange Act).

331. 15 U.S.C. § 77k (2012); see also Dodd-Frank Act § 939G (“Rule 436(g), promulgated by the Securities and Exchange Commission under the Securities Act of 1933, shall have no force or effect.”).

332. See 15 U.S.C. § 78n (2012); BUTLER & RIBSTEIN, *supra* note 3, at 93–100 (applying the theoretical underpinnings for the commercial-political speech distinction to proxy speech and concluding that “[t]he foregoing analysis strongly supports characterizing proxy regulation as political speech”); Wolfson, *supra* note 139, at 282 (“The point is that the federal proxy rules permit an intrusion into what appears to be a political and artistic process.”).

333. See, e.g., Estreicher, *supra* note 330, at 322–23 (balancing the interests implicated by § 14(a) liability and concluding that “proxy solicitation does not appear to be the kind of expression for which the [F]irst [A]mendment demands the ‘strategic protection for falsehood’ provided by a *Sullivan*-type malice standard for liability”).

## VI. CONCLUSION

In conclusion, this Article seeks to correct the imbalance that occurs when the First Amendment and securities fraud collide. In particular, this Article argues that the *Sullivan* protections should apply in securities fraud cases when the defendant is a noncommercial speaker and the speech concerns a public company. In addition to preventing the chilling of valuable speech, this recommendation will incentivize market professionals to prevent conflicts of interest, so as to benefit from the *Sullivan* protections, and encourage additional non-corporate speech about public companies, in the wake of the expanded corporate speech rights afforded by *Citizens United*. Finally, this Article adds to the literature on the constitutionality of securities regulation by demonstrating that, in the context of securities fraud, securities regulation reaches noncommercial speech, by arguing that the *Sullivan* protections should apply to this noncommercial speech, and by providing a framework for future scholars to analyze whether there should be a First Amendment overlay on other securities claims. Indeed, this Author encourages other scholars, whether they be securities scholars or First Amendment scholars or both, to continue this discussion about the collision between the First Amendment and securities regulation.